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THE
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ANNOTATED

BOOK XXXVIII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
P. FARNHAM, ASSISTANT

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LAWYERS' REPORTS

ANNOTATED.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PENN MUTUAL LIFE INSURANCE
COMPANY, *Plff. in Err.*,

v.

MECHANICS' SAVINGS BANK & TRUST
COMPANY.

(37 U. S. App. 602; 43 U. S. App. 73.)

1. Under a statute providing that in case of warranty of answers in an application for insurance no misrepresentation made in good faith shall defeat the policy unless it is material to the risk, the mere fact of warranty in form will not render every statement of fact material, but the question of materiality is subject to judicial investigation.

2. False answers in an application for insurance, knowingly made for the purpose of misleading the company, although not material, will avoid the policy under a statute providing that such answers innocently made shall have no effect on the policy.

3. Certificates in mutual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company.

4. Omitting a part of the insurance carried, from an answer to a question in an application as to policies in other companies, with directions to state companies and amount, will render the answer false.

NOTE.—Is a benefit association an insurance company?

- I. Where the question is as to "other insurance."
- II. Where the construction of the certificate is in question.
- III. Where compliance with state insurance law is required before doing business.
- IV. Where the question is in regard to jurisdiction.
- V. Under statutes exempting benevolent societies.
- VI. Where the question is not discussed.
- VII. Some definitions.
- VIII. Summary.

In controversies arising with a mutual benefit association, the weight of authority seems clearly to establish the rule that such companies are insurance companies, and their contracts are governed by the same rules as insurance policies limited by the constitution and by-laws of the association, or by statutes specifically exempting such associations. But there are some cases where the association is held to be purely benevolent and not insurance. Such associations are usually controlled by insurance laws in regard to transacting business in the state unless specifically exempted by statute, and are then if they exceed their powers. They are usually regarded as insurance companies on the question of jurisdiction. Under statutes exempting benevolent associations from the operation of general insurance laws, such societies are frequently regarded as insurance companies for all purposes except those limited by the proviso in the exempting statute.

I. Where the question is as to "other insurance."

In the case of *PENN MUTUAL LIFE INSURANCE CO. v. MECHANICS' SAVINGS BANK & TRUST CO.* it was held that certificates in mutual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance" in this or any other company.

This is in accord with the decisions in similar cases where the question has been fairly presented. In some other similar cases the question turned on estoppel, and the question as to whether mutual

benefit associations were insurance companies was not discussed.

In an action upon a policy where the defense was breach of warranty in answering the question, Has any company or association declined to grant a policy on your life? when in fact the assured had made application in the People's Mutual Benefit Association of Waterville, it was held that this was no defense. The court said: "I find that the legislature has itself made a distinction, and has used the term 'policy,' or 'certificate of membership,' apparently in contradistinction one to the other, the word 'policy' as referring to a contract of insurance, issued by life insurance companies other than those organized under § 3830, and in that section which authorizes the organization of such companies it provides for the issuing of certificates of membership, and that 'no company or organization shall issue a certificate for a greater amount than such company or organization shall be able to pay from the proceeds of one assessment.' I find further in every case of a mutual benefit association that the contract of insurance is termed a certificate of membership." *White v. National L. Ins. Co.* 30 Ohio L. J. 237.

And in an action on a policy issued by the Equitable Life Insurance Company, the plaintiff was properly permitted to prove by the agent of the defendant company, by whom the application was secured, that pending negotiations between him and the insured, and before the insured made answer to the question as to other insurance, the insured asked the agent what was meant by that; if it referred to assessment companies or mutual companies? Witness explained that it did not, and the insured then said he had made application to the "Legion of Honor" for assurance, whereupon witness told him that the "Legion of Honor" was a mutual company and was not regarded as a life insurance company, and he was instructed by the general agent of the defendant not to consider them as assurance companies. *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

So where defense was made to an action on a policy on the ground that the applicant had given

- 5. Upon the question of intent** in omitting existing policies from the answer to a question in an application as to amount of other insurance, evidence of similar omissions by the applicant in answer to similar questions by other companies is relevant and competent.
- 6. An insurance expert cannot be permitted to give his opinion** that certain undisclosed facts increased the risk of a life policy, but he may state the usage of insurance companies as to rejecting risks when made aware of such facts.
- 7. An insurance expert will not be permitted to state** whether or not a misrepresented or concealed fact in an application for a life policy would be regarded among insurance companies generally as material.

8. The question as to the materiality of the omission to mention another policy in an application for life insurance, and of the fact that the applicant was an embezzler, is for the jury under a statute providing that misstatements and concealments shall not defeat the policy unless material.

9. Mere temporary ailments or affections not of a serious or dangerous character, which pass away and are likely to be forgotten because they leave no trace in the constitution, are not to be regarded as diseases within the meaning of a life insurance policy.

10. A question as to occupation in an application for life insurance does not call for information as to the fact of the applicant being an habitual embezzler.

a false answer to the question of other insurance, the company was held liable on the ground of estoppel by the act of the agent in explaining to the applicant that other insurance did not include "co-operative" companies, under Iowa Laws 1880, chap. 211, p. 200, providing that the person soliciting insurance shall be held to be the soliciting agent of the company. It was further held "the purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations." *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 804, 38 L. ed. 841.

But where the insured answered "No" to the question, Are you now insured in any other company? and he held at that time certificates of membership of insurance in the Buffalo Life & Reserve Association, and in the Rochester Mutual Aid & Accident Association, and it was contended that such other life insurance was not in the regular and authorized insurance companies, but was in aid and accident associations, and that insurance in such last-named companies was not a breach of the warranty, it was held that such companies were unquestionably life insurance companies, under N. Y. Laws 1883, chap. 176, § 5, providing, in substance, any corporation or association issuing certificates or agreements whereby upon the decease of a member any money is to be paid to the representatives or beneficiary designated, to be derived from donations or admission fee, dues and assessments collected from the members, and wherein the payment is conditioned upon the same being realized in the manner aforesaid, and wherein the money is applied to the uses and purpose of such corporation, association, or society, and expenses, shall be deemed to be engaged in the business of life insurance upon the co-operative or assessment plan. *McCollum v. Mutual L. Ins. Co.* 55 Hun, 103.

And where the insured answered "No," to the question in the application, Has any other insurance company declined to grant a policy on your life? when in fact he had made an application to the National Benefit Association which had been rejected, it was held that such false statement vitiated

his policy, although the court did not discuss the question whether such other application was to a life insurance company, but assumed that it was. *Kemp v. Good Templars' Mut. Ben. Assn.* 46 N. Y. S. R. 429.

In *Clapp v. Massachusetts Ben. Assn.* 146 Mass. 519, which was an action on a certificate of membership, and the defense was a breach of warranty in answering "No" to the question, Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? and there was evidence that an application had been made to the New England Mutual Aid Society, the court did not discuss the question as to whether or not it was an insurance company, but whether the jury should have been instructed as for a non-suit.

II. Where the construction of the certificate is in question.

The weight of authority on matters of the construction of the certificate as to beneficiaries, forfeiture, and the like, treats mutual benefit societies as life insurance companies in the absence of statutes defining them not to be insurance companies, although some of the cases hold that the by-laws and constitution became a part of the contract, and thus cause the certificates in some respects to differ from ordinary insurance policies. *Lake v. Minnesota Masonic Relief Assn.* 61 Minn. 96; *Block v. Valley Mut. Ins. Assn.* 53 Ark. 301; *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111; *Tennessee Lodge No. 20, K. of H. v. Ladd*, 5 Lea, 716; *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 98; *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 200; *Goodman v. Jeddijah Lodge No. 7, I. O. of B. B. 67 Md.* 117; *Walter v. Hensel*, 42 Minn. 204; *Massey v. Mutual Relief Soc.* 102 N. Y. 523; *Barton v. Provident Mut. Relief Assn.* 63 N. H. 535; *Splawn v. Chew*, 80 Tex. 532; *Bauer v. Samson Lodge, K. of P.* 102 Ind. 282; *Supreme Council, O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501; *Northwestern Benev. & Mut. Aid Assn. v. Wanner*, 24 Ill. App. 357; *Berry v. Knights Templars & M. Life Indemnity Co.* 36 Fed. Rep. 439; *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775; *Supreme Commandery, K. of G. R. v. Ainsworth*, 71 Ala. 438, 46 Am. Rep. 332; *Smith v. Bullard*, 61 N. H. 381; *Stambler v. Order of Penta*, 159 Pa. 462; *Erdmann v. Mutual Ins. Co. O. of H. S.* 44 Wis. 376; *Danlher v. Grand Lodge, A. O. U. W.* 10 Utah, 110; *McCorkle v. Texas Benev. Assn.* 71 Tex. 149; *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 42 Wis. 380; *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541; *Hanford v. Massachusetts Ben. Assn.* 122 Mo. 50; *Nurich v. Supreme Lodge, K. & L. of H.* 24 N. Y. S. R. 237; *Franklin Beneficial Assn. v. Com.* 10 Pa. 357.

So where the question was as to the amount due the beneficiary it was held that the Minnesota Masonic Relief Association was a mutual life insurance company proceeding on the assessment plan, and its contracts were to be construed according to

11. A warranty in an application for life insurance, that no circumstance or information has been withheld touching applicant's past or present state of health and habits of life with which the insurer ought to be acquainted, does not cover a habit of embezzlement as to which the application contains no inquiry.

12. Concealment by an applicant for life insurance, of embezzlements by him which are not inquired about by the insurer, will not, unless fraudulent, avoid the policy, although the fact of embezzlement may be material to the risk.

13. The burden is on the insurer to show materiality of a concealment by an applicant for life insurance, as well as fraudulent intent, for the purpose of avoiding the policy.

14. Materiality of a concealment of other insurance upon a life risk cannot be presumed from the fact that such concealment was made by the applicant in applications to other companies.

15. An insurer is not entitled to an instruction to the jury that the failure of an applicant for insurance to mention a policy in another company when asked about other insurance raises the presumption that the omission was fraudulent.

On rehearing.

16. A representation is made in bad faith, within the meaning of a statute providing that it shall not avoid the policy unless made in bad faith, only when it is made with actual intent to mislead, not when it is made through forgetfulness and inadvertence.

the same rules as those of any other mutual life insurance company. This was organized to provide for the payment to the widow, children, or mother (or such person as designated), of any member of such society as may from time to time decease, of such sum as the by-laws of such association may from time to time prescribe; the said sum to be raised by voluntary contribution by the members, each surviving member to be assessed at the death of a member at certain rates. *Lake v. Minnesota Masonic Relief Assn.*, 61 Minn. 96.

In *Block v. Valley Mut. Ins. Assn.*, 53 Ark. 201, where the question was as to the assignability of the insurance, and it was claimed to be issued by a mutual benefit company, and the charter and articles of association were not shown, and the by-laws showed that the object was mutually to associate a number of individuals whereby the survivors were to contribute for the relief of the representatives of those of their number whom death may strike down, it was held to be an ordinary insurance policy.

And under Pa. act March 14, 1873, Pamph. Laws, 46, authorizing assignees of life, fire, and marine insurance policies to sue in their own name, it was held that a mutual aid association was an insurance company within the operation of that act, but the charter controlled as to assignments where it was an express condition of the contract that the certificates should not be otherwise assigned or transferred, as this takes them from the operation of the act. It was said that "the contention that the association is not an insurance company within the meaning of the act of 1873 cannot be maintained. All that was decided in *Com. v. National Mut. Aid Assn.*, 94 Pa. 481, was that the corporation was excepted from the operation of the act taxing foreign insurance companies." *National Mut. Aid Soc. v. Lupold*, 101 Pa. 111.

So, where the question was as to the right to change a beneficiary, it was held that a benefit certificate in the Supreme Lodge Knights of Honor of the World would be governed by the same rule as a policy of insurance. *Tennessee Lodge, No. 20, K. of H. v. Ladd*, 5 Lea, 716.

In *Olmstead v. Masonic Mut. Ben. Soc.*, 87 Kan. 93, which company was organized under the laws of Kansas "to give financial aid and benefit to the widows, orphans, and dependents of deceased members thereof," it was held that Kan. Laws 1871, chap. 93, § 76, providing that in case any life insurance company organized under the laws of this state shall have issued a policy and the beneficiary dies, the party insured may require a new policy to be issued in favor of another beneficiary, applied to this society.

In *Titworth v. Titworth*, 40 Kan. 571, the case of *Olmstead v. Masonic Mut. Ben. Soc.*, 87 Kan. 93, was distinguished, as in that case the company was organized under the Kansas law and in this case of *Ancient Order of United Workmen* was not incor-

porated but was a voluntary association governed by its own constitution and by-laws, and in the former case the record did not show that the rules of the society provided for a change of the beneficiary, and in the *Olmstead* Case no change was made by the society. It was said that the attention of the court was not called to Kan. Comp. Laws 1885, chap. 50a, § 78, exempting companies organized on the co-operative plan.

A society known as the "Ancient Order of United Workmen" so far as it engaged in the business of life insurance was held to be a mutual life insurance company. In this case the certificate stated that it was issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen witnessing that it, as master workman degree member was entitled to the privileges of membership and to participate in the beneficiary fund of the order to the amount of \$2,000 which at his death shall be paid to his wife, etc., providing that K. shall in every particular while a member of said order comply with all the laws, rules, and requirements thereof. The question in this case was as to the fund vesting in administrators. *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 209.

And the *Jedidjah Lodge No. 7* of the Independent Order B'nai B'rith was a system of mutual or co-operative life insurance. The court said: "Under it a book of endowment certificates was furnished to each subordinate lodge, and one of these certificates was issued to each member; and it stipulated for the payment of \$1,000 upon his death to his widow and children, if he left any, and if not, then to a beneficiary to be designated by him, whose name must appear in the body of the instrument. Such certificates differ in no substantial point from ordinary life insurance policies issued by ordinary life insurance companies." *Goodman v. Jedidjah Lodge No. 7, I. O. of B. B.*, 67 Md. 117.

And in *Walter v. Hensel*, 42 Minn. 204, it was held that the *Minnesota Odd Fellows' Mutual Benefit Society*, a corporation organized under Minn. Gen. Stat. 1878, chap. 34, title 3, providing for the incorporation of a benefit society for the purpose of instruction or mutual improvement in art or science or for literary or social culture, and under articles of the association stating that the general nature and purpose was the insuring the lives of the members upon the plan of paying to the representatives of every deceased member a certain sum to be assessed upon and received from the other members of the said association, the court held that this was nothing more nor less than a mutual insurance company upon the assessment plan. The question involved was as to designation of beneficiaries.

And the *Odd Fellows' Mutual Benefit Society* organized under Minn. Gen. Stat. 1878, chap. 34, title 3, relating to corporations other than those for pecuniary profit, and providing in its articles of association that the general nature of its business

(February 4, 1896.)

ERROR to the Circuit Court of the United States for the Middle District of Tennessee to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

Before *Taft* and *Lurton*, Circuit Judges, and *Hammond*, J.

Statement by *Taft*, Circuit Judge:

This action was on a policy of insurance for \$10,000 issued December 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt, on his own life. Schardt died April 17, 1893, during the currency of the policy.

and purpose is the insuring the lives of the members upon the plan of paying to the representative of every deceased member a certain sum to be assessed upon and received from the other members of said association, was held to be a mutual life insurance company on the assessment plan, where the question involved was as to the designation of a beneficiary. *Walter v. Hensel*, 42 Minn. 204.

Where the question was as to designation of beneficiary, and the Mutual Relief Society was organized under New York Laws 1875, chap. 267, entitled, "An Act for the Incorporation of Societies or Clubs for Certain Lawful Purposes," providing for the incorporation of social, political, and mutual benefit and benevolent purposes, it was held that the subject of life insurance was not among the enumerated objects, unless it was embraced in the term "mutual benefit" or "benevolent." It was further held that the first direct reference to anything of the nature of life insurance was in the by-laws, art. 1, § 2, providing that the objects of the society shall be to secure mutual benefit and protection to its members, and to furnish aid to their families or assigns in case of a member's death, and § 8 stating that the plan of the society will be to issue certificates for a sum not to exceed \$2,000, to be paid to the heirs or beneficiaries of deceased members named in his certificate, from funds arising from assessments; and the court said the by-laws then proceed to organize a system similar to that of a mutual life insurance company. *Massey v. Mutual Relief Soc.* 102 N. Y. 523.

And where the question was as to the right to change the beneficiary in the Provident Mutual Relief Association, it was held that "the contract, though one of life insurance, must be interpreted according to its terms, in view of the laws of the defendant association and of the evident understanding of the parties." *Barton v. Provident Mut. Relief Assn.* 68 N. H. 535.

So, where the benefit fund in the American Legion of Honor was raised by means of payments by parties joining the order before being received into membership, and the assessments levied upon them upon death of a member, it was held to be, so far as those provisions are concerned, a mutual life insurance company in which the life of every member is insured, by reason of his membership and compliance with the requirements of the constitution and by-laws; but the rules of law for the construction of ordinary policies so far as they refer to the indefeasible rights of beneficiaries did not apply, where the by-laws of this association were different. *Splawn v. Chew*, 60 Tex. 532.

In *Bauer v. Samson Lodge*, K. of P. 102 Ind. 262, it was said that "a corporation which promises to pay a certain sum as benefits during a member's illness, in consideration of his payment of dues, is not a purely benevolent organization; it may be, and doubtless is, benevolent and charitable in a great 88 L. R. A.

Just before his death he had assigned the policy to the Mechanics' Savings Bank & Trust Company, of Nashville, Tennessee, to secure a large debt owed by him to the bank. Since his death the bank has made a general assignment for the benefit of creditors to J. J. Pryor, for whose benefit, as assignee, this suit was brought. The trial resulted in a judgment for the full amount of the policy and interest, in favor of the plaintiff below, and the insurance company brings the judgment here for review on writ of error. The defendant filed nineteen pleas to the declaration, averring that both by misrepresentation of facts warranted to be true in the application and policy, and by concealment of a fact material to the risk, the policy was avoided.

degree, but it is not a benevolent organization in the sense of dispensing benefits without consideration. The consideration the order receives is the dues paid by the member, and in return it promises him benefits. In speaking of an order of a character similar to the Knights of Pythias, the supreme court of Massachusetts said: "The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident." But it was held that the remedy under the by-laws must be first exhausted before an action could be maintained.

And a certificate issued by the Order of Chosen Friends was a contract of insurance, where the by-laws provided, should a member become permanently disabled by reason of disease or accident such member should be entitled to a benefit not exceeding one half of the relief-fund certificate held by him, and the refusal by the officers to allow his claim under a by-law making their decision final would not defeat a recovery. But the insured was required to exhaust his remedies under the by-laws before he could maintain the action. *Supreme Council O. of C. F. v. Forsinger*, 125 Ind. 52, 9 L. R. A. 501.

In the case of *Northwestern Benev. & Mut. Aid Assn. v. Wanner*, 24 Ill. App. 387, where it was claimed that a by-law passed after a certificate of insurance vitiated the certificate on account of suicide, it was held that "we cannot distinguish the appellant from any other mutual insurance company. In all mutual insurance the shareholder participates in the benefits and profits, and is a recognized member of the company." In this case it was contended that the insured took upon himself that he should comply with the constitution and by-laws, and that they might be changed limiting the liability.

Where it was claimed that the Knights Templar & Masons' Life Indemnity Company was not a life insurance company, and not subject to Mo. Rev. Stat. § 5982, preventing insurance companies from making a defense for suicide, and the officers and agents of this company enjoyed remunerative salaries, the commissions of the manager amounting to as much as \$1,000 a month, and the company had no affiliation with the Masonic Order, and the Masonic feature was only limited to its name and restriction of its membership and employment of agents, it was held: "It is apparent, from an examination of its charter, and its method of doing business, that the defendant is a mutual life insurance company on the assessment plan. Its business is insurance, and nothing else. There is not a social, charitable, or benevolent feature in its organization, or the conduct of its business. It has no lodges, pays no sick dues, and distributes no aid, and gives no attention, to members in distress or poverty. It deals with its members on the strictest

The opening words of the policy were:

"In consideration of the application for this policy, which is hereby made a part of this contract (a copy of which is hereto attached), and of the payment by John Schardt of the premiums as hereinafter provided, the Penn Mutual Life Insurance Company hereby promises to pay at its home office, in the city of Philadelphia, Pennsylvania," etc.

The questions and answers in the application which are material to the controversy here were as follows:

"1. A. Give your name in full and postoffice address? A. John Schardt, Nashville, Tennessee."

"Present and previous occupations? (State

kind of business.) B. Present teller in Mechanics' Bank. Previous, same."

"6. A. Have you your life insured in this or any other company? (If so, give the name of each company, and the kind and amount of each policy.) A. Yes; \$10,000 in Northwestern, 20 pay life; \$5,000 in Aetna; \$1,000 in N. Y. Mutual Life, renewable term."

After these answers this statement was signed by the applicant:

"I hereby warrant and agree, that I am temperate in my habits, now in good health, and ordinarily enjoy good health, and that in the statements and answers in this application no circumstance or information has been withheld touching my past and present state of

business principles. The policy holders get nothing for which full value has not been paid by the assured, but the assured may pay much, and the policy holder receive nothing, by reason of the forfeiture of the policy, for a violation of some one of its numerous conditions. It would be a curious sort of benevolence which would withhold from innocent children the insurance effected for their benefit on the life of their father because he committed suicide. But that is the kind of benevolence the defendant wants to practice in this case. The assumption of a Masonic name does not make it a Masonic institution. *Berry v. Knights Templar & M. Life Indemnity Co.* 46 Fed. Rep. 439. Affirmed *Knights Templar & M. Life Indemnity Co. v. Berry*, 4 U. S. App. 353, 50 Fed. Rep. 511.

And where it was claimed that the association was exempt from Mo. Rev. Stat. 1899, § 5835, it was held that the senate of the National Union was not a fraternal beneficial society within the intent of the Missouri statute, where the association was exclusively engaged in collecting and distributing assessments, and where its members were not restricted to any class, calling, or profession; nor was it essential to membership that they should become interested or united in some good work or reform conducive to their own welfare or to the welfare of mankind in general, and the tests of membership required in this association were those usually prescribed by every well-regulated insurance company. *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775.

And a by-law in regard to suicide was construed to be controlled by the same law as governed other insurance, where it was held that "the instrument in writing upon which this suit is founded, and which is set out in full in the complaint, entitled a 'Knight's Benefit Certificate,' has the elements and characteristics of a contract of life insurance. It purports to have been issued by the 'Supreme Commandery of the Knights of the Golden Rule,' which is averred to be a corporation created and organized under a law of the state of Kentucky. The commandery hereby promises, on the death of the husband of the appellee, to pay her \$2,000, in consideration of the husband having become a member of the order, and having paid the fee for admission to membership, and of his payment in the future of all assessments levied and required by the supreme commandery, upon the condition that he remained a member of the order, in good standing, and complied with all the laws then of force, or subsequently enacted. These are the essential elements of a contract of life insurance, made by a mutual insurance company with one of its members. . . . The payment of the fee for admission to membership, and of the assessments levied and required by the commandery, are the equivalent of premiums, and form the pecuniary consideration of the contract." *Supreme Commandery, K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 382.

The Odd Fellows Mutual Relief Association of 88 L. R. A.

the Connecticut River Valley, a Massachusetts corporation established for the purpose of defraying the expenses of the sickness and burial of its deceased members or their heirs, the sum to be paid on admission measurably proportioned to the age of the applicant and an assessment on the death of a member, and an assessment upon the surviving members upon the death of a member, was an insurance contract under N. H. Gen. Laws, chap. 175, §§ 2, 3, providing that the amount of insurance is not chargeable with the debts of the deceased. The court said: "The corporation is a mutual life insurance company; membership is an insurance contract; and a certificate of membership, expressly or by necessary implication including the terms of the contract stated in the application, by-laws, and 'last legal assignment,' or last valid designation of the payee, is a policy." *Smith v. Bullard*, 61 N. H. 381.

And on the question of estoppel as applicable to a beneficial association by waiver of proof of loss, it was held "while such associations are in some respects unlike insurance companies, there is every reason for holding them to the rule applicable to notice and proofs of loss under ordinary insurance policies." *Stambler v. Order of Pente*, 159 Pa. 492.

So, where the question was one of forfeiture of certificate, it was held that a mutual insurance company of the Order of Hermann's Sons of Wisconsin on the assessment plan was subject to the application of those legal principles applicable to other mutual life insurance companies. *Erdmann v. Mutual Ins. Co.*, O. of H. 8, 44 Wis. 376.

And a certificate in the Ancient Order of United Workmen was an insurance contract, and the association was in effect a mutual life insurance company, and the rights of the parties on the question of forfeiture were determined by the law applicable to life insurance companies where a certificate in the nature of an insurance policy was issued to a member and was kept in force by the payment of assessment and dues. *Daniher v. Grand Lodge, A. O. U. W.* 10 Utah, 110.

So, the Texas Benevolent Association was governed by the rules of law that are applied to ordinary life insurance companies in regard to forfeiting policies, where such association was organized for the mutual protection of its members and acted through its regular officers under a charter and by-laws, and resorted to assessments on its living members to procure funds to discharge its obligations to its officers and such of its members as should die. *McCorkle v. Texas Benev. Assn.* 71 Tex. 149.

And in *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369, in an action on a certificate issued by the Grand Lodge of the United Ancient Order of Druids, where a forfeiture was construed by the constitution and by-laws, it was said: "The defendant was obviously organized to answer the ends, or serve the purpose, of a mutual life insurance company. Among the provisions of

health and habits of life with which the Penn Mutual Life Insurance Company ought to be made acquainted; . . . and that the statements and answers to the printed questions above, together with this declaration, as well as those to be made to the company's medical examiner, shall constitute the application, and be the basis of this contract, and the place of contract shall be the city of Philadelphia, state of Pennsylvania."

Then followed the medical examination of the insured, of which only the questions and answers given below have a bearing on the issues in this case:

"9. A. How long since were you attended by a physician or professionally consulted one?
*A. A year.

the constitution and by-laws adopted for its management, is one which provides that, on the death of a member, in good standing, there shall be paid to his surviving widow, or heirs, the sum of \$800, as life insurance."

And the Citizens' Mut. Relief Society of Portland was a mutual life insurance company where the requisite qualifications for membership were to be a male resident of the city of P. or a business man resident in A. B. C. D. E. having a regular place of business in P., between twenty-one and sixty years of age and chosen by a two-thirds vote of the members of the society present and the payment of fee, and the object was the payment of a sum on the death of a member as relief to any person designated by him in writing, or to his widow, children, or relatives in the order specified in the articles of association. It was held that a misrepresentation invalidated the contract of insurance notwithstanding the acceptance by the member into the association. *Swett v. Citizens' Mut. Relief Soc.* 73 Me. 541.

And the Massachusetts Benefit Association was held to be a company doing a life insurance business, and its policies not benefit certificates within the meaning of the Missouri statutes relating to fraternal beneficial societies, but assessment-plan policies, or were governed by the more general statutes relating to life insurance, where the association agreed to pay the beneficiary \$5,000 after proof of death, and the member was to pay in forty days from the date of the contract, and annually, an assessment of \$15 as an expense fund, and bi-monthly the assessment specified in the table of rates, and the policy holders had no vote in the election of directors, and there was no lodge system connected with the organization, except a few boards or councils in different cities in Massachusetts who seemed to have no duties other than to solicit risks. But it was held that Mo. Rev. Stat. 1899, § 5849, providing that no misrepresentation in obtaining a life insurance policy shall render it void unless, etc., did not apply to a policy issued under chap. 89, art. 3, defining contracts of insurance on the assessment plan, and providing that nothing herein shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this state except as herein set forth. *Hanford v. Massachusetts Ben. Assn.* 122 Mo. 50.

And where the defense was fraudulent concealment of material facts in response to the question as to having had medical attendance previously, it was held that "the liability to pay is founded solely on the contract obligation, which must be enforced (if at all) by the general principles applicable to life insurance." *Nunrich v. Supreme Lodge, K. & L. of H. 24 N. Y. S. R. 287.*

In *Grossman v. Supreme Lodge, K. & L. of H. 18 N. Y. S. R. 502*, where the question was as to the by-laws controlling in regard to a breach of warranty

"B. For what disease? *B. A cold.

"C. Give the name and residence of such physician? C. Dr. T. E. Enloe, Nashville, Tennessee."

"11. A. Do you now use intoxicating liquors?
A. None whatever."

"C. Have you always been temperate in their use? (If not, explain the duration and extent of excess, and when last.) C. Yes.

"12. Have you ever used opium, morphia, chloral, or any narcotic, unless regularly prescribed by a physician? (If so, explain fully.)
A. No.

"B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart, or lungs? B. None except—No.

in a benefit certificate, it was held that they controlled, and it was said: "It would indeed be extraordinary that a certificate in the nature of a policy of life insurance should be issued without any examination as to the condition of the insured."

In *Franklin Beneficial Assn. v. Com.* 10 Pa. 337, it was said that the Franklin Beneficial Association is "virtually a mutual health-insurance company, standing, as regards the present question, exactly as a life insurance company." The question involved was as to disability incurred from soldiering.

And in *Presbyterian Mut. Assur. Fund v. Allen*, 108 Ind. 593, where the question was as to a warranty in the application, it was said: "The certificate, although issued by a mutual benefit association, is, in legal contemplation, a policy of insurance, and is in most respects governed by the general rules of law which apply to insurance contracts. . . . The weight of authority, as will appear from an examination of the cases cited, is in favor of the general doctrine that beneficiaries may be changed in cases where the policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts. But granting that this is the general rule, still it cannot prevail if the charter of the association prohibits a change in the beneficiary first agreed upon and designated."

But there are some mutual benefit companies which are plainly not insurance companies. Some cases have made a distinction on account of their by-laws in construing the contract of certificate, and other cases were under statutes providing that such companies shall not be deemed insurance companies. *Swift v. San Francisco Stock & Exchange Board*, 67 Cal. 567; *Richmond v. Johnson*, 28 Minn. 447; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Dickinson v. Ancient Order of U. W.* 159 Pa. 259; *Lithgow v. Supreme Tent, K. of M. of the World*, 165 Pa. 232; *McAlee v. Supreme Sitting, O. of I. H.* (Pa.) 12 Cent. Rep. 415; *Donald v. Chicago, B. & Q. R. Co.* 98 Iowa, 234, 33 L. R. A. 492; *Order of Railway Conductors of America v. Koester*, 55 Mo. App. 186; *Holland v. Taylor*, 111 Ind. 121; *Lamont v. Grand Lodge, I. L. of H. 31 Fed. Rep. 177*; *Titaworth v. Titaworth*, 40 Kan. 571; *Masonic Benev. Assn. v. Bunoh*, 109 Mo. 560; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99.

So, where the question was as to the instrument being an asset of a decedent's estate, under art. 23 of the constitution of San Francisco Stock & Exchange Board, providing that on the death of a member of the board the trust fund shall pay from the increase in their hands from investment of said moneys to such person or object as may have been designated in writing by such deceased member the sum of \$10,000, and in case of no disposition then to

"Have you ever had cancer or any tumor, chronic diarrhoea, discharge from the ear, dropsy, fistula, gall stones or gravel, open sores, inflammatory rheumatism, gout, syphilis, or stricture, or any disease of the liver, kidneys, or bladder? C. None except—No.

"14. Have you had any illness or disease other than as stated by you above? (If so, state full particulars.) No.

"Give here particulars as to date, duration, severity, etc., of each disease you have had.

"*Explain fully 9, A and B.

"None.

"It is hereby agreed: That all the foregoing statements and answers made to the company's medical examiner are warranted to be

true and are offered to the company as a consideration of the contract."

It was conceded that at the date of the application Schardt had a policy for \$5,000 in New York Life Insurance Company, which he failed to mention. In order to show an intent on his part to deceive by this omission, defendant offered to show that in applications for policies in other companies for \$25,000 each, made by him, one in February, 1893, and the other early in March following, he had also untruly stated the amount of existing insurance on his life. This offer was rejected by the court. Schardt's salary as teller was \$1,500, and he had but a small amount of property. When he died in April, 1893, he had \$80,000 of insurance on his life, nearly all

the wife, then to the child, and if none there shall be no payment, it was held that there was no contract of insurance between the members. It was also held that the contract merely provided for a beneficiary fund, and for the payment out of the fund of a specified sum to the surviving or designated person or persons qualified to receive it upon the death of a member, and the term "life insurance" did not apply to such an object. *Swift v. San Francisco Stock & Exch. Board*, 67 Cal. 567.

And in *Richmond v. Johnson*, 28 Minn. 447, it was said that the Grand Lodge Ancient Order of United Workmen was a mutual benefit association incorporated under the laws of that state, and that the certificate was not an ordinary contract of insurance made between an insurance company and another person, the rights of the parties to be determined exclusively by the policy; but the rights depended, not on the certificate only, but rather on the membership of the assured in the association, and such rights were defined and controlled by its constitution and by-laws.

A certificate of membership of a beneficial association was held not to be a contract of insurance within the meaning of Pa. act May 11, 1881, Pub. Laws, 20, requiring the application for insurance to be attached to the policy before it can be received in evidence. *Dickinson v. Ancient Order of U. W.* 150 Pa. 258; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Lithgow v. Supreme Tent, K. of M. of the World*, 165 Pa. 202.

In *Lithgow v. Supreme Tent, K. of M. of the World*, 165 Pa. 202, it was said that the case of *Com. v. Equitable Beneficial Assn.* 137 Pa. 412, arose under a different act of assembly, that of April 29, 1874; but the question was whether the defendant was an insurance company or a beneficial association, and the distinction so clearly pointed out in the opinion between these two classes of organizations has since been approved and followed under the act of May 11, 1881, in *Dickinson v. Ancient Order of U. W.* 150 Pa. 258.

In *McAlees v. Supreme Sitting O. of I. H. (Pa.)* 12 Cent. Rep. 415, where it was contended that the Supreme Sitting Order of Iron Hall was a mutual insurance company and controlled by Pa. act May 11, 1881, Pub. Laws, 20, relating to life and fire insurance policies, and providing that the constitution and by-laws should not be received in evidence unless attached to the policy, and that the remedy afforded by the by-laws was therefore not obligatory on the member of a beneficiary company because the by-laws were not made a part of the policy, it was held, without discussing the question of insurance, that a member of a beneficial society must resort to the society tribunals, and that a fair judgment thereon would be conclusive.

The Burlington Voluntary Relief Department of the Chicago, Burlington, & Quincy Railroad Company, which maintained a fund for the relief of

members and their relatives or beneficiaries, in case of sickness, accident, or death, was held not to be an insurance company on the ground that it did not purport to be an insurance company, and while the benefits were in the way of relief in case of sickness, accident, or death, the manifest intent was different, and this was not an insurance company but a beneficial association. The fund was to be obtained by monthly assessment of its members, and the amount deducted from monthly payments, and such amounts as were not raised from these assessments were to be made up by the company from its earnings in the way of interest on the monthly balances of the relief department, and the incidental expenses were paid by the railroad company, and in case the fund of the relief department was not sufficient the company paid all benefits due in full, and the relief department was organized in connection with the workings of the company in the way of benefiting its employees. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 462.

So, a benefit certificate issued by the Order of Railroad Conductors differed from an ordinary policy of life insurance, where such association was organized under the statute of Iowa, § 7, providing that no corporation or association under this act shall issue any certificate unless the beneficiary shall be the husband, wife, relative, legal representative, heir, or legatee of such insured member, and whose by-laws provided: "Its object is to aid and benefit disabled, and the families of deceased, members of the Order of Railway Conductors." It was said: "A benefit certificate of this kind has some of the features of an insurance policy, but it also has its point of difference, and, in the particular we are now considering, it is testamentary in its character. The rule of the law of insurance, that if one have an insurable interest at the date of the policy, the policy is not vitiated by termination of that interest, does not apply in a case like this." *Order of Railway Conductors of America v. Koster*, 55 Mo. App. 186.

And where the question was, Who was entitled to the insurance in the Royal Arcanum? it was held that for many, and indeed for most, purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies. The court said that there are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance, and that the most usual difference is the power on the part of the insured in mutual benefit associations to change the beneficiary. *Holland v. Taylor*, 111 Ind. 181.

And where the question was as to the right of the beneficiary being vested it was said: "That such is the rule when a contract of insurance is entered into between a life insurance company and a third

of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted at the time of the application for this policy to little less than \$100,000, and at his death exceeded that sum. He did not disclose the fact of his crime to the defendant at the time of his application, or at any other time. His death in April, 1893, was caused by congestion of the brain and other vital organs, caused by the mental strain which a disclosure of his crime brought on. Defendant introduced evidence tending to show that, six years before the application Schardt had had the syphilis, a venereal and constitutional disease; that thereafter he had sore throat, due to

syphilis; and that in 1892 he had had the gonorrhea, a venereal disease. In rebuttal, plaintiff adduced evidence making it probable that Schardt did not have the syphilis, but only a local sore, difficult to distinguish from the first symptom of syphilis, called a "chancreoid," which was of no seriousness as a disease; that its resemblance to syphilis in the first stages induced a treatment for syphilis; that the result of such treatment was a cauterization of the throat, and a subsequent local inflammation of the throat; that Schardt then changed his physician, and employed Dr. Enloe, the one named in the application, who became the regular physician of himself and family during the next six years until his death, and during this period treated him for this throat trouble, and for indigestion at times. Evidence was

party, whereby the company agrees to pay the amount due on the policy to such third party, is not questioned. In such cases the third party or beneficiary is a party to the contract of insurance. When, however, a person joins a mutual benefit association of the character of the Iowa Legion of Honor, his rights in the beneficiary fund, and his control over the same, are usually determined by the constitution of the order." *Lamont v. Grand Lodge, I. L. of H. 81 Fed. Rep. 177.*

In *Titworth v. Titworth*, 40 Kan. 571, it was held that Kan. Law 1871, chap. 93, § 76, did not apply to the Ancient Order of United Workmen, which was an association governed by its own constitution and by-laws; distinguishing *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 93, saying: "In the *Olmstead* Case no change was made by the society; in this case the association did make a change, at the request and on the application of the member; so that an entirely different class of questions arises in the two cases. Finally, § 78, chap. 50, a, Compiled Laws 1885, declares that the provisions of the act containing § 76 shall not apply to companies organized on the co-operative plan, and we think this Order of United Workmen operates on that plan. The defendant company in the *Olmstead* Case was also organized on the co-operative plan; but, as the section making the provisions of the act inapplicable to such companies was not then brought to the attention of the court, it was erroneously led to apply the rule prescribed in § 76, and to state it as an additional ground for the decision there made. The case was, however, correctly disposed of on the first ground of decision."

In *Masonic Benev. Assn. v. Bunch*, 109 Mo. 560, it was said: "Were the plaintiff in this case an ordinary life insurance company, and the right to the benefits to be determined by the rules governing life insurance, we would have little hesitation in saying that the averments . . . are insufficient to show an insurable interest in the life of Lewis Bunch. But will this rule apply to these benevolent associations? By the statute authorizing their creation they are declared not to be insurance companies. The courts have not agreed how far the principles governing life insurance generally should be applied." It was held the beneficiary's interest in an ordinary policy of life insurance was a vested right immediately upon the issuing of the policy, whereas in a benevolent society like plaintiff the beneficiary had no vested right in the certificate before the death of the member on whose account it was issued, and the member could change the beneficiary without the consent of the beneficiary.

In regard to changing the beneficiaries it was held that the rules governing policies issued by ordinary insurance companies were not controlling when applied to certificates of membership in an 88 L. R. A.

association such as that here involved under Ind. act March 2, 1879, relating to beneficiary societies, providing that the benefits shall be for the sole use and benefit of the parties named as beneficiaries in the policy or certificate of membership. *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189.

And where a beneficial association was established with a view to peculiarly aid the widows, orphans, heirs, and devisees of deceased members, and the fund was claimed by an executor as against the heirs, it was held: "The association is not an insurance company, nor are these certificates issued by it in the state of Illinois, contracts of insurance." By the statute of Illinois under which the association was incorporated it was provided that associations to benefit widows, orphans, heirs, and devisees of deceased members thereof, and where no annual dues or premiums are required, and where the member shall receive no money as profit or otherwise, shall not be deemed insurance companies. *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99.

And the same was held where the Masonic Mutual Association of Cleveland was incorporated under the law of Ohio. *Masonic Mut. Assn. v. Jones*, 154 Pa. 107.

III. Where compliance with state insurance law is required before doing business.

Under statutes requiring compliance with state insurance law, the following cases define mutual benefit companies to be insurance companies. Some merely hold that they must comply with the statutes of the state relating to insurance companies before transacting business in the state, and some go further and declare that such mutual benefit companies are not within the saving clause of a statute exempting benevolent societies, but some cases hold that some of those companies are within such exemptions while some cases restrict their attempts to do unauthorized business, where they depart from the benevolent character. *Mutual Ben. L. Ins. Co. v. Mayre*, 85 Va. 613; *State, Atty. Gen., v. Farmers' & M. Mut. Benev. Assn.* 18 Neb. 276; *State, Beach, v. Citizens' Ben. Assn.* 6 Mo. App. 163; *Order of International Fraternal Alliance v. State*, 77 Md. 547; *Com. v. Wetherbee*, 105 Mass. 149; *State, Graham, v. Miller*, 66 Iowa, 28; *State, Graham, v. Nichols*, 78 Iowa, 747; *Endowment & Benev. Assn. v. State*, 35 Kan. 253; *State v. Vigilant Ins. Co.* 30 Kan. 585; *Farmer v. State*, 69 Tex. 561; *State v. Moore*, 38 Ohio St. 7; *People, Blossom, v. Nelson*, 46 N. Y. 477; *State, Atty. Gen., v. Northwestern Mut. Live Stock Assn.* 16 Neb. 549; *State, Atty. Gen., v. Merchants' Exch. Mut. Benev. Assn.* 72 Mo. 146; *State v. Brawner*, 15 Mo. App. 597; *Foster v. Moulton*, 35 Minn. 458; *Golden Rule v. People, Swigert*, 118 Ill. 492; *Sherman v. Com.* 82 Ky. 102; *State, Bradford, v. National Assn. of the Farmers' & M. Mut. Aid Assn.* 36 Kan. 51; *State, Churchill, v. Tru-*

introduced by plaintiff tending to rebut testimony for defendant that Schardt was afflicted with gonorrhea in 1892. Defendant called insurance experts to testify in regard to the materiality of the facts in respect to which it was claimed that Schardt had been guilty of misrepresentation or concealment. The court permitted the experts to say whether, in their opinions, the facts misstated or concealed were material, but refused to allow them to say whether, by the usage of all insurance companies, such facts were regarded as material to the risk.

The defendant requested the court to instruct the jury to bring in a verdict for the defendant because it appeared by the undisputed evidence that Schardt's warranties of the truth

of his representations in regard to facts material as a matter of law had been broken, and the policy avoided, in the following particulars, to wit: First, in that the amount of existing insurance of his life was greater than stated; second, in that he had had the syphilis; third, in that he had had a sore throat; fourth, in that he had had a chancre; fifth, in that he had had indigestion; sixth, in that his occupation was that of an embezzler, as well as bank teller. Defendant asked the same instruction on the ground that Schardt had concealed from it and its agents the fact that he was an embezzler in the sum of \$100,000,—a fact claimed to be material to the risk, as a matter of law. These requests were refused by the trial court on one ground, among others,

by, 37 Minn. 97; *State, Clapp, v. Critchett*, 37 Minn. 13; *Com. v. Keystone Ben. Assn.* 171 Pa. 465; *Com. v. Order of Veeta*, 2 Pa. Dist. R. 254; *Re National Indemnity & E. Co.* 142 Pa. 450; *Masonic Aid Assn. v. Taylor*, 2 S. D. 324; *State v. Standard Life Assn.* 38 Ohio St. 281; *State, Atty. Gen., v. Central Ohio Mut. Relief Assn.* 29 Ohio St. 399; *Newbold Friendly Soc. v. Barlow* [1893] 2 Q. B. 123.

So, the Mutual Benefit Life Insurance Company of Hartford was not entitled to do business under Va. act May 18, 1887, providing that such companies must deposit with the auditor a copy of their Constitution and by-laws, which must show that all indemnities to beneficiaries are in the main provided for by assessments upon all surviving members, where the company laid its regular assessment in advance of any loss, and thus created a fund out of which losses might be paid or not, as the company might decide. It was held that such company came under Va. Code, chap. 53, requiring a deposit before doing business. *Mutual Ben. L. Ins. Co. v. Marye*, 85 Va. 643.

So, a mutual or co-operative insurance company was not authorized to do business in Vermont, under Vt. Rev. Laws, § 3607, amended by act 1884, No. 45, providing that a mutual insurance company or a co-operative insurance company, association, or society, not organized under the laws of this state, shall not transact the business of said company in this state unless it has \$100,000 in assets, where such company did not make such showing. *Granite Mut. Aid Assn. v. Porter*, 58 Vt. 581.

And the Farmers' & Mechanics' Mutual Benevolent Association was a mutual insurance company, where under its contract the subject insured was the life or health of the member who paid a certain sum at the inception of the contract fixed by the association and promised to pay assessments punctually when called for, and semi-annual dues, and at the death of a member the beneficiary was to receive a sum graduated by the number of contributing members at the date of the assessment therefore. It was held that such company could not do business without complying with Neb. act June 1, 1873, requiring a certificate of the auditor before transacting business. It was said: "The courts have with a great degree of unanimity treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract of life insurance." *State, Atty. Gen., v. Farmers' & M. Mut. Benev. Assn.* 18 Neb. 278.

The Citizens' Benefit Association was held to be an insurance company which could not carry on its business in Missouri without complying with the statute, where its object was to give financial aid to the widows and children of deceased members, and applicants were required to be of a certain age and reside in a certain place, and the board of trustees

was authorized to regulate the terms of membership and rate of initiation fee, to divide the membership into classes according to the sums to be paid on death of a fellow member, and to limit the number of members in each class, and to regulate the manner and time of payment, and the amount to be paid to the representatives of a deceased member of a class, and to provide a compensation for each applicant procured by another member, and the board of executive committee were to be paid \$2 each on each attendance at their meetings. *State, Beach, v. Citizens' Ben. Assn.* 6 Mo. App. 163.

And the Order of International Fraternal Alliance incorporated under Md. Code Pub. Gen. Laws, art. 23, for social or fraternal beneficial purposes, or both, convening in assemblies or local bodies conducting the operations of their members, according to the ritual of the order, was held to be an insurance company, and amenable to Md. Code, art. 23, § 127, prohibiting insurance business in the state without fully complying with the insurance law. It was said: "A great deal of stress has been laid upon the idea that the 'ritual and lodge' features of the appellant ought to rescue it from the assault now being made against it, but the lodge system and its ritual cannot be, under the law, incorporated with an insurance business such as is now conducted by the appellant, and called 'a corporation for social or fraternal beneficial purposes or both,' and thus frustrate the provisions of the insurance laws." *Order of International Fraternal Alliance v. State*, 77 Md. 547.

A contract made between the Connecticut Mutual Benefit Company and its members was held not to differ in any essential particular of form or substance from an ordinary policy of mutual life insurance, where the subject insured was the life of the member and the risk was death, and the payment by the assured was fixed by the directors, and not exceeding \$10 at the inception of the contract and assessments of \$2 each annually, and \$1 each upon the death of any member of the division to which he belonged during the risk, and the company promised to pay in case of death as many dollars as there are members in the same division the number of which is limited to 5,000, subject to no contingency but insolvency. The means of paying it were derived from assessments on other members from certificates of membership and from a guaranty fund. It was held that this was not the less a contract of mutual insurance upon the life of the assured because the amount was graduated by the number of members holding similar contracts, nor because a portion of the premiums was to be paid upon the uncertain periods of the deaths, nor because on nonpayment of assessments the contract provided no means of enforcing payment except by forfeiture. It was further held that evidence offered that the object of the organization

that by the terms of the policy this was a Pennsylvania contract, and was to be construed in the light of a statute of that state which made the effect of a breach of these warranties in avoiding the policy to depend on the materiality of the fact misrepresented, or the good faith of the applicant, and that under such a construction the materiality of the fact misstated was a question for the jury, and so, also, was the good faith of the applicant. The court charged the jury that the plaintiff was entitled to recover the amount of the policy unless the defendant could show that Schardt had made untrue statements, and that the facts thus misrepresented were material to the risk, or that they had been misrepresented with intent to

deceive the company, and that the burden of establishing these defenses was on the defendant. The court accordingly submitted to the jury the question whether the fact that Schardt had a policy in the New York Life Insurance Company was material to the risk, and, if not material, whether the omission by Schardt to include it in his answer was made in good faith. He took the same course with respect to the other representations, leaving the question of their untruth, materiality, and good faith to the jury. The defendant excepted to so much of the charge as imposed upon the defendant the burden of showing that Schardt's failure to include in his existing insurance the New York Life policy was with intent to defraud, or that it was material to the risk,

was benevolent and not speculative had no bearing upon the nature and effect of the business, and such company was required to comply with Massachusetts laws before transacting business as an insurance company. *Com. v. Wetherbee*, 105 Mass. 149.

And the Ancient Order of United Workmen was held to be an insurance company within the meaning of Iowa Code, § 1160, requiring a guaranteed capital of \$100,000. It was said: "We are satisfied, from an examination of the record, that the primary object and purpose of the association of the Ancient Order of United Workmen is to provide a beneficiary fund to be paid upon the death of each member, and that the avowed fraternal character of the association is merely incidental thereto. In fact, we go further than this, and from the record find that one of two things is true, that is to say, either the fraternal objects of the association as avowed have been abandoned, or they never were intended to be enforced." *State, Graham, v. Miller*, 66 Iowa, 28.

And the Ancient Order of United Workmen was again held to be an insurance company, and its primary object life insurance, in the case of *State, Graham, v. Nichols*, 78 Iowa, 747. It was held that the fact that it had social objects also did not destroy its character as an insurance company, and such company was not allowed to do business in Iowa without complying with the statutes as to capital, investments, and other requirements. The constitution of the society provided that it was to protect labor, to improve the social condition, to create a fund for the benefit of its members during sickness, and in case of death to pay a sum to such person designated by each member, and the adoption of secret work to protect its members, to hold lectures, and discuss art, science, and literature.

And a contract by an association to pay at certain stated periods of time certain sums of money as endowments to living members, or in case of death to pay benefits to their beneficiaries, was held to be life insurance, and therefore the Endowment & Benevolent Association of Kansas was held not to be entitled to transact business in the state without complying with the provisions of Kan. Laws 1886, chap. 131, providing for the organization and control of mutual life insurance associations in this state. It was held that contracts to pay benefits to beneficiaries of deceased members were insurance, and contracts to pay endowments to living members were also. *Endowment & Benev. Assn. v. State*, 35 Kan. 253.

The Vigilant Insurance Company, a mutual indemnity association against losses from horse thieves, was held to be an insurance company, where each member paid a membership fee and annual dues to keep up the organization and pay officers' fees, and assessments were made to pay losses; therefore it was held that such company could not carry on the 88 L. R. A.

business without authority from the state. *State v. Vigilant Ins. Co.*, 30 Kan. 585.

And the Masonic Mutual Benevolent Association of Texas constituted an insurance company within the spirit and true meaning of that term, and not an association conducted in the interest of benevolence as contemplated by Tex. Rev. Stat. title 20, providing for corporations for charity or benevolence, and it was subject to state control, under Rev. Stat. art. 2971a, providing that it shall not be construed to affect or in any way apply to mutual relief associations organized under title 20, which has no capital stock and whose relief funds are created by assessments upon members, and that such organization shall be required to make an annual statement showing certain facts and salaries paid officers, and gross amount of receipts, and amount of policy holders; and that if the report is not made the company is to be deemed an insurance company conducted for profit and amenable to the laws governing such companies. And it was held that the report showed that this company was managed in the interest of its officers, and was an insurance company and not a benevolent society. *Farmer v. State*, 60 Tex. 561.

The Fidelity Mutual Aid Association organized under a Pennsylvania statute which authorized "insuring lives on the plan of assessment upon surviving members" without other restriction than that policy holders shall have an interest in the lives of members, was not authorized to do business in Ohio, under Ohio Rev. Stat. § 8630, providing that a company or association may be organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members of such company or association, and may receive money either by voluntary donation or contribution or collect the same by assessments on its members, and that such association shall not be subject to the preceding section of this chapter. *State v. Moore*, 38 Ohio St. 7.

So, under N. Y. Laws 1848, chap. 819, being an act for the incorporation of benevolent, charitable, scientific, and missionary societies, authorizing any five or more persons to associate themselves for benevolent, charitable, literary, scientific, missionary, or mission or other Sabbath-school purposes, the Mutual Reliance Society was not entitled to incorporate, where the certificate stated "that the object for which the said society is formed is benevolent, by the association and co-operation of its members, by their contributions and the contributions of others, to provide a relief fund; also to aid persons of moderate pecuniary resources in obtaining from a reputable insurance company insurance on their lives, and in maintaining the necessary payments on the same; and to secure to families of persons so insured an immediate advance of funds in case of death." It was said that "it is evidently

and requested upon this subject the following charge, which the court refused: "The undisputed evidence shows that Schardt omitted to disclose, in his answer to question 6, A, that, in addition to the insurance therein stated, he had been insured, and was then insured, and had a policy, in the New York Life Insurance Company, for \$5,000, which it was his duty to have done. The presumption is that he knew of this additional insurance. In fact, it is not controverted that he did. The presumption, also, is that he intentionally suppressed the fact. The presumption, also, is that the question, answer, and information sought by the question, as well as that disclosed as that suppressed, were material. The defendant makes out a prima facie defense by referring to the

question and answer, and proving the omission to state in his answer the policy in the New York Life Insurance Company; and the burden is on the plaintiff to show that the omission was not intentional, and that the matter suppressed was not material." Upon the question of concealment of the fact, the court charged the jury as follows: "It is again insisted, as the court understands the line of defense, that, in addition to the answers which it is alleged are false, that the insured concealed from the insurance company a fact about which he was not asked in the policy, and that by reason of that concealment the policy is avoided. That fact is that he was at the time a defaulter to the bank of which he was an officer. Now, it is not insisted that this

a corporation for business purposes, having in view pecuniary gain and profit to the incorporators. It may contemplate the promotion of the temporal interests of others, but such object is merely incidental to the chief end of the association." *People, Blossom, v. Nelson*, 46 N. Y. 477.

In *State, Atty. Gen., v. Northwestern Mut. Life Stock Assn.* 16 Neb. 549, it was said that under Neb. Laws 1883, 236, 237, authorizing any number of persons not exceeding two hundred to make mutual pledges and give valid obligations to each other for their own insurance from loss by death; but such association shall in no case insure life except that of a member, nor pay salary or compensation, and shall receive no premium and declare no dividends, —the statute was evidently intended for neighborhoods, benevolent societies, etc., and was never intended to authorize such an association to do a general insurance business.

And the Merchants' Mutual Benefit Society, an association having for its object to give financial aid to the widows and children of deceased members or to such purposes as members should direct by their last will, providing a fund for this purpose from assessments and entrance fees, was held to be a mutual insurance company. Mo. act March 8, 1879, relating to benevolent, religious, and educational associations, adding the privilege of providing for relief of families and dependents of deceased members and for assisting the sick and exempting such societies from the law relating to insurance companies, was repealed by the act of May 18, 1879. *State, Atty. Gen., v. Merchants' Exch. Mut. Benev. Assn.* 72 Mo. 146.

So, a corporation organized to promote the well being of the members, and to furnish aid to a member's family in case of his death, where no moral or social prerequisite was required for membership, but only conditions of age and health, and which provided no benefit except in case of death, and collected funds for this purpose by assessment in case of death, was held to be a mutual insurance company and subject to the insurance laws of the state, and not a benevolent or charitable association within the meaning of Mo. Secs. Laws 1881, p. 87. *State v. Brawnner*, 15 Mo. App. 597.

In *Foster v. Moulton*, 35 Minn. 453, where the association did not comply with the statute so as to become an insurance corporation, and it was contended that it was duly incorporated as a benevolent society, under Minn. Gen. Stat. 1878, chap. 34, title 3, providing for the organization of corporations other than those for pecuniary profit, including benevolent societies or associations for mutual improvement in any art or science or for literature or social culture, it was held that it was no more a benevolent society than any mutual insurance company or other mutual company, or any partnership by which one member undertakes to do something for the pecuniary advantage of another mem-

ber, in consideration of the undertaking of the latter to do the like thing for him. It was held that the undertaking was not in any sense benevolent but was for a *quid pro quo*; it was paid for, and the association involved in this case was in substance for the purpose of mutual insurance.

And in an action to prevent a benevolent company from doing an insurance business, where it was incorporated under Ill. Rev. Stat. 1874, chap. 290, act April 18, 1872, and it was claimed to be exempt under § 81 providing that societies intending to benefit the widows, orphans, heirs, or devisees of deceased members and members who have received a permanent disability without any annual dues or premiums while the members receive no money as profit or otherwise except for permanent disability, shall not be deemed insurance companies, it was held that this exemption did not apply where the object was the benefit of members, and the pecuniary benefits were enjoyed, not by the widows, but by appointees of deceased members, and by certain of the members generally, and not members who had received a permanent disability. *Golden Rule v. People, Swigert*, 118 Ill. 402.

The Mutual Reserve Fund Life Association of New York, organized under an act for the incorporation of societies and clubs for certain lawful purposes, and the purpose being "the mutual benefit of ourselves and all others who may become members" was a life insurance company, and was not exempt under Ky. act March 6, 1876, providing that all Masonic Orders, Odd Fellows Associations, and all lodges of Ancient Order of United Workmen, Knights of Honor, and all other associations for the sole purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families or heirs of deceased members, are hereby declared not to be insurance companies in the sense and meaning of the general life-insurance law of this state, and are exempt from its provisions. It was held that the application for the certificate in this case was similar to that of an ordinary life insurance company, and that it was an insurance company attempting to assume the sacred name and purpose of a benevolent and charitable association, while the distribution of profits was disguised by designating them payments of salaries, fees, and expenses which appeared enormous in view of the payment of losses reported, and a fine was imposed for doing business without a license. *Sherman v. Com.* 82 Ky. 102.

So, the National Association of the Farmers' & Mechanic's Mutual Aid Association was held to be a mutual life insurance company on the assessment plan and subject to Kan. Laws 1885, chap. 131, although the declared purpose was to promote charity as well as the social and moral advancement of its members, who were classified as social and beneficiary members, and the social members were not required to pay assessments or contribute to the

is a false answer to anything asked here, because in the policy and in the application there is no question made upon that point at all; and, in the absence of any question at all upon the point, it constitutes no part of the written application or policy, and is therefore not governed by the same rule as stated to you as governing the other propositions. If the answers to the written questions were false and material, as explained to you, that would avoid the policy, without more, but in respect to a fact about which no question is asked, in order that the concealment from the company of such a fact as that should avoid the policy, it must have been intentionally concealed; and the omission to state it because the insured did not think it material, or the entire omission to

speak of it because not asked about it, or because it was at the time not recollected or was forgotten, or its omission in any manner in good faith, would not avoid the policy. For the concealment of a fact such as that, outside of anything asked in the policy to have that effect, as stated, it must have been intentional." To this action of the court the defendant took the following exceptions: "(4) Said counsel next then and there excepted to so much of said charge as instructs the jury that before the failure of John Schardt, the insured, to disclose to the defendant company the fact of his defalcation to the plaintiff bank, at the time of the application and policy in question, could be available as a defense to his action, the concealment must have been intentional

beneficiary fund, but the main object was to contract with its beneficiary members by which they were to pay a membership fee and an assessment upon the death or permanent disability of another beneficiary member of the section to which he belonged to be collected and paid by levy of an assessment. Kan. Laws 1885, chap. 131, providing that this act shall not apply to any association of religious societies now existing or under the supervision of a grand or supreme lodge, nor to any class of mechanics, express, telegraph, or railroad employees formed for the mutual benefit of the members thereof and their families exclusively, was held not to exempt the association where it was not shown that it was a secret society existing when the law was enacted, and that fact that it was under the supervision of a grand or supreme lodge was not enough to exempt it where it was not shown to be a secret society. State, Bradford, v. National Asso. of the Farmers' & M. Mut. Aid Asso. 35 Kan. 51.

In State, Churchill, v. Trubey, 37 Minn. 97; State, Clapp, v. Critchett, 37 Minn. 13, it was held that the Single Men's Endowment Association of Minnesota, which was a marriage aid association, whose purpose it was to endow the wife of each member with a sum of money equal to as many dollars as there were members of the association to be raised by assessment on them, was not a benevolent society, and could not be incorporated under Minn. Stat. 1878, chap. 84, § 166, providing for the incorporation of societies for benevolence, or instruction, or mutual improvement, or for literary or social culture purposes.

A beneficial association organized under Pa. act May 23, 1891, Pub. Laws, 107, Am. act April 22, 1874, authorizing the maintenance of a society for beneficial or protective purposes to its members, from funds collected therein, and to contract to pay not exceeding \$250 in the event of death, providing that this act shall not apply to fraternal, benevolent, charitable, or secret societies, issuing beneficiary certificates or paying benefits to their membership through the lodge system, or to insurance or relief associations for the exclusive benefit of employees or religious associations; but shall only apply to companies employing agents and doing "a general public insurance business," was held to be doing an insurance business where it issued death benefit certificates for \$250; but this was authorized by this act. Com. v. Keystone Ben. Asso. 171 Pa. 465.

And under Pa. act 1874, providing for the incorporation of a society for benevolent or protective purposes to its members from funds collected therein, no authority was conferred upon a corporation to extend its operation by means of agents or so-called subordinate lodges which are merely agencies called by another name throughout and beyond the state for the pecuniary advantage of the officers and managers, and therefore a judgment of ouster was granted against the Order of Vesta 88 L. R. A.

which was organized under the act of 1874, and which society organized a central corporation which undertook to levy assessments upon and assess benefits to beneficiary members of subordinate lodges who were excluded from membership in the national lodge. It was said: "These certificates are based on an application, the form of which is not given, but, from the fact that it is to contain the result of an examination by the medical examiner of a subordinate lodge, and is subject to the approval of the 'national' medical examiner, we infer that it is substantially like an ordinary application for a life insurance policy." Com. v. Order of Vesta, 2 Pa. Dist. R. 234.

And the National Indemnity & Endowment Company was not a beneficiary association within Pa. act April 29, 1874, Pub. Laws, 74, §2, ¶9, providing for the maintenance of a society for beneficial or protective purposes to its members from funds collected therein, where the only persons likely to be benefited by the scheme set forth in the charter were the officers; therefore a judgment of incorporation was revoked. Re National Indemnity & E. Co. 143 Pa. 450.

And the Masonic Mutual Aid Association was held to be an insurance company where the principal object was to secure to each member of the association on his death, for his beneficiary or representatives, a certain sum, and the membership was limited to masons in good standing who were not over fifty years of age and could pass the required medical examination; therefore it was held that such association was required to pay to the state a tax on its gross assessments before it could do business, and was not exempt under S. D. Insurance Laws, § 53, exempting from the payment of this tax secret, benevolent, or fraternal societies. It was further held that this was not a secret society although it only insured Masons, and if the word "Mason" was eliminated from the association, its primary and only purpose was that of life insurance for its members. It was also held that it was not a fraternal order because fraternal orders and associations usually provide for sick benefits and funeral expenses, without regard to the age or physical condition of the member at the time of admission. Masonic Aid Asso. v. Taylor, 2 S. D. 324.

The Fraternal Alliance, a secret order organized to cultivate social and fraternal relations and to furnish aid to the disabled, all aid to be by voluntary subscription, was held to be an insurance company, but to have the right to do business in Michigan without being under the control of the commissioner of insurance, under How. (Mich.) Stat. chap. 131, § 4225, providing that no company shall be at liberty to transact the business of life insurance within the state until such company shall have deposited with the state treasurer \$100,000 in securities, and § 4244 providing that all cor-

on the part of the said insured, and that, if his failure to divulge the fact arose from any of the causes stated in said charge, that such defense could not be established; and said counsel, insisting that the purpose, design, or intention of the insured in withholding the fact from the knowledge of the company is not material in making out said defense, except to the opinion of the court in its decision to the contrary."

Messrs. F. C. Maury and J. B. Daniel, for plaintiff in error:

The failure to include the facts in the answer of Schardt to the question in the application made that answer untrue because the ques-

tion called for a statement of all the occupations in which Schardt had been, and was then, engaged; and his answer did not communicate to the company one of the occupations (to wit, that of a practised embezzler) in which he was then and had been engaged. Though an apparently complete answer, it was nevertheless incomplete and therefore untrue. The company had a right to rely upon it as a full and truthful answer, and act upon it as such.

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 80 L. ed. 644; *Potter v. Ontario & L. Mut. Ins. Co.* 5 Hill, 147; *Chaffee v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 876; *Burrill v. Saratoga County Mut. F. Ins. Co.* 5

porations, associations, partnerships, or individuals doing business involving an insurance, guaranty contract, or pledge for the payment of annuities or endowments, or for the payment of moneys to families or representatives, or certificate holders or members, shall be considered and be deemed to be life insurance companies within the meaning of the laws relating to life insurance within this state, and § 4246 excepting mutual benefit corporations and other benevolent associations organized under the act of April 3, 1869, and Laws of 1883, chap. 181, § 5, providing that this act shall not be construed to apply to any secret or fraternal society, lodge, council, or association now doing business in this state, which is under the supervision of a grand or supreme body and furnishes insurance to its members, but neither pays any commissions nor employs any paid agents, whether organized under the laws of this or any other state; but such associations shall be authorized to transact business in this state and not be subject to the provisions of this or any other act. *Kensenhouse v. Seeley*, 72 Mich. 608.

In *State, Royal Arcanum, v. Benton*, 35 Neb. 463, it was said that certificates of indemnity issued by the Royal Arcanum Society were in form and substance contracts of insurance. But it was held that such societies were not amenable to Neb. Comp. Stat. chap. 43, requiring payment of fees to the auditor by license, as they were exempted under *Sees. Laws 1887, chap. 18*, being "An Act to Exempt Secret Societies and Associations from the Requirements of Chapter 16 of the Compiled Statutes of 1885, to Define the Duties, Powers, and Obligations of Such Societies and Associations, and to Provide Penalties for Violations Thereof."

Under *Kan. Laws 1871, p. 248, § 78*, providing that the provisions of this act shall not apply to life insurance companies organized on the co-operative plan, the Bankers & Merchants' Mutual Benefit Association was held to be an insurance company organized upon the co-operative plan and exempt from the provisions of the law of 1871, where the corporation had no stock, proposed no accumulation of assets to pay law suits, held no reserve but collected an assessment from its members on a death, and paid the amount to a beneficiary. The charter provided that the purpose was the creation of a fund by mutual pledges and obligations of its members with each other for their own insurance from loss by the death of its members; the preservation of the fund by investment in bonds and distribution among the families or beneficiaries of deceased members, and provided that it shall have no stock, insure no life except members, receive no premium, nor make any dividend, and the private property of its members shall be exempt from corporate debts. *State v. Bankers' & M. Mut. Ben. Assn.* 23 Kan. 499.

And a certificate of membership in the Standard 83 L. R. A.

Life Association was held to be a contract of insurance, where the so-called member contracted to pay an admission fee and annual dues of specified amounts and a stated assessment for each death in the class to which he belonged, in consideration of which the company agreed to pay his beneficiary named the assessments collected (less certain deductions) not exceeding the amount of insurance named in the certificate. It was further held that under Ohio Rev. Stat. § 3630, authorizing such corporation for the mutual protection and relief of its members, and also for the payment of stipulated sums of money "to the families or heirs" of deceased members, an association contracting to pay to a person who was not of his family should be ousted from doing business. *State v. Standard Life Assn.* 38 Ohio St. 281.

In *State, Atty. Gen., v. Central Ohio Mut. Relief Assn.* 29 Ohio St. 399, it was said that it had been held by that court that mutual relief associations incorporated under Ohio act February 23, 1875, are not subject to the statutes of this state relating to life insurance and life insurance companies. But this did not determine what will constitute a proper organization under the act, and a judgment of ouster was awarded where such company had issued sixty-four certificates of membership to one person who was not a member, upon the lives of strangers in whom the insured had no insurable interest. The association had no power either to make such contracts or to issue certificates of membership thereon. It was held the only beneficiaries for whom it had power to provide were the families or heirs of its members.

Where an association sought a mandamus to compel the issuance of a license to do business it was granted, and it was also held that under *Wis. Laws 1891, chap. 418*, regulating mutual beneficial and fraternal corporations, societies, orders, and associations providing insurance on the assessment plan, the Covenant Mutual Benefit Association of Illinois was "a beneficiary association furnishing life insurance upon the assessment plan, within the meaning of the act in question. The mere fact that the relator was authorized to receive calls or premiums in advance does not destroy its character as such insurance association." *State, Covenant Mut. Ben. Assn., v. Root*, 38 Wis. 667, 19 L. R. A. 271.

Under the *Friendly Society act 1875, § 23*, subsecs. 2, 7, and § 4, and life insurance company's act 1870, § 2, providing that no society (including any person or persons not registered under the friendly society act, which issues policies of insurance on human life or grants assurance on any one life for a less sum than £20, and receives premiums or contributions by collectors at less intervals than two months, and who assures the payment of money on the death of children under ten years of age) shall pay on the death of a child under ten years of age except to — upon the production of a certificate of

Hill, 188, 40 Am. Dec. 345; *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75; *Wilson v. Herkimer County Mut. Ins. Co.* 6 N. Y. 59; *Trench v. Chenango County Mut. Ins. Co.* 7 Hill, 123; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Hayward v. New England Mut. F. Ins. Co.* 10 Cush. 444; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Bliss, Life Ins.* 2d ed. §§ 40, 72, 131, pp. 189, 190; *Phillips, Ins.* §§ 550, 565, 567.

It was clearly Schardt's duty in response to the question to have stated all of the occupations in which at the time of the answer he was employed and which he had previously followed, and if he was or had been engaged in two, and concealed either, he should rather have withheld the more innocent and less risky one and disclosed the more hazardous one, since the evident object of the question was to

ascertain the risk to which the company would be exposed by reason of the occupation of the man whose life was proposed for insurance.

Hurtman v. Keystone Ins. Co. 21 Pa. 467; *United Brethren Mut. Aid Soc. v. White*, 100 Pa. 12; *May, Ins.* § 806.

It was the duty of Schardt to have made a full and fair disclosure of the material fact thus peculiarly known to him and thus concealed by him, and his failure to do so was a breach of an implied condition of the contract that avoided the policy.

1 *Phillips, Ins.* 2d ed. 213, 233, 234 *et seq.* 284 *et seq.* 292 *et seq.* 302; *Bliss, Life Ins.* §§ 55-64; *Walden v. Louisiana Ins. Co.* 12 La. 134, 32 Am. Dec. 116; *Beebe v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 553; *Curry v. Commonwealth Ins. Co.* 10 Pick. 535, 20 Am. Dec. 547; *Bufs v. Turner*, 6

death, where it was contended that a society registered under the company's acts 1862-90 did not issue, and were not liable under policies of assurance,—it was held that they were properly convicted where they paid money to a member on the death of her child under ten years of age without the production by her of a registered certificate. In this case the subscription card was claimed not to be a policy of life insurance but issued to inform the subscriber how he stood, and that it did not contain any contract of insurance. *Newbold Friendly Soc. v. Barlow* [1893] 2 Q. B. 128.

But there are some cases where the associations are purely benevolent, or held to be within the saving clause of the statute. *State v. Taylor*, 56 N. J. L. 49; *Durlan v. Central Verein of Hermann's Soehne*, 7 Daly, 168; *Louisville German Mut. F. Ins. Asso. v. Com.* 9 Bush, 394; *State v. Whitmore*, 75 Wis. 232; *State, Atty.-Gen., v. Mutual Protection Asso.* 26 Ohio St. 19; *Supreme Council O. of C. F. v. Fairman*, 62 How. Pr. 398; *Fawcett v. Supreme Sitting O. of I. H.* 64 Conn. 170, 24 L. R. A. 815; *Com. v. National Mut. Aid Asso.* 94 Pa. 481; *State, Clapp. v. Federal Investment Co.* 48 Minn. 110.

Under N. J. Pamph. Laws 1869, p. 174, prohibiting any contract of insurance of any kind, and also the transaction of the business of insurance of any kind whatsoever, save under the provisions of that act, a contract made by the Commonwealth Benevolent Association was not a contract of insurance where the association confined its agreements to the payment of sick benefits and burial expenses. It was said: "Mutual associations for the purpose of securing, *inter alia*, sick benefits and burial expenses are benevolent institutions in the strictest sense of the term, whereas a contract for life insurance is a mere business undertaking entirely divorced from all charitable considerations." *State v. Taylor*, 56 N. J. L. 49.

And a benevolent society like the Sons of Hermann and its Central Verein was not subject to N. Y. Laws 1840, chap. 80, and Laws 1858, chap. 187, empowering a wife to cause the life of her husband to be insured; and it was said that it was doubtful if it would be contended "that the Central Verein was subject to the control of the superintendent of the department of insurance, and obliged to conform to the laws respecting life insurance companies. The Verein is a corporation, but it is not restricted by law as to the methods of accomplishing the benevolent designs to promote which it was organized. It issues no policies." The question involved was as to whether a man could designate a woman other than his wife as his beneficiary. *Durlan v. Central Verein of Hermann's Soehne*, 7 Daly, 168.

And the Louisville German Mutual Fire Insurance Association and German Washington Mutual Fire Association were not insurance companies, in 38 L. R. A.

the sense in which these terms were used in Ky. act March 12, 1870, providing for the incorporation and regulation of fire, marine, health, accident, live stock, and all other except life insurance companies, where the companies were chartered in 1856 (§ 1890), and the contracts between the various members were simply application of indemnity against loss by fire, the performance of which was secured by the pledge of the property by each member to the extent of his own insurance, and they had no capital stock either in cash or premium notes. It was further held that the provisions of the act of 1870, prohibiting mutual insurance until two hundred applicants and premiums amounting to \$100,000 be secured, did not apply. *Louisville German Mut. F. Ins. Asso. v. Com.* 9 Bush, 394.

And under Wis. Rev. Stat. 1878, § 1978, defining what are insurance corporations, and Laws 1880, chap. 240, § 4, requiring a certificate of authority before an agent effects insurance in this state, the National Benevolent Association of Minneapolis, which was a fraternal benevolent association for Odd Fellows upon the co-operative or assessment plan, was exempt under Laws 1879, chap. 204, § 1, providing that secret beneficial, charitable, or benevolent orders of Free Masons, Odd Fellows, etc., are hereby declared not to be life insurance companies in the sense and meaning of the laws of this state relating to life insurance and life insurance companies, and that such societies, orders, or associations are and shall hereafter be exempt from the provisions of said general law as aforesaid. *State v. Whitmore*, 75 Wis. 332.

So, the Mutual Protection Association organized under Ohio act April 20, 1872, 69 Ohio Laws, 82, authorizing associations for the purpose of mutual protection and relief of their members and for the payment of stipulated sums of money to the families or heirs of deceased members of such association, was not subject to the statute relating to life insurance and life insurance companies, under the act of February 23, 1875, 72 Ohio Laws, 23, § 3, providing that all rights accrued and all associations formed under the original act shall survive and be subject to and governed only by the provisions of said original act as hereby amended, and in no manner subject to the laws of this state relating to life insurance companies. *State, Atty. Gen., v. Mutual Protection Asso.* 26 Ohio St. 19.

And the Supreme Council of the Order of Chosen Friends was not required to comply with the general insurance laws, where N. Y. Laws 1881, chap. 256, provided that all associations and societies which may issue any certificate or make any agreement with their members whereby upon the decease or sickness or other physical disability of a member, any money or other benefit or aid is to be paid to such member or others dependent upon him,

Taunt. 338; *Columbian Ins. Co. v. Lawrence*, 27 U. S. 2 Pet. 25, 7 L. ed. 835; *Curry v. Sun Fire Office*, 155 Pa. 471; *Von Lindenau v. Desborough*, 8 Barn. & C. 586; *Morrison v. Muspratt*, 4 Bing. 60; *Huguenin v. Rayley*, 6 Taunt. 186.

If the fact was material as it certainly was, and if Schardt was conscious of the defalcation, as he certainly was, then whether the failure to disclose it was the result of stupidity, mistake, inadvertence, or any other cause, the concealment avoided the policy.

Walden v. Louisiana Ins. Co. 13 La. 186. 82 Am. Dec. 116; *Bebee v. Hartford County Mut. F. Ins. Co.* 25 Conn. 59, 65 Am. Dec. 558; *Bufe v. Turner*, 6 Taunt. 888; *Curry v. Commonwealth Ins. Co.* 10 Pick. 542, 20 Am. Dec. 547; *Abbott v. Howard, Hayes*, 881; 8 Bigelow, Life & Acci. Ins. Rep. 294; *Huguenin v. Ray-*

ley, 6 Taunt. 186; *Bliss, Life Ins.* §§ 55, 66, 72; *Lindenau v. Desborough*, 8 Barn. & C. 586.

The concealment of the policy of the New York Life falsified the answer to the same extent as if Schardt had expressly denied therein the existence of any insurance other than that specified in the answer.

The nondisclosure in question was a breach of the warranty and avoided the policy.

Wood v. Hartford F. Ins. Co. 13 Conn. 544; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 Am. Dec. 845; *Jennings v. Chenango County Mut. Ins. Co.* 2 Denio, 75; *Chaffee v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 876; *Wilson v. Herkimer County Mut. Ins. Co.* 6 N. Y. 59; *Trench v. Chenango County Mut. Ins. Co.* 7 Hill, 123; *Egan v. Mutual Ins. Co.* 5 Denio, 326; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 299, 88 Am. Dec. 544.

or designated beneficiary, which money or aid is derived from donations or fees, dues and assessments collected from members, and which funds and business are limited to such benevolent or charitable uses, shall be subject only to the provisions of this act, and the certificate in this case was to pay a member on reaching seventy-five years of age which was held to be a physical disability under the statute. Supreme Council O. of C. F. v. Fairman, 62 How. Pr. 386.

And the National Mutual Aid Association of Columbus, Ohio, was held to possess some of the features of an insurance company, but was not a mutual insurance company so as to require compliance with Pa. act, April 4, 1873, imposing a penalty on foreign insurance companies for transacting business in the state without authority of law. It was said that in Ohio, in *State, Atty. Gen., v. Mutual Protective Asso.* 25 Ohio St. 19, it was held not to be a mutual insurance company, and if it was not so held it would be exempt under Pa. act May 1, 1878, Pamph. Laws, 53, § 54, providing that this act and the act of which this is a supplement shall not apply to beneficial associations that provide aid for the family or heirs of a deceased member, whether insurance policies containing a guaranteed sum of insurance or not, nor to associations issuing policies not containing a guaranteed sum of insurance. *Com. v. National Mut. Aid Asso.* 94 Pa. 481.

In *Fawcett v. Supreme Sitting O. of I. H.* 64 Conn. 170, 24 L. R. A. 815, it was held that the Supreme Sitting of the Order of Iron Hall was not controlled by Conn. Gen. Stat. § 2802, requiring insurance companies to have authority from the insurance commissioners, at it was exempt under § 2808, providing that every secret fraternal society is excepted from the operation of that statute, and this corporation was held to answer both of those descriptions, as under its constitution secret work was one of the functions of the Supreme Sitting, as the branches were to meet with a "watchman" at the outer and a "vidette" at the inner door. But in the opinion of Hamersley, J., who concurred in the result, it was said that "secret or fraternal society" includes only the well-known class of associations for dispensing aid or benefits to their members, and that the exception did not apply to a corporation doing an assessment insurance business distinct from the benevolent operation of any secret or fraternal society, and that it would hardly be claimed that the mere word "secret" was efficacious to exclude from the operation of the act any corporation that may call its janitor a "watchman" and its door-keeper a "vidette."

The Federal Investment Company was not an insurance company of any kind where an admission fee was charged and monthly dues during member-

ship, of which the admission fee and 15 per cent of the dues were to pay agents, commissions, and the expenses, and 15 per cent went into a reserve fund, and the balance constituted a maturity fund and was paid out to the member holding the oldest outstanding certificate and then he ceased to be a member. It was held that this association was not amenable to Minn. Laws 1888, chap. 184, providing for a corporation transacting life, casualty, or endowment insurance upon the assessment plan. *State, Clapp, v. Federal Investment Co.* 48 Minn. 110.

IV. Where the question is in regard to jurisdiction.

It is generally held under statutes providing for jurisdiction in actions against life insurance companies, that benevolent associations are controlled by the general insurance laws; but there are exceptional cases in Illinois. *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910; *Miner v. Michigan Mut. Ben. Asso.* 68 Mich. 888; *Kentucky Mut. Security Fund Co. v. Logan*, 90 Ky. 364; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 128; *Covenant Mut. Ben. Asso. v. Baldwin*, 49 Ill. App. 202; *Supreme Council, A. L. of H. v. Larmour*, 81 Tex. 71.

So, under Wis. Rev. Stat. § 1953, requiring every life insurance company not organized under the laws of this state to designate an attorney upon whom process may be served, and § 1977, providing that whoever solicits insurance or transmits an application or makes any contract for insurance or collects any premium in so doing shall be held to be an agent of such corporation, the Order of Railway Conductors of America was held to be a mutual insurance company within the provisions of such act where it was under the control of the grand division composed of those members of the order who choose to participate in its benefits, and insured its members against death and total disability from accident and disease. *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910.

And the Michigan Mutual Benefit Association of Hillsdale was an insurance company under How. (Mich.) Stat. § 4360, providing for an action against insurance companies in the circuit court of the county in which the plaintiff resides, if the company issues policies or takes risks in such counties, where the company was organized under How. Stat. (Mich.) chap. 118, authorizing any number of persons not less than five to become a body corporate and political for the purpose of securing to the family or heirs of any member upon his death a certain sum of money to be paid by such corporation either out of its funds or by an assessment upon its members. In this case the articles of association provided that members should pay a cer-

If not a warranty then the answer is a written representation incorporated with and made part of the policy and the omission to include the additional insurance in the answer was a substantial misrepresentation or a substantial concealment tantamount to a misrepresentation, and attended by the same consequences.

May, Ins. § 158; *Phœnix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Fire Asso. of Philadelphia v. Williamson*, 26 Pa. 196.

Whether the nondisclosure be regarded as proof of an express misrepresentation or a concealment tantamount thereto, in neither case can the materiality of the omitted fact nor the motive or intent of Schardt in misrepresenting or concealing the fact be made the subject of inquiry any more than if it was a breach of warranty.

tain amount upon each assessment for death benefits which shall not increase with the age of the member, and its by-laws prescribed the manner in which persons could become members. *Miner v. Michigan Mut. Ben. Asso.* 63 Mich. 333.

And the Kentucky Mutual Security Fund Company was an insurance company within the meaning of Ky. Code, § 71, providing that an action against an insurance company may be brought in the county in which its office or principal place of business is situated, or if it arises out of a transaction with an agent of such corporation it may be brought in the county in which such transaction took place, although the charter provided that "the said company being of a purely benevolent character, it shall not be subject to the laws of this state governing life insurance companies, except as herein provided." *Kentucky Mut. Security Fund Co. v. Logan*, 90 Ky. 364.

And the Railroad Conductors' Benefit Association was an insurance company within the Illinois act April 3, 1873, providing for jurisdiction of the circuit court of the county where the plaintiff resides, in actions against life insurance companies, notwithstanding the act of April 18, 1872, amended May 22, 1883, providing that associations and societies intended to benefit widows, orphans, heirs, and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies. It was said that the legislative intention was merely to exempt mutual benefit societies from the duty of complying with the general insurance law, and to substitute therefor a code for their regulation. *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138.

This case disapproved the case of *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Asso.* 31 Fed. Rep. 63, which held that a similar association organized under the same act was purely a voluntary association, and under its constitution the refusal of the directors to make an assessment because the assured was delinquent was final.

And under Ill. Rev. Stat. chap. 110, § 3, providing that an action against a life insurance company may be brought in the county where the plaintiff resides, and chap. 32, § 81, providing that associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise except for permanent disability, shall not be

Phillips, Ins. § 542; *Bliss, Life Ins.* § 72; *May, Ins.* §§ 181, 185; *Phœnix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 646; *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 22 Wall. 47, 22 L. ed. 893; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Ætna L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *Miller v. Mutual Ben. L. Ins. Co.* 81 Iowa, 232, 7 Am. Rep. 122; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Davenport v. New England Mut. F. Ins. Co.* 6 Cush. 341.

Neither does the materiality of a fact misrepresented in or concealed from an answer to a specific question, nor the effect of such false statement or omission upon the contract, depend upon an express stipulation in the policy, application, or condition (sometimes annexed) declaring the policy void for misrepresentations or concealments.

deemed insurance companies, the jurisdiction attached where the plea did not show that the members received no profit, and did not aver that the funds derived from mortuary calls were not in excess of what was necessary to provide the benefits for which the association was organized. *Covenant Mut. Ben. Asso. v. Baldwin*, 49 Ill. App. 203.

In *Covenant Mut. Ben. Asso. v. Baldwin*, 49 Ill. App. 203, it was said that in *Northwestern Life Asso. v. Stout*, 32 Ill. App. 31, the association was exempt, but the plea in this case did not bring the defendant within the exemption.

And where the question was as to jurisdiction it was held that the Supreme Council American Legion of Honor was an insurance company, and that an answer to the merits waived the question of jurisdiction. *Supreme Council, A. L. of H. v. Larmour*, 81 Tex. 71.

In *State v. United States Mut. Acci. Asso.* 69 Wis. 76, where the question was as to the right of a non-resident mutual accident association to do business in the state, it was said that it is claimed that the views in this case conflicted with the decision in *State v. United States Mut. Acci. Asso.* 67 Wis. 624. This was a case where the statute giving jurisdiction was held to apply. The court says: "It is true it is said in that case that § 1964 applies to every life or accident insurance company doing business in this state. This remark, however, must be considered in connection with the facts and case in which it was made. It was perfectly correct, considered in relation to the question decided there; but cannot control our judgment here, where the question is whether the last clause of § 1954, which imposes a penalty for a failure to do certain acts, applies to a nonresident corporation which has never been licensed to do business in this state."

But in *Union Mut. Acci. Asso. v. Riel*, 38 Ill. App. 414, a plea to the jurisdiction was sustained under Ill. practice act, § 3, providing that the circuit court of the county where the plaintiff may reside shall have jurisdiction in all actions against life insurance companies incorporated or doing business in the state, and the company was organized under *Starr & C. Ill. Stat.* 1250, § 9, providing that all corporations organized for the purpose of furnishing life, accident, or permanent disability, indemnity, or mortuary benefit on the assessment plan in accordance with the 1st section of this act, shall not be deemed insurance companies or subject to the laws of this state relating thereto. It was held that the legislature has the power to define what shall or shall not be deemed or held to be insurance companies in this state, and that this company was not a corporation falling within the class of life insurance companies, and was expressly exempted by statute, and the service of summons was illegal.

May, Ins. § 195; 1 Wood, Fire Ins. § 120, pp. 300, 301; *Phoenix Mut. L. Ins. Co. v. Radcliff*, 120 U. S. 189, 30 L. ed. 646; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 53; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 402; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44; *Davenport v. New England Mut. F. Ins. Co.* 6 Cush. 340; *Hayward v. New England Mut. F. Ins. Co.* 10 Cush. 444; *Wilbur v. Bowditch Mut. F. Ins. Co.* 10 Cush. 446; *Draper v. Charter Oak F. Ins. Co.* 2 Allen, 569; *Chaffee v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 376; *Hutchinson v. Western Ins. Co.* 21 Mo. 103, 64 Am. Dec. 218; *London Assurance v. Mansel*, L. R. 11 Ch. Div. 863.

The question relates to matters intrinsically and essentially, as well as contractually, material and important, and the fact omitted from the answer thereto had a material bear-

ing upon the contract and upon the risk assumed, as matter of law, independently of contract; and its materiality was, moreover, established by the uncontradicted testimony in the case.

May, Ins. §§ 290-293, A. B. 364; *Ryan v. Springfield F. & M. Ins. Co.* 46 Wis. 674; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159; *Puller v. Madison Mut. Ins. Co.* 36 Wis. 604; *Shoemaker v. Glenn Falls Ins. Co.* 60 Barb. 84; *Pitten v. Merchants' & F. Mut. F. Ins. Co.* 38 N. H. 338; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 614, 35 Am. Rep. 623; *Hutchins v. Cleveland Mut. Ins. Co.* 11 Ohio St. 480; *Davenport v. New England Mut. F. Ins. Co.* 6 Cush. 340; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 347, 53 Am. Dec. 44; *Hayward v. New England Mut. F. Ins. Co.* 10 Cush. 444; *Wilbur v. Bowditch Mut. F. Ins. Co.* 10 Cush. 449; *Brown v. People's Mut. Ins. Co.* 11 Cush. 282;

And in *Northwestern Life Asso. v. Stout*, 32 Ill. App. 31, under Ill. act April 3, 1873, practice act, § 3, providing that the circuit court of the county wherein the plaintiff resides shall have jurisdiction over all actions against life insurance companies, and Laws 1883, p. 74, § 31, providing that associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise except for permanent disability, shall not be deemed insurance companies, the Northwestern Life Insurance Company was not deemed an insurance company within the provisions of the practice act so as to give jurisdiction. It was said that whether or not the associations described in the act of 1883 are in any sense insurance companies is immaterial, and the legislature could not change the effect by their declaration, and it did not assume to do so, but simply declared they shall not be deemed such.

V. Under statutes exempting benevolent societies.

Under statutes exempting benevolent societies from the operation of certain insurance laws, some cases notwithstanding such statute have defined such associations to be insurance companies owing to the business carried on by such benevolent society, which cases are as follows:

Under Mass. Stat. 1890, chap. 341, amending § 8 of the insurance law, providing that any corporation duly organized as aforesaid, and which does not employ paid agents in soliciting or procuring business other than in preliminary organization of local branches, and which conducts its business as a fraternal society on the lodge system, may provide for weekly payments during disability or pay a benefit to a member or his family as shall be fixed by the by-laws, a corporation incorporated for the purpose of doing an insurance business could not claim the benefit of this act, where it employed agents in soliciting or procuring business other than in the preliminary organization of the local branches. *Fogg v. Supreme Lodge, U. O. of G. L.* 155 Mass. 431.

And in *Supreme Council, A. L. of H. v. Larmour*, 81 Tex. 71, where it was held that the policy was an insurance contract and the defendant was an insurance company, it was further held that such company was not subject to the penalty under Tex. Rev. Stat. art. 2953, providing the penalty of 12 per cent damages for failure to pay loss, as act 1885, act. 2971a, provided that "nothing in this title shall be construed to affect or in any way apply to mutual relief associations . . . organized under the laws of any other state, which have no capital

stock, and whose relief funds are created and sustained by assessment made upon members of the association." It was held that "the purpose of this article seems to be to declare, in effect, that although a mutual relief association of the class to which plaintiff in error belongs may make an insurance contract which is substantially a life insurance policy, and that to that extent it may be, as was found by the court, an insurance company, still, if it was such an association as is described in that article, it would be relieved of the penalty."

And the *Kennebec Masonic Mutual Association* was not such a corporation as is provided by Me. Rev. Stat. chap. 55, § 5, providing that no corporation organized for charitable or benevolent purposes shall sue any of its members for dues or contributions of any kind, or be sued by any members for any benefit or sum due him; but all such rights and benefits, dues and liabilities, shall be regulated and enforced only in accordance with its by-laws. It was said: "If the prevalent purpose and nature of the association, of whatever name, be that of insurance, the benevolent or charitable results to its beneficiaries would not change its legal character. And that this association *et id omne genus* are mutual life insurance companies, we entertain no doubt whatever." *Bolton v. Bolton*, 73 Me. 290.

And the *Bankers' Life Association* organized under Minn. Gen. Stat. 1878, chap. 34, tit. 3, associating male persons for the purpose of obtaining employment while living, and at their death for securing and rendering pecuniary assistance in a stated amount to their families by means of assessments upon the survivors, having no capital stock, was an insurance society or association doing business on the co-operative or assessment plan, and exempted by Minn. Gen. Stat. 1878, chap. 34, § 368, providing that all associations or secret orders, such as Masons and other benevolent or fraternal co-operative societies, associated or incorporated for the sole purpose of mutual protection and relief to its members and for the payment of stipulated sums of money to the family of deceased members, are hereby declared not to be insurance in the sense and meaning of the general life insurance laws of the state, and they are and shall be henceforth exempt from the provisions of said general insurance law and are exempt from garnishment for a debt of a member under § 369, providing such exemption when a benevolent association or society sets apart or appropriates a beneficiary fund. *Brown v. Balfour*, 46 Minn. 68, 12 L. R. A. 373.

In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 2 L. R. A. 420, where an endowment certificate was issued by an association organized under Ill. Rev. Stat. 1874, chap. 32, § 30, providing that as

Draper v. Charter Oak F. Ins. Co. 2 Allen, 578; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 52; *Borditch Mut. F. Ins. Co. v. Winslow*, 8 Gray, 481; *Columbian Ins. Co. v. Lawrence*, 27 U. S. 2 Pet. 47, 7 L. ed. 848; *Curry v. Sun Fire Office*, 155 Pa. 467; *London Assurance v. Mansel*, L. R. 11 Ch. Div. 870; *Jeffries v. Economical Mut. Ins. Co.* 89 U. S. 23 Wall. 47, 22 L. ed. 888; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 510, 10 L. ed. 1050; *Phoenix Mut. L. Ins. Co. v. Radcliff*, 120 U. S. 189, 80 L. ed. 646; *Hartford F. Ins. Co. v. Small*, 80 U. S. App. 127, 66 Fed. Rep. 494; *Hutchinson v. Western Ins. Co.* 21 Mo. 101, 64 Am. Dec. 218; *Obermeyer v. Globe Mut. Ins. Co.* 48 Mo. 576; *Hard v. Penn. Mut. F. Ins. Co.* 158 Pa. 260; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 805, 88 Am. Dec. 544; *Brown v. Commonwealth Mut. Ins. Co.* 41 Pa. 194; *Louisiana Mut. Ins. Co. v. New Orleans*

Ins. Co. 13 La. Ann. 247; *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. 409; *McCollum v. Mutual L. Ins. Co.* 55 Hun, 103, 124 N. Y. 642; *Kemp v. Good Templars' Mut. Ben. Asso.* 46 N. Y. S. R. 429; *Studwell v. Mutual Ben. Life Asso.* 29 Jones & S. 287.

The omission or misrepresentation here was substantial. The answer had no approach to accuracy.

Studwell v. Mutual Ben. Life Asso. 29 Jones & S. 287; *McCollum v. Mutual L. Ins. Co.* 55 Hun, 103; *Jeffries v. Economical Mut. Ins. Co.* 89 U. S. 22 Wall. 47, 22 L. ed. 888; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 52; *Jacobs v. Eagle Mut. F. Ins. Co.* 7 Allen, 136; *Falis v. Conway Mut. F. Ins. Co.* 7 Allen, 50; *Abbott v. Shawmut Mut. F. Ins. Co.* 8 Allen, 216; *Brown v. People's Mut. Ins. Co.* 11 Cush. 282; *Hayward v. New England Mut. F. Ins. Co.* 10 Cush. 445; *Byers v. Farmers' Ins. Co.* 35 Ohio

sociations and societies intended to benefit widows, orphans, heirs, and devisees of the deceased members where no annual dues are required, and members shall receive no profit, shall not be deemed insurance companies, it was held that an endowment policy was a species of life insurance, while the undertaking under the provisions of the statute was not to be deemed insurance, and the obligation was *ultra vires* and void.

In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 2 L. R. A. 420, affirming *Canton Masonic Mut. Ben. Soc. v. Rockhold*, 26 Ill. App. 141, it was held that a recovery could not be had upon a certificate in a mutual benevolent society, which promised to pay the member on his arriving at seventy years of age, as such contract was void for want of power in the association. It was further held that the contract was one of insurance and prohibited by Ill. Laws 1869, p. 142, providing that an insurance company must have a guaranteed capital of \$100,000 before issuing a policy; and it was further held under Ill. act March 28, 1874, providing that associations and societies intended to benefit widows, heirs, etc., where no annual dues or premiums are required and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies, that the certificate would be authorized for the benefit of the widow, orphans, and heirs; but the law was unchanged with reference to the clause in the certificate which obligated the payment to the member on arriving at seventy years of age, and that such an association could not issue a certificate to that effect without complying with the insurance laws.

In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 410, 2 L. R. A. 420, it was said that it is a misapprehension of what was decided in *Commercial League Asso. v. People, Needles*, 90 Ill. 166, and *Martin v. Stubbings*, 126 Ill. 387, to say that Ill. act 1869, in relation to life insurance, had no application to beneficiary certificates like those issued by the Canton Masonic Mutual Benevolent Society, providing for the payment to the member while living on reaching a certain age.

Where the question was as to the assignability of a certificate in the Knights Templars' & Masons' Life Indemnity Company, organized under Ill. act July 1, 1883, providing for the organization of corporations or societies for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, etc., it was held that "a mutual benefit society is not a life insurance company in the restricted sense in which that term is used in our statute in relation to life insurance companies, nor is a certificate of membership in such society a policy of life insurance in the same restricted sense of the term, yet it is manifest that such membership cer-

tificate is in the nature of a mutual life insurance policy. . . . Such contracts are therefore subject to the rules of law governing life insurance policies, except so far as those rules must be held to be modified by the peculiar organization, objects, and policy of such societies." *Martin v. Stubbings*, 126 Ill. 387.

In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 2 L. R. A. 420, it was said that what was said in *Martin v. Stubbings*, 126 Ill. 387, in reference to whether a certificate of membership in a mutual benevolent society is a policy of insurance, was predicated upon the statutes as affected by the amendatory act of the 28th of March, 1874. "In that case the society admitted its liability, and the only question was, whether it was to the assignee of the certificate or to the widow, and no question, therefore, was before the court as to the power of the corporation to issue the certificate in the first instance."

The Massachusetts Benefit Association was an insurance company, but was exempt from insurance laws under Mo. Rev. Stat. chap. 89, art. 3, defining contracts of insurance on the assessment plan. *Hanford v. Massachusetts Ben. Asso.* 122 Mo. 50.

The Masonic Mutual Benevolent Association was an insurance company and was not a benevolent company contemplated by Tex. Rev. Stat. tit. 20, providing for corporations for charity or benevolence. *Farmer v. State*, 69 Tex. 551.

The Fidelity Mutual Aid Association was an insurance company and was not exempt from the insurance laws under Ohio Rev. Stat. § 2630, providing for an association for the mutual protection and relief of its members. *State v. Moore*, 38 Ohio St. 7.

A benefit society was an insurance company, and was not allowed to claim the benefit of Ill. Rev. Stat. 1874, chap. 290, act April 18, 1872, providing that certain societies shall not be deemed insurance companies. *Golden Rule v. People, Swigert*, 118 Ill. 492.

The Mutual Reserve Fund Life Association was an insurance company, and was not allowed to claim the benefit of Ky. act, March 6, 1878, providing for the exemption of certain named secret orders and similar associations for protection and relief of its members. *Sherman v. Com.* 82 Ky. 102.

A benefit association was an insurance company, and was not exempt under Kan. Laws 1885, chap. 131, providing for exemption for religious or secret societies under the supervision of a grand or supreme lodge, and associations of mechanics, express, telegraph, or railroad employees. *State, Bradford v. National Asso. of Farmers' & M. Mut. Aid Asso.* 35 Kan. 55.

A benefit association was an insurance company.

St. 616, 85 Am. Rep. 623; *Rowditch Mut. F. Ins. Co. v. Window*, 3 Gray, 481; *Smith v. Agricultural Ins. Co.* 118 N. Y. 518; 1 Wood, Fire Ins. 400.

Schardt knew that he had not truly answered the question, and from this knowledge the law infers that the omission to tell the truth was designed and intentional.

Bliss, Life Ins. §§ 40, 66; *Wall v. Howard Ins. Co.* 14 Barb. 383; *Dewees v. Manhattan Ins. Co.* 84 N. J. L. 244; *Curry v. Sun Fire Office*, 155 Pa. 487; *Dennison v. Thomaston Mut. Ins. Co.* 20 Me. 181, 87 Am. Dec. 42; *Ianigan v. Prudential Ins. Co.* 63 Hun, 408; *Studdell v. Mutual Ben. Life Assn.* 29 Jones & S. 287; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 614, 85 Am. Rep. 623; *Toune v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 52; *Collins v. Demmons*, 12 Met. 549; *Johnson v. Wallower*, 15 Minn. 472, 18 Minn. 288; *Hammatt v. Emerson*, 27

Me. 308, 46 Am. Dec. 598; *Clafin v. Commonwealth Ins. Co.* 110 U. S. 81, 28 L. ed. 76.

The court erred in rejecting the testimony to prove that on February 27, 1893, Schardt applied for and obtained a policy upon his life for \$25,000 in the Mutual Life of New York, and that on March 9, 1893, he applied for and obtained a policy for a like amount in the United States Life of New York; and that in his written applications to these companies respectively in reply to questions requiring full disclosures of existing insurances upon his life, Schardt concealed insurances then upon his life, additional to those mentioned in his answers to said questions.

Muddill Min. Co. v. Watrous, 22 U. S. App. 12, 61 Fed. Rep. 168; *Wood v. United States*, 41 U. S. 16 Pet. 842, 10 L. ed. 987; *Taylor v. United States*, 44 U. S. 8 How. 197, 11 L. ed. 559; *Castle v. Bullard*, 64 U. S. 23 How. 172,

and was not exempt from the insurance laws, under Pa. act May 23, 1891, Pub. Laws, 107, exempting fraternal, benevolent, charitable, or secret societies issuing beneficiary certificates. *Com. v. Keystone Ben. Assn.* 171 Pa. 465.

A benefit society was an insurance company, and was not authorized to act under Pa. act 1874, providing for benevolent societies. *Com. v. Order of Vesta*, 2 Pa. Dist. R. 254.

The Masonic Mutual Aid Association was an insurance company and not exempt under S. D. Insurance Laws, § 53, exempting from tax secret, benevolent, or fraternal societies. *Masonic Aid. Assn. v. Taylor*, 2 S. D. 324.

Standard Life Association was an insurance company, and was not authorized to do business under Ohio Rev. Stat. § 3630, providing for corporations for mutual protection and relief of its members. *State v. Standard Life Assn.* 38 Ohio St. 281.

The Mutual Relief Society was an insurance company, where it was organized under N. Y. Laws 1875, chap. 237, providing for the incorporation of societies or clubs for social, political, and mutual benefit and benevolent purposes. *Massey v. Mutual Relief Soc.* 102 N. Y. 523.

The Royal Arcanum was an insurance company but was exempt under Neb. Secs. Laws 1887, chap. 18, exempting secret societies or associations from the act requiring license fees. *State, Royal Arcanum v. Benton*, 35 Neb. 463.

The Bankers' & Merchants' Mutual Benefit Association was an insurance company, but was exempt under Kan. Laws 1871, p. 248, § 78, exempting life insurance companies on the co-operative plan. *State v. Bankers' & M. Mut. Ben. Assn.* 23 Kan. 499.

The Fraternal Alliance was an insurance company, but was authorized to do business under How. (Mich.) Stat. chap. 181, § 4246, exempting mutual benefit corporations and secret or fraternal societies. *Hensenhouse v. Seeley*, 72 Mich. 603.

The National Mutual Aid Association was similar to an insurance company, but was exempt under Pa. act May 1, 1876, Pub. Laws, 53, § 54, exempting beneficial societies. *Com. v. National Mut. Aid Assn.* 94 Pa. 481.

The Mutual Reliance Society was not allowed to incorporate under N. Y. Laws 1848, chap. 319, for the incorporation of benevolent, charitable, scientific, and missionary societies. *People, Blossom v. Nelson*, 46 N. Y. 477.

The Northwestern Mutual Live Stock Association was not allowed to do business under Neb. Laws 1883, 236-7, authorizing a certain number of persons to make mutual pledges to each other. *State, Atty. Gen., v. Northwestern Mut. Live Stock Assn.* 18 Neb. 549.

A benefit association was not a benevolent or 36 L. R. A.

charitable association under Mo. Secs. Laws 1881, p. 67; *State v. Brawner*, 15 Mo. App. 597; *State, Beach v. Citizens' Ben. Assn.* 6 Mo. App. 163.

A benefit association was not allowed to claim the benefit of Minn. Gen. Stat. 1874, chap. 34, title 2, providing for the organization of benevolent societies in Foster v. Moulton, 35 Minn. 458.

A marriage aid association could not claim the benefit of Minn. Stat. 1878, chap. 34, § 106, providing for the incorporation of societies for benevolent and other purposes, in *State, Churchill v. Trubey*, 37 Minn. 97; *State, Clapp v. Critchett*, 37 Minn. 13.

A benefit association was not allowed to act under Pa. act, April 29, 1874, Pub. Laws, 74, § 2, ¶ 9, providing for societies for beneficial or protective purposes, in *National Indemnity & E. Co.* 143 Pa. 450.

But other cases hold that mutual benefit companies are not subject to the general principles of insurance law, or to particular statutes applicable to insurance companies, where such association is not an insurance company, or where it is declared not to be an insurance company, or where it is expressly exempted by statute.

In *Knudson v. Grand Council, N. W. L. of H.* 7 S. D. 214, in an action on a certificate issued by a mutual benefit association where the defense was breach of warranty as to statements in regard to habits of intoxication, and it was insisted that Dak. Laws 1890, chap. 51, § 24, providing that in all suits on policies of life insurance that the company is estopped if its agent knew of such habits and the company thereafter received premiums, it was held that this section did not apply for the reason that § 51 provided that an association doing business by an assessment upon its members or upon the mutual premium plan should be deemed a mutual benefit association and not subject to the general insurance laws of this state regulating life insurance. It was further held that the first thirty-one sections treated of life insurance companies proper and the last twenty-three sections treated of assessment companies, and the application of the statute was also distinguished by the term "agent" as mutual associations generally act through lodges or councils. It was further held that a distinguishing feature was the term "policy" which only applies to life insurance companies, and in the statute relating to assessment companies the term "policy or certificates" was used. But the court quoted Comp. Laws, § 4164, providing that a breach of warranty "prevented the policy from attaching to the risk," and applied the term "policy" in that section to the certificates in controversy, and held that it was void.

And under Ill. Rev. Stat. 1874, p. 604, and act March 23, 1899, providing that before any life insur-

16 L. ed. 424; *Lincoln v. Olafin*, 74 U. S. 7 Wall. 132, 19 L. ed. 106; *Butler v. Watkins*, 80 U. S. 13 Wall. 456, 20 L. ed. 629; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Cary v. Hotelling*, 1 Hill, 311, 37 Am. Dec. 323; *Allison v. Muthieu*, 3 Johns. 235; *McKenney v. Dingley*, 4 Me. 172.

The court also erred in rejecting the offer of the company to prove that Schardt applied to the Royal Arcanum on May 4, 1891, and obtained a benefit certificate for \$3,000 on his life, which was in force on December 2, 1892.

The evidence was competent and relevant because insurance in such orders was insurance within the meaning of the law and contract, and such insurance as Schardt was bound to disclose in his answer to the question, and the court should have so held.

State, Graham, v. Nichols, 78 Iowa, 747; *Supreme Lodge, A. O. U. W. v. Hutchin-*

son, 6 Ind. App. 404; *Presbyterian Mut. Assur. Fund v. Allen*, 105 Ind. 593; *Holland v. Taylor*, 111 Ind. 121; *Bauer v. Sampson Lodge, K. of P.* 103 Ind. 282; *Elkhart Mut. Aid Benev. & Relief Assn. v. Houghton*, 98 Ind. 149; *Supreme Lodge, K. of P. of the World v. Schmidt*, 98 Ind. 374; *Holland v. Supreme Council, O. of C. F.* 54 N. J. L. 490; *McCollum v. Mutual L. Ins. Co.* 55 Hun, 104; *Mayer v. Equitable Reserve Fund Life Assn.* 43 Hun, 237; *Sherman v. Com.* 83 Ky. 102; *Com. v. Wetherbee*, 105 Mass. 149; *Goucher v. Northwestern Traveling Men's Ins. Co.* 20 Fed. Rep. 596; *Catholic Knights of America v. Kuhn*, 91 Tenn. 214; *Co-operative Fire Insurance Order v. Lewis*, 12 Lea, 136; *Bacon, Ben. Soc.* §§ 51, 52; *Niblack, Mut. Ben. Soc.* §§ 163-166.

What insurance companies generally considered material to the risk was simply their custom and practice in regard to such matters.

company goes into operation a guaranteed capital of at least \$100,000 shall be required, and Rev. Stat. 1874, p. 201, chap. 22, § 31, providing that associations and societies which are intended to benefit the widows, orphans, heirs, or devisees of deceased members, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies, the Commercial League Association issuing policies to its members was held to be an insurance company in the general and enlarged sense, but was not a life insurance company as that term was used in the act. It was further held that if it was an insurance company within the act of 1869, the amendment of 1874 has so changed the law that the company did not fall within the provisions of the act of 1869. And it was further held that a by-law providing that officers shall receive such compensation as may be agreed upon between them and the trustees was held not to be receiving money as profit or otherwise. It was said that compensation for labor could not be regarded as profit within the meaning of the law. *Commercial League Assn. v. People, Needles*, 90 Ill. 166. See *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, 2 L. R. A. 420.

And where it was claimed that an association was a life insurance company within the meaning of Iowa Code, chap. 5, title 9, § 1161, providing that every company formed for the purpose of insuring the lives of individuals shall before issuing any policy comply with the conditions of this chapter, it was held that this section applied to stock and mutual companies, and that under § 1160 providing that nothing in this chapter shall prevent any number of persons from making mutual pledges to each other for their own insurance, but such association of persons shall in no case insure any life except that of its own members, nor shall the provisions of this chapter be applicable to such associations or companies; the Iowa Mutual Aid Association, affording financial aid and benefits to the families and beneficiaries of deceased members, and assistance to the members personally in case of disability, was not either a joint-stock company or mutual company and not controlled by § 1163 requiring a certain number of applications to be filed before they could do business. *State, Auditor, v. Iowa Mut. Aid Assn.* 59 Iowa, 125.

So, under Mass. Stat. 1887, chap. 204, authorizing the formation of associations for the purpose of rendering assistance to the widows, orphans, and dependents of deceased members, by means of the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto, and declaring that the

provisions of the general laws relating to life insurance companies shall not be held to be applicable to such beneficiary corporations, a contract by The New England Mutual Aid Society with a member was held not to be assignable during his life to a person not within either of those classes, for if so these associations would stand substantially on the same footing as life insurance companies. *Briggs v. Earl*, 139 Mass. 473.

And the Mutual Reserve Fund Life Association was not controlled by N. Y. Laws 1877, chap. 321, providing that no life insurance company can forfeit a policy for nonpayment of dues without having given the notice required, as by Laws 1883, chap. 175, § 5, co-operative or assessment plan companies are subject only to the provisions of the latter act. *Ronald v. Mutual Reserve Fund Life Assn.* 132 N. Y. 373, Affirming 32 N. Y. S. R. 981.

So, under Pa. act May 11, 1881, Pub. Laws, 20, providing that policies issued by life and fire insurance companies shall have attached copies of the by-laws and the same shall not be received in evidence unless so attached, a certificate in the Supreme Lodge Shield of Honor was held not to be an insurance policy within the meaning of this act. This was held on account of the distinction made in Pa. act May 1, 1876, Pub. Laws, 67, providing for the incorporation and regulation of insurance companies, and act June 5, 1883, Pub. Laws, 80, providing for the formation of corporations to assure lives on the assessment plan, which makes a distinction between insurance companies and beneficial associations. In this case the object of the association was to unite fraternally white male persons, between the ages of twenty-one and fifty years, who were sound physically and mentally and of good moral character, socially acceptable and believers in a Supreme Being, to give mutual and material aid to its members, and provide in the treasury a fund for the relief of sick and destitute members, and to provide by assessment a sum not less than \$1,000 on proof of death of a member. There were no profits, no capital stock, and it was a secret society in which three black balls were sufficient to reject a member. *Donlevy v. Supreme Lodge, S. of H.* 1 Pa. Dist. R. 213.

And where the charter of the Grand Grove of the United Ancient Order of Druids of the state of Missouri provided that it was for the purpose of rendering aid and comfort to the members and families of members thereof, in case of accident, sickness, or death, and the property was to be used only for the purpose of creating a fund for aiding the sick and distressed and burying the dead, and for aiding the families of deceased, sick, or needy members of the order, and the last clause of § 1 of the charter provided that the powers hereby granted shall not

Mr. Lambert had learned what this custom and practice were by a long experience in the business, and the testimony offered was therefore competent.

May, Ins. 3d ed. §§ 580-582; *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 298, 7 Am. Rep. 522.

On petition for rehearing.

At common law whenever a party while in negotiation with another in respect to a business engagement in reply to a specific inquiry about a matter connected with the business states as true that which he either knows to be untrue, or which, from his peculiar relation to the fact, he is bound to know to be so, then, so far as knowledge of its falsity is a necessary element in the makeup of an actionable deceit or in the defense of a suit brought to enforce the contract, the *scienter* is established by proof of knowledge, or by showing the fact from which the knowledge is inferred.

2 Pom. Eq. Jur. 2d ed. 1242; *Cooper v. Schlesinger*, 111 U. S. 148, 23 L. ed. 882; *Bignell*, Fr. ed. 1877, 51; 2 Pom. Eq. Jur. 2d ed. 1223, 1244, and note 1245; *Arkerwright v. Newbold*, L. R. 17 Ch. Div. 320; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Burrows v. Lock*, 10 Ves. Jr. 470; *Slim v. Croucher*, 1 DeG. F. & J. 518; *Bullis v. Noble*, 88 Iowa. 618; *Stone v. Great Western Oil Co.* 41 Ill. 85; *Hine v. Campion*, L. R. 7 Ch. Div. 844; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 608, 35 Am. Rep. 628; *Studdell v. Mutual Ben. Life Asso.* 29 Jones & S. 287.

Applicant's attention as a business man about to enter into an important contract was specifically called to a fact which existed as the result of his own conscious, active, direct efforts, and to the inquiry made respecting it he made an untrue answer. The common law in such a case conclusively presumes that he knew his answer was false, at the time he made

be used for banking or insurance purposes, it was held that it was not the intent of that provision to prohibit the payment of money by the corporation to the surviving representatives of deceased members; and further, that "the corporation is not to carry on an insurance business, in the usual acceptance of the term in the commercial world."

Barbaro v. Occidental Grove No. 16, 4 Mo. App. 429. An association was held not to be an insurance company under the Illinois statute providing that associations to benefit widows, etc., where no annual dues are required and no profit is to be had by members, shall not be deemed insurance companies. *Northwestern Masonic Aid Asso. v. Jones*, 154 Pa. 99.

So where the association was incorporated under Ohio laws providing for beneficiary societies. *Masonic Mutual Asso. v. Jones*, 154 Pa. 107.

And the insurance law did not apply to the Ancient Order of United Workmen under Kan. Comp. Laws 1885, providing that the laws of 1871, chap. 93, § 76, shall not apply to companies organized on the co-operative plan. *Titworth v. Titworth*, 40 Kan. 571.

And a certificate was held to differ from an insurance contract under Iowa stat. § 7, providing that no corporation or association shall issue any certificate, unless the beneficiary be, etc. *Order of Railway Conductors of America v. Koster*, 55 Mo. App. 186.

And the Masonic Benevolent Association was not controlled by the ordinary insurance law where the statute declared such associations not to be insurance companies. *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560.

And the law of insurance companies did not apply to beneficiary societies under Ind. act March 2, 1879. *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189.

And a benevolent association was exempt under Wis. Laws 1879, chap. 204, § 1, exempting secret, beneficial, charitable, or benevolent orders, and defining them not to be insurance companies. *State v. Whitmore*, 75 Wis. 332.

And the Mutual Protective Association was exempt under Ohio act. April, 1872, 69 Ohio Laws, 82, act of February 3, 1875, 72 Ohio Laws, 23, § 3, exempting associations for mutual protection and relief of its members from the operation of insurance laws. *State, Atty. Gen., v. Mutual Protection Asso.* 26 Ohio St. 19.

And the Order of Iron Hall was exempt from operation of insurance laws under Conn. Gen. Stat. § 2903, excepting secret or fraternal societies. *Fawcett v. Supreme Sitting, O. of I. H.* 64 Conn. 170, 24 L. R. A. 815.

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VI. *Where the question is not discussed.*

In *McClure v. Johnson*, 58 Iowa, 620, where the question was as to the right of the insured to dispose of the insurance by will upon a certificate issued by the Free Masons, it was said "the contract was one of insurance."

In *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412, a certificate in a benefit association was treated as and called insurance without discussing that question.

In *State v. Central St. Louis Masonic Hall Asso.* 14 Mo. App. 597, it was held that in the absence of allegation or proof it would not be assumed that a Masonic institution was a charity.

In *Mutual Acci. & Life Asso. v. Kayser*, 14 W. N. C. 86, a company charging an admission fee and annual dues with weekly and death assessments was called and treated as a mutual insurance company incorporated under Pa. act April 29, 1874.

In *Fisk v. Equitable Aid Union*, 20 W. N. C. 290, a benefit certificate payable by assessment on members was treated as insurance without discussion.

In *Illinois Masons' Benev. Soc. v. Winthrop*, 85 Ill. 537, which was an action upon a certificate of membership in the Illinois Masons' Benevolent Society, and the certificate was in the nature of a policy of insurance on the life of P., issued in his lifetime, and the covenant was a promise to pay his widow after proof of death certain amounts for each member as regulated by their class, the court said: "The organization is a kind of mutual benefit association, managed by a directory, and the expenses and losses of the society are paid by assessments made upon the members for such purposes."

In *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113, which was a suit against the president, secretary, and treasurer on an implied agreement to make the necessary assessment, the complaint alleged that they were jointly engaged in carrying on a life insurance business under the name of "Connecticut State Insurance Fund." The certificate was entitled "Connecticut State Insurance Fund of Ancient Order of Hibernians of the State of Connecticut," and provided that in consideration of \$1 initiation fee and assessments levied from time to time, and the agreement to L. to accept the following conditions and rules as a part of the contract between the Ancient Order of Hibernians Insurance Fund, it constituted L. a benefit member and agreed to pay his wife if living, if not his heirs, a sum received from assessments not exceeding \$1,000, and the conditions were that the statements in the application were part of the contract, and that the members should be in good standing in the order. The court does not discuss the question or treat it as an insurance company.

it. He would not be permitted at common law to plead forgetfulness or inadvertence about an act of which he was the author. If living he would not be permitted to testify on his own behalf that he believed the statement to be true at the time he made it.

Burraues v. Lock, 10 Ves. Jr. Perkin's ed. 470, at 475; *Slim v. Croucher*, 1 DeG. F. & J. 518; *Bullis v. Noble*, 36 Iowa, 618; *Raley v. Williams*, 78 Mo. 310; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Bine v. Campion*, L. R. 7 Ch. Div. 844; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Studdell v. Mutual Ben. Life Assn.* 29 Jones & S. 287; 2 Pom. Eq. Jur. 2d ed. 1246, and note; Bigelow, Fr. ed. 1877, 57, 68, 439; *Seranton Gas & Water Co. v. Lackawanna Iron & C. Co.* 167 Pa. 186; *Lewey v. H. U. Fricke Coke Co.* 166 Pa. 536, 28 L. R. A. 283.

The statute exacts of the applicant for life insurance in his replies to questions put to him in the application the same measure of good faith as is required at common law of all persons who induce action on the part of others by undertaking to make representations as to past or existing facts.

Words in a statute which have acquired a particular legal meaning when applied to the subject-matter as to which they have acquired such meaning are to be taken in their technical sense.

Hillhouse v. Chester, 3 Day, 211, 8 Am. Dec. 265; *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 218; *Rice v. Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 359, 17 L. ed. 147; *Buckner v. Real Estate Bank*, 5 Ark. 541, 41 Am. Dec. 105; *Rices v. Guthrie*, 1 Jones, L. 89; *State v. Engle*, 21 N. J. L. 847; *Rex v. Hickman*, 1 Moody, C. C. 84; *Com. v. Shaver*, 3 Watts & S. 338; *Figg v. Snook*, 9 Ind. 202.

In a business transaction the presumption against a man making a fraudulent misstatement ceases—at least when they relate to his own past acts and conduct—at the moment it is shown that he has made the misstatement, and the presumption of fraud then arises which the law for sound reasons does not permit the guilty party to gainsay.

Brockel v. Ohio & P. R. Co. 14 Pa. 241, 53 Am. Dec. 534; *Lehigh County v. Schock*, 113 Pa. 378; *Brewer v. Blougher*, 39 U. S. 14 Pet.

VII. Some definitions.

In *Bolton v. Bolton*, 73 Me. 290, it was said "the text-books, as well as the opinions of various courts, contain definitions of the contract of insurance as it applied to its various subjects; and although differently expressed they all concur as to its substantive elements, that all that is essential to such a contract is the payment of a consideration by one party, and the promise of the other to pay an agreed amount upon the happening of the contingency specified in the contract, it being understood that the former party had an insurable interest in the subject-matter insured."

It was held that the essential difference between a certificate of membership in a beneficial association and an ordinary life insurance policy, is that in the latter the rights of the beneficiaries are fixed by the terms of the policy, while in the former they depend upon the certificate and the rights of the members under the constitution and by-laws of the association. *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189; *Grossman v. Supreme Lodge, K. & L. of H.*, 13 N. Y. S. R. 562; *Nunrich v. Supreme Lodge, K. & L. of H.*, 24 N. Y. S. R. 287.

In *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, it was said that a certificate promising to pay a member of the order on reaching a certain age a certain sum while living was one of insurance if considered apart from all arbitrary statutory classification or definitions. It is an undertaking by a society, in view of the ascertained age and condition of health of one of its members, in consideration of the present payment of a sum of money and of the undertaking to pay other contingent sums in the future by him, to pay a sum to him, or to his widow or heirs, . . . contingent as to time, upon the duration of his life; and it has been held that the undertaking is not the less a contract of insurance because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premium is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of nonpayment of assessments by members, the contract provides no means of enforcing payment thereof."

A certificate in the Supreme Council American Legion of Honor was held to be a contract of life insurance, "which is an agreement, in consideration of a specified sum in the aggregate or at stated 85 L. R. A.

intervals of time during the contract, to make a payment in money upon the destruction or injury of something in which the assured has an interest. Property is the subject-matter of fire and marine insurance. Life, health, and soundness of the person constitute usually the subject-matter of life and accident insurance." Supreme Council, A. L. of H. v. Larmour, 81 Tex. 71.

In *State, Atty. Gen. v. Merchants' Exch. Mut. Benev. Soc.* 72 Mo. 146, it was said that all insurance was originally based on the idea of benevolence, and, "if, then, defendants are exercising charity and benevolence by means of contracts for the payment of money upon the death of a member, they are doing an insurance business. It matters not how those contracts are evidenced, what name is given to them, whether evidenced by a certificate of membership, or the provisions of the articles of association, by by-laws, or by rules adopted by the society, courts will . . . look at the substance of the thing itself."

In *Block v. Valley Mut. Ins. Co.* 52 Ark. 201, it was said "the distinguishing feature [between insurance companies and benefit companies] is that they contemplate gain, while these contemplate benevolence only. Within the scope of their benevolence is included, with many fraternal objects, the providing of a fund to be paid upon the death of members, in which this is regarded as but an incident of the main object."

In *Rensenhouse v. Seeley*, 72 Mich. 603, it was said that mutual benefit and co-operative associations are, strictly speaking, insurance organizations, whenever in consideration of periodical contributions they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency, although they may also partake of the nature of fraternal societies, yet whether the benefit be paid for sickness or to accumulate a fund out of which payments are to be made to the beneficiaries of deceased members, the contract falls within the definition of an insurance contract, but they are excepted by statute from the provisions of the act applying to other insurance companies.

In *Farmer v. State*, 69 Tex. 561, it was held that a contract of the Masonic Mutual Benefit Association had all the features of a life insurance policy. "It is a contract by which one party for a consideration promises to make a certain payment of money upon the death of the other; and it is well settled that whatever may be the terms of pay-

198, 10 L. ed. 417; *Scranton Gas & Water Co. v. Lackawanna Iron & C. Co.* 187 Pa. 187; *Levey v. H. C. Fricke Coke Co.* 166 Pa. 536, 28 L. R. A. 288; *Schwartzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227.

Messrs. M. T. Bryan, E. H. East, and Vertrees & Vertrees for defendants in error.

Taft, Circuit Judge, delivered the opinion of the court:

There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application which is made part of the policy, that "the place of contract shall be the city of Philadelphia, state of Pennsylvania." In *Wayman v. Southwirl*, 28 U. S. 10 Wheat. 1-48, 6 L. ed. 253-264, Chief Justice Marshall stated it to be a principle of universal law that "in every forum a contract is governed by the law with a view to which it is made." See *Pritchard v. Norton*, 106 U. S. 124, 186, 27 L. ed. 104, 108, and cases there cited. In this case

no necessity exists for presumption from the circumstances, because the intention of the parties is express.

An act of the legislature of Pennsylvania passed June 28, 1885, provides that "whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relate to some matter material to the risk." Laws 1885, p. 184, No. 101.

At common law it is held that the warranty of the truth of the answer to a specific inquiry in the application implies the agreement that the subject-matter of the question and answer is to be regarded as material, and that an untrue answer thus warranted avoids the policy, whether the answer be made in good faith or not. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. It is contended by counsel for the insurance

ment of the consideration by the assured, or the mode of estimating or securing payment of the insurance money, it is still a contract of insurance, no matter by what name it may be called."

And in an action to determine whether a beneficial association was doing an insurance business in this state, it was said the law recognizes the existence of beneficial societies as distinguished from insurance companies. The general purpose of insurance companies is to afford indemnity against loss, and is not founded in any philanthropic, benevolent, or charitable principle, and indemnity against loss is a dominant feature of the contract of insurance; but in beneficial associations the underlying purpose is not to indemnify or to secure against loss; its design is to accumulate a fund from the contributions of its members "for beneficial or protective purposes," to be used in their own aid or relief, in the misfortunes of sickness, injury or death. The benefits, although secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies are rather of a philanthropic or benevolent character; their beneficial features may be of a narrow or restricted character; the motives of the members may be to some extent selfish, but the principle upon which they rest is founded in the considerations mentioned." It was said that they have no capital stock, they yield no profit and their contracts exclude the idea of insurance or of indemnity or of security against loss. *Com. v. Equitable Beneficial Assn.* 137 Pa. 412.

VIII. Summary.

The following named associations were treated as insurance companies, or their certificates controlled by the insurance laws:

American Legion of Honor. *Splawn v. Chew*, 60 Tex. 532.

Ancient Order of United Workmen. *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 209; *State, Graham, v. Nichols*, 78 Iowa, 747; *State, Graham, v. Miller*, 66 Iowa, 26; *Daniher v. Grand Lodge*, A. O. U. W. 10 Utah, 110.

Bankers' Life Association. *Brown v. Balfour*, 46 Minn. 68, 12 L. R. A. 873.

The Bankers' & Merchants' Mutual Benefit Association. *State v. Bankers' & M. Mut. Ben. Assn.* 23 Kan. 499.

Buffalo Life and Reserve Association. *McCollum v. Mutual Life Ins. Co.* 55 Hun, 103.

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Citizens' Benefit Association of St. Louis. *State, Beach, v. Citizens' Ben. Assn.* 6 Mo. App. 163.

Citizens' Mutual Relief Society of Portland. *Swett v. Citizens' Mut. Relief Soc.* 78 Me. 541.

Connecticut Mutual Benefit Company. *Com. v. Wetherbee*, 105 Mass. 149.

Covenant Mutual Benefit Association. *State, Covenant Mut. Ben. Assn., v. Root*, 83 Wis. 667, 19 L. R. A. 271; *Covenant Mut. Ben. Assn. v. Baldwin*, 49 Ill. App. 203.

Endowment & Benevolent Association of Kansas. *Endowment & Benev. Assn. v. State*, 35 Kan. 253.

Equitable Aid Union. *Fisk v. Equitable Aid Union*, 20 W. N. C. 290.

Expressmen's Aid Society. *Expressmen's Aid Soc. v. Lewis*, 9 Mo. App. 412.

Farmers & Mechanics' Mutual Benevolent Association. *State, Atty. Gen., v. Farmers' & M. Mut. Ben. Assn.* 18 Neb. 276.

Fidelity Mutual Aid Association. *State v. Moore*, 88 Ohio St. 7.

Franklin Beneficial Association. *Franklin Beneficial Assn. v. Com.* 10 Pa. 337.

Fraternal Alliance. *Rensenhouse v. Seeley*, 72 Mich. 608.

Golden Rule. *Golden Rule v. People*, *Swigert*, 118 Ill. 492.

Grand Lodge of the United Order of Druids. *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369.

Granite Mutual Aid Association. *Granite State Mut. Aid Assn. v. Porter*, 58 Vt. 581.

Independent Order of B'nai B'rith. *Goodman v. Jeddijah Lodge No. 7, I. O. of B. B.* 67 Md. 117.

International Fraternal Alliance. *Order of International Fraternal Alliance v. State*, 77 Md. 547.

Kentucky Mutual Security Fund Company. *Kentucky Mut. Secur. Fund Co. v. Logan*, 90 Ky. 364.

Keystone Benefit Association. *Com. v. Keystone Ben. Assn.* 171 Pa. 465.

Masonic Aid Association of Dakota. *Masonic Aid Assn. v. Taylor*, 2 S. D. 224.

Masons Benevolent Association. *Illinois Masons' Benev. Soc. v. Winthrop*, 85 Ill. 537.

Masonic Mut. Benevolent Association of Texas. *Farmer v. State*, 69 Tex. 561.

Masonic Mutual Benefit Society of Kansas. *Olmstead v. Masonic Mut. Ben. Soc.* 37 Kan. 98.

Canton Masonic Benevolent Association. *Rock-*

company that the same mode of determining the materiality of representations must obtain under this statute. If so, then it is difficult to see what change the statute was intended to effect, because every matter warranted would be material, and the good faith in the statement would remain of as little importance as it did without the statute. This is one of a class of statutes passed in many states to relieve against the hardships arising from the strict enforcement at common law of warranties in insurance policies concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit, and of the purest technicality. That such statutes are remedial in their nature, and quite within the police power of the legislature, is no longer a debatable question. *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 177; *Equitable L. Assur. Soc. v. Pettus*, 140 U. S. 226, 35 L. ed. 497; *Wall v. Equitable L. Assur. Soc.* 32 Fed. Rep. 273; *Eagle Ins. Co. v. Ohio, Kinder*, 53 U. S. 446, 38 L. ed. 773; *Reilly v. Franklin Ins. Co.* 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45; 4 Thomp. Corp. §§ 5491, 5524.

As the statute was passed to prevent defeat of the policy by mere stringency of stipulation, a reasonable interpretation of it will not permit the mere fact of warranty in form to render every statement of fact material to the risk. Its manifest purpose was to leave open to judicial investigation in the ordinary way the question whether the fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If it is in this manner found to be material, then the plain implication of the statute is that the usual penalty for breach of insurance condition and warranty shall follow, and the policy be avoided, whether the answer be made in good faith or not. If, however, the question truly answered relates to something not found to be material to the risk, and if the answer is in good faith, then the breach of warranty works no prejudice to the insured or his representatives. If, though the question truly relates to something not directly material to the risk, the untrue answer is made in bad faith,—that is with a knowledge of its falsity, and for the purpose of misleading the company into the contract,—the implication of the statute is that the rule at common law shall prevail, and the policy shall be avoided. The statute has been construed by the supreme

hold v. Canton Masonic Mut. Benev. Soc. 129 Ill. 440, 2 L. R. A. 420.

Central St. Louis Masonic Hall Association. State v. Central St. Louis Masonic Hall Asso. 14 Mo. App. 597.

Kennebec Masonic Mutual Association. Bolton v. Bolton, 73 Me. 290, subd. 3.

Knights Templars' & Masons' Life Indemnity Company. Perry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. Rep. 439.

Minnesota Masonic Relief Association. Lake v. Minnesota Masonic Relief Asso. 61 Minn. 96.

Samson Lodge Knights of Pythias. Bauer v. Samson Lodge, K. of P. 102 Ind. 262.

Massachusetts Benefit Association. Hanford v. Massachusetts Ben. Asso. 122 Mo. 50.

Merchants' Exchange Mutual Benefit Society. State, Atty. Gen., v. Merchants' Exch. Mut. Benev. Soc. 72 Mo. 146.

Michigan Mutual Benefit Association. Miner v. Michigan Mut. Ben. Asso. 63 Mich. 338.

Mutual Accident & Life Association of Pennsylvania. Mutual Acccl. & Life Asso. v. Kayser, 14 W. N. C. 86.

A "Mutual Benefit Association." Foster v. Moulton, 35 Minn. 458.

Mutual Insurance Company. Order of Hermann's Sons. Erdmann v. Mutual Ins. Co., O. of H. S. 44 Wis. 376.

Mutual Benefit Life Insurance Company of Hartford. Mutual L. Ben. Ins. Co. v. Marye, 85 Va. 643.

Mutual Reliance Society. People, Blossom, v. Nelson, 46 N. Y. 477.

Mutual Relief Society. Massey v. Mutual Relief Soc. 102 N. Y. 523.

Mutual Reserve Fund Life Association of New York. Sherman v. Com. 82 Ky. 102.

National Association of the Farmers' & Mechanics' Mutual Aid Association. State, Bradford, v. National Asso. of Farmers' & M. Mut. Aid Asso. 35 Kan. 51.

National Benefit Association. Kemp v. Good Templars' Mut. Ben. Asso. 46 N. Y. S. R. 429.

National Indemnity & Endowment Company. Re National Indemnity & E. Co. 142 Pa. 450.

National Mutual Aid Society. National Mut. Aid Soc. v. Lupold, 101 Pa. 111.

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Newbold Friendly Society. Newbold Friendly Soc. v. Barlow [1893] 2 Q. B. 128.

Northwestern Benevolent & Mutual Aid Association. Northwestern Benev. & Mut. Aid. Asso. v. Wanner, 24 Ill. App. 357.

Northwestern Mutual Live Stock Association. State, Atty. Gen., v. Northwestern Mut. Live Stock Asso. 16 Neb. 549.

Odd Fellows' Mutual Benefit Society. Walter v. Hensel, 42 Minn. 204.

Odd Fellows, Relief Association of the Connecticut River Valley. Smith v. Bullard, 61 N. H. 381.

Minnesota Odd Fellows' Mutual Benefit Society. Walter v. Hensel, 42 Minn. 204.

Order of Chosen Friends. Supreme Council, O. of C. F. v. Forsinger, 125 Ind. 52, 9 L. R. A. 501.

Order of Pente. Stambler v. Order of Pente, 159 Pa. 492.

Order of Vesta. Com. v. Order of Vesta, 2 Pa. Dist. R. 24.

Order of Railway Conductors of America. Dixon v. Order of Railway Conductors of America, 49 Fed. Rep. 910.

Railroad Conductors' Benefit Association. Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson, 147 Ill. 132.

Presbyterian Mutual Fund. Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 593.

Provident Mutual Relief Association. Barton v. Provident Mut. Relief Asso. 63 N. H. 535.

Rochester Mutual Aid & Accident Association. McCollum v. Mutual L. Ins. Co. 55 Hun, 103.

Royal Arcanum. State, Royal Arcanum, v. Benton, 35 Neb. 463.

Senate of the National Union. National Union v. Marlow, 40 U. S. App. 95, 74 Fed. Rep. 775.

Single Men's Endowment Association of Minnesota. State, Churchill, v. Trubey, 37 Minn. 97; State, Clapp, v. Critchett, 37 Minn. 13.

Standard Life Association. State v. Standard Life Asso. 38 Ohio St. 281.

Supreme Commandery Knights of the Golden Rule. Supreme Commandery, K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

Supreme Council American Legion of Honor. Supreme Council, A. L. of H. v. Larmour, 81 Tex.

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court of Pennsylvania, and we think our conclusions above stated are in accordance with the views of that court. *Hermany v. Fidelity Mut. L. Asso.* 151 Pa. 17. In that case the court says (p. 23): "This act has effected a change in life insurance contracts,—a much-needed change so far as some companies are concerned. The questions of materiality and good faith are ordinarily questions of fact, and therefore for the jury. They were certainly so in this case. . . . The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries."

The construction of a state statute by the highest court of the state is usually authoritative in courts of the United States. *Burgess v. Seigman*, 107 U. S. 20, 27 L. ed. 859. And even if it were otherwise, we should reach the same conclusion in this case. The court of appeals of Maryland has had occasion to construe this same statute, and has given it a like interpretation. *Fidelity Mut. L. Asso. v. Picklin*, 47 Md. 172, and 185.

Having settled the construction of the statute, we come now to the questions of evidence. The circuit court was right in holding that within the scope of the question, "Have you your life insured in this or any other company? (If so, give the name of each company and the kind and amount of the policy)," were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. It will be conceded that these associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring upon certain conditions the payment of a sum certain to the member's representatives on his death, has much resemblance in form, purpose, and effect to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a

Supreme Lodge, etc., Golden Lion. *Fogg v. Supreme Lodge*, U. O. of G. L. 156 Mass. 431.

Supreme Lodge Knights & Ladies of Honor. *Nunrich v. Supreme Lodge*, K. & L. of H. 24 N. Y. S. R. 257.

Supreme Lodge Knights of Honor of the World. *Tennessee Lodge No. 20*, K. of H. v. Ladd, 5 Lea, 716. *Texas Benevolent Association*. *McCorkell v. Texas Benev. Asso.* 71 Tex. 149.

Valley Mutual Insurance Association. *Block v. Valley Mut. Ins. Asso.* 52 Ark. 201.

Vigilant Insurance Company of Nimrod. *State v. Vigilant Ins. Co.* 30 Kan. 585.

The following named associations were held in the cases below cited not to be controlled by the law of insurance. In some of them this was held on account of a statute exempting such association. *Ancient Order of United Workmen*. *Titsworth v. Titsworth*, 40 Kan. 571; *Dickinson v. Ancient Order of U. W.* 159 Pa. 258; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127.

Burlington Voluntary Relief Association. *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 482.

Central Ohio Mutual Relief Association. *State, Atty. Gen., v. Central Ohio Mut. Relief Asso.* 29 Ohio St. 399.

Central Verein of Hermann's Sohne. *Durlan v. Central Verein of Hermann's Sohne*, 7 Daly, 168.

Commonwealth Benevolent Association. *State v. Taylor*, 50 N. J. L. 49.

Equitable Beneficial Association. *Com. v. Equitable Beneficial Asso.* 137 Pa. 412.

Federal Investment Company. *State, Clapp, v. Federal Investment Co.* 48 Minn. 110.

Grand Council Northwestern Legion of Honor. *Knudson v. Grand Council*, N. W. L. of H. 7 S. D. 214.

Grand Grove Ancient Order of United Druids. *Barbaro v. Occidental Grove No. 18*, 4 Mo. App. 429.

Grand Lodge Iowa Legion of Honor. *Lamont v. Grand Lodge*, I. L. of H. 31 Fed. Rep. 177.

Iowa Mutual Association. *State, Auditor, v. Iowa Mut. Aid Asso.* 159 Iowa, 25.

Legion of Honor. *Equitable L. Ins. Co. v. Hazlewood*, 75 Tex. 333, 7 L. R. A. 217.

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Louisville German Mutual Fire Insurance Association & German Washington Mutual Fire Association. *Louisville German Mut. F. Ins. Asso. v. Com.* 9 Bush, 394.

Masonic Benevolent Association. *Masonic Benev. Asso. v. Bunch*, 109 Mo. 560.

Masonic Mutual Association of Cleveland. *Masonic Mut. Asso. v. Jones*, 154 Pa. 107.

Masonic Mutual Benefit Society. *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189.

Northwestern Masonic Aid Association of Chicago. *Northwestern Masonic Aid Asso. v. Jones*, 154 Pa. 99.

Mutual Protection Association. *State, Atty. Gen., v. Mutual Protection Asso.* 26 Ohio St. 19.

Mutual Reserve Fund Life Association. *Roland v. Mutual Reserve Fund Life Asso.* 122 N. Y. 373.

National Mutual Aid Association. *Com. v. National Mut. Aid Asso.* 94 Pa. 481.

National Mutual Benevolent Association. *State v. Whitmore*, 75 Wis. 332.

New England Mutual Aid Society. *Briggs v. Earl*, 139 Mass. 473.

Northwestern Life Association. *Northwestern Life Asso. v. Stout*, 32 Ill. App. 31.

People's Mutual Benefit Association. *White v. National L. Ins. Co.* 30 Ohio L. J. 237.

Order of Railway Conductors of America. *Order of Railway Conductors of America v. Koster*, 55 Mo. App. 136.

Royal Arcanum. *Holland v. Taylor*, 111 Ind. 121.

San Francisco Stock & Exchange Board. *Swift v. San Francisco Stock & Exch. Board*, 67 Cal. 567.

Supreme Council Order of Chosen Friends. *Supreme Council, O. of C. F. v. Fairman*, 62 How. Pr. 386.

Supreme Lodge Shield of Honor. *Donlevy v. Supreme Lodge*, S. of H. 1 Pa. Dist. R. 213.

Supreme Sitting Order of Iron Hall. *Fawcett v. Supreme Sitting, O. of I. H.* 64 Conn. 170, 24 L. R. A. 815.

Supreme Sitting Order of Iron Hall. *McAless v. Supreme Sitting, O. of I. H. (Pa.)* 12 Cent. Rep. 415.

Supreme Tent Knights of Maccabees. *Lithgow v. Supreme Tent, K. of M. of the World*, 165 Pa. 292.

Union Mutual Accident Association. *Union Mut. Acci. Asso. v. Riel*, 88 Ill. App. 414. I. T.

motive his life insurance would furnish the applicant for self-destruction, or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. *Continental L. Ins. Co. v. Chamberlain*, 182 U. S. 304, 33 L. ed. 341. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (*Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 809, 7 C. C. A. 581, 58 Fed. Rep. 945, 22 L. R. A. 620; *Accident Ins. Co. v. Orandal*, 120 U. S. 527, 583, 30 L. ed. 740, 743), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description, "policy of life insurance in any other company." We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid associations, and the certificates of life insurance which they issue to their members. In *Dickinson v. Ancient Order of U. W.*, 159 Pa. 253, the defendant association sought to avoid its certificate on the ground of misrepresentation in the application. The plaintiff objected to the introduction of the application because it had not been attached to the policy in accordance with the Pennsylvania statute which forbade the introduction by an insurance company, in defense of a suit on its contract of insurance, of an application not attached to the policy when issued. It was held that the statute did not apply, because the defendant association was not an insurance company, but belonged to the distinctly recognized class of organizations known as "benevolent associations." See also *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99; *Com. v. Equitable Beneficial Assn.*, 137 Pa. 412; *Com. v. National Mut. Aid Assn.*, 94 Pa. 481; *Lithgow v. Supreme Tent. K. of M. of the World*, 165 Pa. 292; *Theobald v. Supreme Lodge K. of P.*, 59 Mo. App. 87; *Sparks v. Knight Templars & M. Life Indemnity Co.*, 61 Mo. App. 115. It is true that in other states it has been held that such associations are within the description of "insurance companies," and that the contracts they make are properly termed "policies," as that term is used in the statutes of such states. *State, Graham, v. Nichols*, 78 Iowa, 747; *Co-operative Fire Insurance Order v. Lewis*, 12 Lea, 136; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 594; *Com. v. Wetherbee*, 105 Mass. 159; *Sherman v. Com.*, 82 Ky. 33 L. R. A.

102. In this conflict of authority, we must lean towards the decisions of the state courts of that state, according to the laws of which we must construe this contract, and, for the reasons already given, hold that certificates of membership in mutual benefit benevolent associations were not embraced in the question asked by the company in that state.

We now come to the questions of evidence with respect to the \$5,000 policy in the New York Life Insurance Company which Schardt omitted in his answer to the question concerning other insurances. It is first insisted for the plaintiff below that his answer was not untrue. He was asked if he had other policies in other companies, and, if so, to state the companies and amount. It is urged that when he gave three such policies the question was answered correctly, and that his failure to give the fourth policy did not involve a false statement, but only left the answer incomplete, but true in everything stated. Several cases are cited to the point that such an answer is not a misrepresentation. In *Perrine v. Marine & General Travelers' Ins. Soc.* 2 El. & El. 817, the applicant was asked what was his profession, and he answered that he was an "esquire." In fact, he was an ironmonger. It was held that there was no misrepresentation here, but, at the most, only a concealment or falsehood by implication, that the answer was true as far as it went. The same ruling was made by the court of appeals of New York in *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182. There the applicant was asked to state the physicians he had consulted in the last ten years. He answered that he had consulted Dr. Paioe nine years before. In fact, he had also consulted another physician. It was held that, the answer being true as far as it went, there was no breach of the warranty; that the answer was full and true. We do not think that these cases can be supported. In *Phanir Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, the supreme court held that, where the answers to questions were obviously incomplete, the insurance company, by failing to inquire further before issuing the policy, waived any right to complain of such incompleteness; but the court clearly indicated its view that if such an answer was apparently complete, but in fact was otherwise, it was a false answer, and a breach of the warranty of its full truth. *Towne v. Fitchburg Mut. F. Ins. Co.*, 7 Allen, 52, 53; *London Assurance v. Mansel*, L. R. 11 Ch. Div. 863; *Bliss, Ins.*, 2d ed. 189, 190; *Phillips, Ins.*, §§ 550, 565, 567. The answer to such a question contains the necessary implication that there is no other insurance than that stated, and, if there is other insurance, it is as false as if the existence of other insurance were expressly denied. As already stated, any answer to a question, though concerning a matter not material to the risk, if made with intent to deceive the insurance company, would avoid the policy. Hence, even assuming that the question of other insurance was found by the jury to be not material to the risk, the company still had a complete defense if it could show that the answer had been made in bad faith. The intent of Schardt in omitting the New York Life policy, therefore, became a substantial issue, and evidence relevant to

show his intent should have been admitted. The company offered to prove that in answers to similar questions in application for other policies, he had made answers equally untrue. We think this evidence was relevant and competent. It might have been forcibly argued on behalf of the defendant that Schardt had a motive to suppress the amount of other insurance, in fear that, if the defendant knew all his then insurance, it would prompt inquiry into his purpose in carrying insurance in an amount out of proportion to his regular income of \$1,500, upon which he was obliged to support a family, and would lead to a rejection of his application. And if the defendant could show a similar suppression of the same fact in the two applications for the later policies for \$25,000 each, made within three months thereafter, when the same motive may be supposed to have been present, it would properly strengthen the argument that his suppression of the extent of his insurance in this case was with intent to conceal and deceive. Such evidence would have a tendency to show that his omission in the three cases was not by accident, but by design. It is a well-established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement, to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance. Thus, where one was on trial for selling skimmed milk for fresh milk, in violation of the statute, it was held competent to show other instances of similar sales on other days by the accused about the same time, because, if he sold skimmed milk in repeated instances, it was rendered more probable that he knew its character in each instance. He might have made the mistake once, but not frequently. *Bainbridge v. State*, 80 Ohio St. 264. So, in this court, where the question was of the defendant's motive and knowledge in making statements concerning the character of a silver mine, we held it competent to show an elaborate and fraudulent scheme to mislead, not the plaintiffs but another, into the purchase of the mine, although the scheme was concocted and carried into attempted execution at least two years before the statements and sale to the plaintiffs. It was the circumstances that the acts related to the sale of the same mine, and that the motive for its sale might be presumed to continue, that removed the objection based on remoteness in point of time. *Mudsill Min. Co. v. Watrous*, 22 U. S. App. 12, 9 C. C. A. 415, 61 Fed. Rep. 163. Judge Lurton, in delivering the opinion of the court in that case, said: "It is not in such a case essential that these former acts of fraud were not contemporaneous with the transaction under inquiry. If they were frauds of like char-

acter, and especially if they concerned former efforts to sell the same property, they are admissible. Remoteness in point of time may weaken their evidential value, but will not ordinarily justify exclusion."

Judge Lurton cites in support of this view *Ross v. Miner*, 67 Mich. 410; *Hoxie v. Home Ins. Co.* 82 Conn. 21, 85 Am. Dec. 240; *Rafferty v. State*, 91 Tenn. 655; *Bottomley v. United States*, 1 Story, 136; *Jordan v. Osgood*, 109 Mass. 461, 12 Am. Rep. 731; *Castle v. Bulard*, 64 U. S. 23 How. 174, 16 L. ed. 424; *Butler v. Watkins*, 80 U. S. 18 Wall. 457, 20 L. ed. 629; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 598, 29 L. ed. 999; *Blake v. Albion L. Assur. Soc.* L. R. 4 C. P. Div. 94.

It would seem clear from the foregoing that the objection made by counsel for the plaintiff that the other false statements of other insurance were too remote in point of time is not tenable. But it is suggested that the fact that the instances sought to be proved were subsequent to the insurance in issue destroys their relevancy, because the fraudulent intent present in them might have been formed after an innocent mistake. This possibility, of course, affects the probative force of these subsequent instances to show fraud, but we do not think it makes them inadmissible. In *Wood v. United States*, 41 U. S. 16 Pet. 342, 10 L. ed. 987, the question was whether there had been fraud in invoicing importations under the customs revenue law. It was objected that, while similar undervaluations in other importations prior to the one in issue might be admissible, still it was error to admit such undervaluations in later importations. To this, Mr. Justice Story, speaking for the court, said: "The other objection has as little foundation, for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party as fraud would be in the last importation from prior fraudulent importations. In each case the *quo animo* is in question, and the presumption of fraudulent intention may equally arise and equally prevail."

For the error in excluding evidence of false statements concerning other insurance in the subsequent policies, the judgment herein must be reversed. The case will doubtless be tried again, however; and it becomes our duty, therefore, to examine and decide other questions made upon this record by the defendant, which must, of necessity, arise again on the second trial.

At the trial the defendant introduced witnesses who had been long engaged in the life insurance business, and was permitted by the court to ask them whether the facts concerning which it was either admitted or claimed that Schardt had made untrue statements, and the fact of his embezzlements which he did not disclose, were material to the risk; but the court declined to permit an answer to the question whether, by the usage and practice of all insurance companies, such facts were regarded as material. This latter ruling of the court was excepted to by the defendant company. The question of evidence thus presented has been before the courts of England and America in many different phases, and the decisions present a bewildering conflict of authority. In the leading case of *Carter v. Boehm*,

8 Burr. 1905, the question arose what effect, if any, was to be given to the opinion of a broker that certain statements in a letter within the knowledge of the insured should have been communicated to the insurer, and that if they had been the insurer would not have "meddled" with the insurance. The subject of insurance was a so called fort and warehouse in the island of Sumatra, and the danger insured against was capture by the enemy. The facts stated in the letter, not communicated, were a report of an abandoned plan of the French in the previous year to attack the place, and the surmise of the writer that a similar plan might be carried out during the then current year. Lord Mansfield said of the evidence: "But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness."

Prior to this, in 1740, Chief Justice Lee, of the common pleas, had admitted as evidence the opinion of insurance brokers that contents of a letter concerning a ship should have been disclosed. *Seaman v. Fonereau*, 2 Strange, 1183. Lord Kenyon (Lord Mansfield's successor) held that commercial men might testify that, had a fact been known concerning the voyage of a ship, it would have made a difference of 15 per cent in the premium, and that many underwriters would not have taken the risk on any terms, and expressed the opinion that such evidence was good evidence, admissible upon the same ground that the evidence of persons versed in arts and science was admitted on questions involving them. *Chaurand v. Angerstein*, Peake, 45. In *Haywood v. Rodgers*, 4 East, 500, before Lord Ellenborough, evidence of insurance brokers as to the effect of certain facts upon insurance premiums was admitted without objection, but it was not given any weight by the court. In *Littledale v. Dixon*, 1 Bos. & P. N. R. 152, the common pleas court considered evidence (admitted, so far as appears, without objection) that the knowledge of the arrival of two ships before the one insured would not vary the premium actually demanded. In *Berthon v. Loughman*, 2 Starkie, 258, Mr. Justice Holroyd, of the Queen's bench, held that, upon the question of the materiality of a fact, it was competent to ask an insurance broker what effect its disclosure would have among underwriters generally to increase the premium, but not what the witness would do in a particular case. In the preceding year Chief Justice Gibbs held that a rumor, if material, ought to be communicated, but held that the opinion of underwriters as to whether the rumor, or any other fact, was material, was inadmissible, stating that Lord Mansfield and Lord Kenyon had discountenanced this kind of evidence. *Durrell v. Bederley*, Holt, N. P. 286. With respect to Lord Kenyon, as we have seen, he was hardly accurate. In *Richards v. Murdock*, 10 Barn. & C. 527, Lord Tenterden, of the Queen's bench, was in accord with his colleague, Mr. 88 L. R. A.

Justice Holroyd, and held that underwriters might testify that a fact not disclosed was material; and his ruling was not disturbed by the full court. In *Elton v. Larkins*, 5 Car. & P. 392, before Tindal, Ch. J., evidence of underwriters was admitted to the point that the time of the vessel's sailing was material, and that, had it been known, the policy would not have been issued. In this case, Sergeant Wilde in argument stated that such evidence, in spite of Lord Mansfield's objection, seemed to have crept into competency. In *Chapman v. Walton*, 10 Bing. 57, a case heard by the court of common pleas in banc, the question was somewhat different. It was on an issue whether an underwriter had been derelict in altering insurance under instructions. The evidence of underwriters was held competent upon the point of what a reasonably skilful and prudent underwriter would have done. In admitting the evidence, however, Chief Justice Tindal, of the common pleas, relied on Justice Holroyd's decision in *Berthon v. Loughman*, and expressly dissented from the view of his predecessor, Chief Justice Gibbs, in *Durrell v. Bederley*. In *Quin v. National Assurance Co.* 1 Jones & C. 816, the Irish exchequer chamber followed *Richards v. Murdock* and *Berthon v. Loughman*, and admitted evidence of the secretary of the insurance company that knowledge by his company of an undisclosed fact would have raised the rate of insurance premium it would have demanded. In *Campbell v. Richards*, 5 Barn. & Ad. 840, precisely the same question came before the court of Queen's bench in banc which had been before that court in *Richards v. Murdock*. The decision in the latter case was overruled, and it was held that the evidence of underwriters upon the materiality of the undisclosed fact was not competent. The case is put on the authority of Lord Mansfield and Chief Justice Gibbs, and the then recent decision of the common pleas in *Chapman v. Walton* is not referred to. This is the last English case where the question has been raised and discussed. In *Ionides v. Pender*, L. R. 9 Q. B. 531, evidence of underwriters that overvaluation of the cargo was a material fact to be known, that in such a case the risk was considered speculative, and that some underwriters could not take such risks, and others would take them only at an advance in the premium of from 25 to 30 per cent, was admitted without objection, and seems to have formed one of the chief grounds for the judgment of the court, delivered by Mr. Justice Blackburn. It may fairly be said, from this review of the English cases, that the question is an open one. See *Carter v. Boehm*, 1 Smith, Lead. Cas. 9th Am. ed. 791. Even in those cases where evidence of underwriters has been admitted, no distinction has been recognized, except, possibly, by Mr. Justice Holroyd in *Berthon v. Loughman*, 2 Starkie, 258, between the individual opinions of such witnesses as to the materiality of undisclosed or misrepresented facts, and their statements, based on usage, of the effect which a knowledge of such facts would have among underwriters generally, in open market, so to speak, upon insurance premiums.

In this country, though all the cases are not easily reconciled, it is not so difficult as in Eng-

land to reach a satisfactory result. At first, in marine cases, it was generally held that underwriters might be asked the direct question whether the facts undisclosed were material to the risk. Mr. Justice Washington permitted it in two cases: *Moses v. Delaware Ins. Co.* 1 Wash. C. C. 386; *Marshall v. Union Ins. Co.* 2 Wash. C. C. 357. In *M'Lanahan v. Universal Ins. Co.* 26 U. S. 1 Pet. 170, 7 L. ed. 98, the question was whether the time of sailing was material to the risk, as a matter of law; and, in pointing out why it was a question for the jury, Mr. Justice Story said: "The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience, and are to be ascertained, in part, upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality,—that is, whether the risk be increased so as to enhance the premium,—is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance."

In *Hawes v. New England Mut. Marine Ins. Co.* 2 Curt. C. C. 229, the issue was whether the failure to disclose that a vessel was aground was a material fact, and an underwriter was called to give evidence. Mr. Justice Curtis said: "I do not allow you to ask the witness what he himself, as an underwriter, would have done; but whether, from his knowledge of the business he is able to state that the facts in question would or would not have an influence with underwriters generally, in determining the amount of the premium. . . . Here the inquiry is, in substance, whether the market price of insurance is affected by particular facts. If the witness, being conversant with the business, has gained, in the course of his employment, a knowledge of the practical effect of these facts, or similar facts, upon premiums, he may inform the jury what it is."

The question soon arose in fire insurance cases. In *Merriam v. Middlesex Mut. F. Ins. Co.* 21 Pick. 162, 32 Am. Dec. 252, where the issue was whether a condition of the policy that no alteration while the policy was current should be made in the building insured, which would increase the risk of fire, was violated, the court held that the alteration must have been such that a higher rate of premium would have been demanded for insurance of the building in its altered form than before. With this as a test of materiality, which, as we have seen, was approved by Mr. Justice Story in *M'Lanahan v. Universal Ins. Co.* 26 U. S. 1 Pet. 170, 7 L. ed. 98, the same court, in the subsequent cases, has established a distinction, to be enforced in the use of insurance expert evidence on such an issue, which was hinted at by Mr. Justice Holroyd in *Berthon v. Loughman*, 3 Starkie, 258, and by Mr. Justice Curtis in *Hawes v. New England Mut. Marine Ins. Co.* 2 Curt. C. C. 229. It is clearly stated by Mr. Justice Gray in *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 7 Am. Rep. 522. There the issue was whether risk of fire was increased by leaving a house unoccupied. Following decisions of the same court in *Multry v. Mohawk Valley Ins. Co.* 5 Gray, 541, 66 Am. Dec. 380, and *Lyman v. State Mut. F. Ins. Co.* 14 Allen, 329, the court held that insurance ex-

perts could not testify that it did increase the risk, because it was only a matter of common knowledge. The learned justice continued, however, as follows: "But whether such a change in the occupation is material to the risk might also be tested by the question whether underwriters generally would charge a higher premium. *Merriam v. Middlesex Mut. F. Ins. Co.* 21 Pick. 162, 32 Am. Dec. 252. That being a matter within the peculiar knowledge of persons versed in the business of insurance, testimony of such persons upon that point is admissible."

Cited in support of this are the remarks of Mr. Justice Story and of Mr. Justice Curtis above quoted. The distinction stated in *Luce v. Dorchester Mut. F. Ins. Co.* has been approved by the same court in the late case of *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 19 L. R. A. 587, and has been recognized by courts of other states. *Plumbers' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 244; *Franklin F. Ins. Co. v. Gruter*, 100 Pa. 266. Such a distinction would also seem to be the basis of the ruling in *Martin v. Franklin F. Ins. Co.* 42 N. J. L. 46. In the later New York fire insurance cases, though they are hardly to be reconciled with *Jefferson Ins. Co. v. Colwell*, 7 Wend. 72, 22 Am. Dec. 567, it seems to be ruled that insurance experts may be asked directly whether the fact in question would increase the risk. *Hobby v. Duna*, 17 Barb. 111; *Cornish v. Farm Buildings F. Ins. Co.* 74 N. Y. 297; *Leitch v. Atlantic Mut. Ins. Co.* 66 N. Y. 102. Reliance is had by the New York courts upon the opinion of Chancellor Kent, expressed in his *Commentaries* (vol. 3, p. 285), that such evidence is admissible. The same ruling is made in *Kern v. South St. Louis Mut. Ins. Co.* 40 Mo. 19, and in *Mitchell v. Home Ins. Co.* 32 Iowa, 424, and *Russell v. Cedar Rapids Ins. Co.* 78 Iowa, 216, 4 L. R. A. 588. In *Schenck v. Mercer County Mut. F. Ins. Co.* 24 N. J. L. 451, it was held proper to ask a fireman of ten years' experience whether the putting of the third story to an L increased the risk. In *Brink v. Merchants' & M. Ins. Co.* 49 Vt. 442, it was held that the owner of a sawmill, who had altered it, might testify that in his opinion the alteration did not increase the risk of fire. And in *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192, an insurance expert was allowed to state that the erection of a partition did not increase the risk; but this is not to be harmonized with the later Massachusetts cases. The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk. In addition to the Massachusetts cases above cited, there is a most satisfactory discussion of the subject in *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 455, 59 Am. Dec. 684, and in *Hill v. Lafayette Ins. Co.* 2 Mich. 481. Other cases to the same effect are *Schmidt v. Peoria M. & F. Ins. Co.* 41 Ill. 295; *Joyce v. Maine Ins. Co.* 45 Me. 169, 71 Am. Dec. 536; *Cannell v. Phœnix Ins. Co.* 59 Me. 582; *Thayer v. Providences Washington Ins. Co.* 70 Me. 539; *Kirby v. Phœnix Ins. Co.* 9 Lea. 142. In *State v. Watson*, 65 Me. 74, the issue was, in a prosecution for arson, whether

it could be expected that fire from one building would be communicated to another building, some distance away from the first. It was held improper to admit evidence of insurance experts on this question. And a similar ruling was made by the Supreme Court of the United States in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 472, 24 L. ed. 258,—an action for damages for burning a warehouse by locomotive sparks. The issue was whether the communication of fire from a pile of lumber to the warehouse and other buildings might have been reasonably anticipated, and insurance experts were called. Their evidence was held inadmissible; and Mr. Justice Strong, in delivering the opinion of the court, cites the language of Lord Mansfield in *Carter v. Boehm*, of Chief Justice Gibbs in *Durrell v. Bederley*, and of Lord Denman in *Campbell v. Rickards*, in support of this conclusion. It is in accord with the better reason, also, to exclude opinions of insurance experts upon the point whether an undisclosed fact was material to an insurance risk. If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of every-day life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. It is the business of judges and lawyers to consider and estimate the value of evidence, and for their own use they doubtless formulate in their minds certain rules for weighing and sifting facts and motives, and by such practice may have acquired great skill in divining the truth; but no one would say that their judgment of the facts of a case could be given in evidence before a jury to assist the jury in its deliberations.

The better authorities, however, seem to sustain the rule that the insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or in rejecting risks, when made aware of the fact claimed to be material. The distinction between this and the rule just discussed may seem at first a close one, but on consideration it appears to be sound. It may be asked why, if one insurance man of long experience cannot give his individual opinion that a fact is or is not material to a risk, should

it be competent for him to state the opinions of a great many insurance men on the same question? A fact is material to an insurance risk when it naturally and substantially increases the probability of that event upon which the policy is to become payable. Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. *Watson v. Mainwaring*, 4 Taunt. 763; *Jones v. Provincial Ins. Co.* 3 C. B. N. S. 65; *Ross v. Insurance Co.* 2 Ir. Jur. 206; *World Mut. L. Ins. Co. v. Schultz*, 78 Ill. 586. And, on the other hand, it does not prove a fact to have been immaterial to the risk that it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of affecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised, or the risk is rejected, then they would have done so.

The question still remains whether the rules above stated are applicable to life insurance cases. Certainly, there is the same ground for excluding the individual opinions of insurance men upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not expert upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind. The evidence of the insurance experts that certain facts were material to the risk was therefore incompetent.

The question of the competency of the evidence of insurance experts as to the usage of life insurance companies generally to raise premiums or reject risks when made aware of an undisclosed or misrepresented fact is more uncertain. In *Rauls v. American Mut. L. Ins. Co.* 27 N. Y. 257, 290, 84 Am. Dec. 280, the defendants made a general offer to prove by experts in the business of life insurance that a person who was in the habitual use, to excess, of intoxicating drinks, would not be considered an insurable subject. The court said: "This

was rightly excluded. It was entirely immaterial what description of subject persons or companies engaged in the business of life insurance would consider good or bad risks. The inquiry did not relate to matters of science or skill, but called, in effect, for the opinion of witnesses as to what persons engaged in a particular business would consider prudent to do in certain cases."

The case was followed in *Higbie v. Guardian Mut. L. Ins. Co.* 58 N. Y. 608, and the same ruling was made in a life insurance case in West Virginia. *Schwanbach v. Ohio Valley Protective Union*, 25 W. Va. 629, 652, 52 Am. Rep. 227.

It is very difficult to reconcile the decision in *Ravels v. American Mut. L. Ins. Co.* with the subsequent fire insurance cases, already referred to, of *Cornish v. Farm Buildings Fire Ins. Co.* 74 N. Y. 297, and *Litch v. Atlantic Mut. L. Ins. Co.* 86 N. Y. 102. It will not do to distinguish them on the ground that the one relates to life insurance, and the others to fire insurance, because the case upon which the court relies in *Ravels' Case* is *Joyce v. Maine Ins. Co.* 45 Me. 168, 71 Am. Dec. 536,—a fire insurance case. After a full consideration, we can see no reason why, in this regard, the rule in life insurance cases should be different from that in fire insurance cases. Our conclusion is in accordance with a decision of the supreme court of Pennsylvania, delivered by Chief Justice Black, in *Hartman v. Keystone Ins. Co.* 21 Pa. 466. In that case an applicant had stated that he was a farmer, when in fact he was a railroad man and a slave catcher. One familiar with the insurance business, it was held, might testify that in his own and all other companies a high rate of premium was charged for a railroad man, and that no insurance would be issued upon the life of a slave catcher, whose occupation was considered extra hazardous. The case is cited in *First Cong. Church v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 19 L. R. A. 587, as supporting the distinction formulated by Justice Gray in *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 7 Am. Rep. 522, and we think it may be so treated. Of course such evidence as this is only to aid the jury, and will not be conclusive upon them; but, according to the best considered authorities, it is admissible. If the fact, the materiality of which is in question, is one of a class of facts which life insurance companies are frequently required to consider in relation to the acceptance of risks, so that a witness may base an answer on a well-defined practice of insurance companies, we think such an answer competent. But care must be taken that the witness shall not substitute his own opinion, or that of his own company only, neither of which is relevant, for the usage of companies generally. The modern practice of life insurance companies seems to be, not to vary the premium, except for age, and either to accept risks of the same age, or reject them altogether. If so, there would seem to be no means of judging the materiality of any other fact than that of age, from the usage or practice of insurance companies, except by their acceptance or rejection of the risk; and the question should be limited, in such cases, therefore, to whether insurance companies generally,

if made aware of the undisclosed fact, would reject the risk. The question which the court refused to permit was whether the misrepresented or concealed fact would be regarded among insurance companies generally as material. This was rightly rejected. The proper form in which the question might have been put to a duly qualified witness was: "Are you able to say, from your knowledge of the practice and usage among life insurance companies generally, that information of this fact would have enhanced the premium to be charged, or would have led to a rejection of the risk?"

It was clearly right in the trial court to refuse to direct the jury to return a verdict for the defendant on the ground that the \$5,000 policy in the New York Life Insurance Company on Schardt's life was a fact material to the risk, as matter of law. Where the parties have not, by the terms of the application and policy, impliedly stipulated that each subject inquired about shall be material, the question whether a fact is material to the risk is always a question for the jury. Now, but for the statute of Pennsylvania already considered, the provisions of the policy here in suit would certainly render the answer to each question of the application material, with all the consequences thereby imposed by the law of insurance; but, as already stated, it was the chief purpose of the statute to destroy such conventional materiality, and to open to judicial investigation the question on its merits. Much reliance is placed by counsel for plaintiff in error on the language of Mr. Justice Gray in *Phenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 188, 189, 30 L. ed. 644, 646, where, in delivering the opinion of the court, he said: "Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract."

In support of this are cited the following cases: *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Jeffries v. Economical Mut. Ins. Co.* 89 U. S. 22 Wall. 47, 22 L. ed. 833; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Lloyds Union F. & Life Ins. Co. L. R. 9 Q. B. 328*; *Edington v. Aetna L. Ins. Co.* 77 N. Y. 564, 100 N. Y. 536. In each one of these cases it will be found that by the terms of the policy the application and its answers were made the basis of the contract, and the question and answer concerning other insurance gave that fact a contractual materiality. The same thing is true of the other cases cited by counsel for the plaintiff in error: *Bowditch Mut. F. Ins. Co. v. Winslow*, 8 Gray, 481; *Ryan v. Springfield F. & M. Ins. Co.* 46 Wis. 674; *Byers v. Farmers' Ins. Co.* 85 Ohio St. 614, 85 Am. Rep. 623; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 299, 88 Am. Dec. 544; *Hartford F. Ins. Co. v. Small*, 30 U. S. App. 127, 14 C. C. A. 38, 66 Fed. Rep. 494; *Bord v. Penn Mut. F. Ins. Co.* 153 Pa. 261; *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. 402; *Obermayer v. Globe Mut. Ins. Co.* 43 Mo. 576; *Hutchinson v. Western Ins. Co.* 21 Mo. 101, 64 Am. Dec. 218. In *London Assurance v. Mansel*, L. R. 11 Ch. Div. 370, cited for plaintiff in error, the action was in equity to set aside a policy; and, of course,

it became a question for the court to decide whether that which had been concealed was material. But the court in that case intimated that it would have been a question of fact for the jury, in an action at law, had the parties not foreclosed the inquiry by an implied stipulation that it should be material. In *Columbian Ins. Co. v. Lawrence*, 27 U. S. 2 Pet. 49, 7 L. ed. 844, the concealed or misrepresented fact related to the interest of the assured in the subject of insurance, and Chief Justice Marshall points out with much clearness and force why it might, and would naturally, be quite material to the risk; but an examination of Mr. Justice Story's opinion in the same case when it was again before the court shows that the remarks of the chief justice were not intended to settle the materiality, as matter of law, for on the second hearing the court expressly decided that the question was one of fact for the jury. See *Columbia Ins. Co. v. Lawrence*, 35 U. S. 10 Pet. 516, 517, 9 L. ed. 516, 517. The circuit court of appeals of the third circuit has had occasion quite recently to consider when the materiality of a fact is for the jury, and, in a clearly stated opinion, Judge Wales shows that it is always for the jury, unless the answers in the application are expressly made the basis of the contract. *Fidelity & C. Co. v. Alpert*, 28 U. S. App. 398, 14 C. C. A. 474, 67 Fed. Rep. 460. In *Maryland Ins. Co. v. Ruden*, 10 U. S. 6 Cranch, 339, 8 L. ed. 242, Chief Justice Marshall said: "It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury."

Other cases to the same effect are *Garcelon v. Hampden F. Ins. Co.* 50 Me. 580; *Mutual F. Ins. Co. v. Deale*, 18 Md. 26; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 528, 84 Am. Dec. 714; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. 481, 30 Am. Dec. 118; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Howard F. Ins. Co. v. Chase*, 72 U. S. 5 Wall. 509, 18 L. ed. 524. The remark in the opinion of this court in *Provident Sav. L. Assur. Soc. v. Llewellyn*, 16 U. S. App. 405, 7 C. C. A. 579, 58 Fed. Rep. 940, from which it might be inferred that the question of the materiality of the insured having had delirium tremens is a matter of law for the court, in any case where inquiry is not foreclosed by express or implied stipulation, was unnecessary to the decision of that case, and cannot be supported.

The same reasons which made the materiality of the additional insurance a question for the jury required the court to submit the materiality of the embezzlements to that tribunal, and the exception based on the court's refusal to hold that they were material, as matter of law, cannot be sustained.

The court was clearly right in refusing to direct a verdict for the defendant on the ground that the uncontradicted evidence showed that Schardt had had syphilis, when he had denied it in his answers. The evidence left it a controverted issue of fact whether Schardt had suffered from this disease, and the questions of his having had it, and of its

materiality, were both for the jury. Equally unobjectionable was the refusal to direct a verdict on the ground that it was admitted that Schardt had had other diseases. The court left it to the jury to determine whether the sore throat and other ailments from which Schardt had suffered were really diseases within the policy, and also to say whether they were material to the risk. It is well settled that mere temporary ailments or affections, not of a serious or dangerous character, which pass away, and are likely to be forgotten, because they leave no trace in the constitution, are not to be regarded as diseases, within the meaning of a life insurance policy. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708; *Connecticut Mut. L. Ins. Co. v. Moore*, L. R. 6 App. Cas. 643; *Manufacturers' Acci. Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 7 C. C. A. 581, 53 Fed. Rep. 945, 22 L. R. A. 620, and cases there cited; *Mutual Ren. L. Ins. Co. v. Wise*, 84 Md. 582; *Wilkinson v. Connecticut Mut. L. Ins. Co.* 30 Iowa, 119, 6 Am. Rep. 637; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 872; *Cushman v. United States L. Ins. Co.* 70 N. Y. 72, 77; *Goucher v. Northwestern Traveling Men's Assn.* 20 Fed. Rep. 596; *Illinois Masons' Ben. Soc. v. Winthrop*, 85 Ill. 537; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 681; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 308, 814; *Hann v. National Union*, 97 Mich. 518. The ailments which it was conceded Schardt had were of a character which made it entirely proper to submit to the jury the question whether they could be said to rise to the dignity of diseases, within the meaning of the policy. *Morrison v. Muspratt*, 4 Bing. 60; *Fitch v. American Popular L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 872.

The trial court held, against the objection of defendant, that when Schardt was asked what his occupation was, he answered truly that he was a bank teller, and that the scope of the question was not such as to require him to add that he was an habitual embezzler. We concur in this view. Neither the company nor Schardt could have thus understood the question. The embezzling was merely misfeasance in his position as teller. He was an unfaithful bank teller. But nothing in the question called upon him to say whether he was a good or bad bank teller. In *New York Bowery F. Ins. Co. v. New York F. Ins. Co.* 17 Wend. 359, 367, the issue was whether a contract of reinsurance was avoided by the failure of the company seeking reinsurance to communicate to the reinsurer facts known to it reflecting on the character of the person originally insured. The supreme court of New York held that it was, but in doing so expressed, through Justice Bronson its opinion of what the duty of the person originally insured was in this regard: "The general doctrine (*i. e.* of concealment) on this subject, is not denied; but it is said that the character of Mortimer (*i. e.* the person originally insured) was not a fact material to the risk; that the person applying for insurance is not bound to say anything about his own character. The last branch of the remark is undoubtedly true. Had Mortimer applied to

the defendants for insurance, he was not bound, nor could it be expected, that he should speak evil of himself. Good manners on the part of the underwriter, and self-respect on the part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source.

This passage is referred to with approval by the Supreme Court of the United States in the case of *Sun Mut. Ins. Co. v. Ocean Ins. Co.* 107 U. S. 485, 510, 27 L. ed. 845. Justice Bronson's discussion related to the disclosure of a fact not inquired about, and the rule there laid down was, of course, not intended to relieve an applicant from answering questions put to him, which, in their necessary scope, require statements from him which relate to his moral character. Nevertheless the reasoning of the court justifies the conclusion that the insured is not called upon to construe a simple question concerning his ordinary vocation into one calling for a statement of crimes or misfeasances of which he may have been guilty in pursuing such vocation. Then it is said that he had expressly warranted that, in his statements and answers in this application, no circumstances or information had been withheld touching his past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted, and that his habit of embezzling should have been communicated, to comply with that warranty. We are of opinion that these words refer to questions and answers in the application, and are equivalent to a warranty that the answers to questions are full and complete. The habits of life referred to are those inquired about in the medical examination, and are those which have a direct relation to physical health, and could not be construed to refer to thefts or embezzlements of which the applicant may have been guilty, and concerning which no inquiry was made.

But even if Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided, if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence, or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the nondisclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view, and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained. The great and leading case on the subject is that of *Carter v. Boehm*. 3 Burr. 1905, where Lord Mansfield explained the effect of concealment of material facts in insurance to avoid the policy. He said: "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his represen-

tation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run, at the time of the agreement."

Carter v. Boehm was the case of insurance of a fort and warehouse in the East Indies against capture by the enemy; and, although not strictly a case of marine insurance, it has usually been treated as such, because of the resemblance of the risk, in its speculative character, to that of a merchant vessel in time of war. That it states the rule enforced by the courts of this country in cases of marine insurance is established by many decisions. Perhaps the one most recently considered by the Supreme Court of the United States was a case of reinsurance of a marine risk. *Sun Mut. Ins. Co. v. Ocean Ins. Co.* 107 U. S. 485, 27 L. ed. 837. The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean towards the view that no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal from the insurer a fact believed to be material; that is, unless the nondisclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss can be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence. In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination, and determine the extent to which it is exposed to danger of fire from surrounding buildings, or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning

himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history. This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination had covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent. A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely, if ever, arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge it is claimed avoid the policy is closed. The application is generally prepared, and the questions are generally answered, under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application. With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent nondisclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice. In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts. In *Bufe v. Turner*, 6 Taunt. 338, it was held 88 L. R. A.

that the failure to disclose a fact which the jury found material to a fire risk avoided the policy, although the nondisclosure was in entire good faith. In *Huguenin v. Rayley*, 6 Taunt. 186, and in *Morrison v. Muspratt*, 4 Bing. 60, the same ruling was made in cases of life insurance. In *Lindenau v. Desborough*, 8 Barn. & C. 586, which was also a case of life insurance and concealment, Bailey, J., stated his view thus: "I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured, and that the proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so."

The other judges expressed similar opinions. This language is quoted with approval by Sir George Jessel, M. R., in *London Assurance v. Mansel*, L. R. 11 Ch. Div. 363. In *Abbott v. Howard*, Haynes, 381, the Irish exchequer chamber expressed approval of *Lindenau v. Desborough*, and followed it in a fire insurance case. In *North British Ins. Co. v. Lloyd*, 10 Exch. 523, the court of exchequer held, in a case of guaranty, that the rule as to concealments in life and marine insurance was the same. Chief Baron Pollock said: "It seems to us an incorrect proposition, that the same rule prevails in the case of guaranties as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. This is peculiar to the nature of such contracts, in which in general the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of the health."

This case is cited by Mr. Justice Swayne in delivering the opinion of the court in *Magee v. Manhattan L. Ins. Co.* 92 U. S. 93, 23 L. ed. 699, on a question of guaranty; but such citation can hardly be regarded as a considered approval of the declaration by the court of exchequer that the rule as to concealments was the same in life as in marine insurance. In the course of the argument in *Lloyd's Case*, Baron Parke approves the statement of some able American law writer on insurance,—presumably Mr. Duer,—that the rule for the necessity of the disclosure of all material circumstances in cases of insurance is founded on mercantile usage, and not upon fraud. 10 Exch. 531. This only confirms our view that the rule had its origin in the peculiar exigencies of a very speculative business, to wit, marine insurance. To enforce it in respect to life insurance is to transfer the result of a usage prevailing in one branch of business to another, where the conditions are very different, and are of a character that prevents the possibility of the existence of a definite usage, well known to both parties, in respect to the contracts made. It is the business of shipowners and their brokers frequently to deal in insurance, and they may be presumed to know the usages prevailing with respect to contracts that they are constantly making. In life insurance the insured never makes a business of taking such insurances, and in most cases he takes but one policy. In *Wheelton v. Hardisty*, 8 El. &

Bl. 232, 233, the exchequer chamber held that an untrue statement of a material fact in a proposal for insurance, made, not by the insured, but by the person whose life was the subject of insurance, did not avoid the policy, in the absence of knowledge of its untruths by the insured. In this conclusion the court avowedly departed from the rule of law governing marine policies, by which such a statement is always treated as a warranty and condition of the policy. See especially the judgments of Martin and Bramwell, BB., and Crowder, J., pages 296, 298, 299. In *Thomson v. Weems*, L. R. 9 App. Cas. 671, which was a Scotch appeal in a life insurance case, Lord Blackburn said: "In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and prima facie, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire; see per Lord Eldon, C., in a Scotch appeal on a fire insurance case. *Newcastle F. Ins. Co. v. Macmorran* (July 10, 1815), 8 Dow, at page 262. No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies."

Mr. Pollock states, in the fourth edition of his work on Contracts (page 490, note 1), that *Wheelton v. Hardisty* virtually overrules *Lindenau v. Desborough*. It may be doubted whether it has this effect, because the latter case only established the doctrine that the withholding of any material fact "within the knowledge of the assured" avoided the policy, whereas in *Wheelton v. Hardisty* the untrue statement was not made by the assured, and its untruth was not known to him. But, while Mr. Pollock's view of the conflict between *Lindenau v. Desborough* and *Wheelton v. Hardisty* may not be precisely accurate, it is certainly true that the latter case, decided by the highest court in England before which the question has come in such a way as to require decision, is an authority for the proposition that the peculiar circumstances under which marine policies are issued require a construction of their terms that is not given to policies of life and fire insurance. It is said that the utmost good faith (*uberrima fides*) is required in all contracts of insurance, and hence the same rule of concealment must apply to life and fire insurance, and must avoid a policy for nondisclosure of a material fact, though in entire good faith. But it was the same standard of *uberrima fides* which held the insurer to his innocent misrepresentations as conditions precedent and warranties in marine insurance. Why should not a difference be also made in respect to innocent nondisclosures in life and fire insurance? The distinction made in *Wheelton v. Hardisty* between marine and life insurance policies seems to justify the language of Mr. Pollock [in his Contracts, 4th ed. §490], where, after stating the rule of concealments and misrepresentation in marine insurance, he says: "These rules have, in modern

times at any rate, been uniformly treated both in law and in equity as determined by the exceptional and speculative nature of this particular contract, and not affording ground for any conclusions of general law. That they do not apply to the contract of life insurance is clear from the judgments in the exchequer chamber in *Wheelton v. Hardisty*, though a different opinion formerly prevailed, and in this very case was not contradicted in the court below."

Mr. Pollock refers to *London Assurance v. Mansel*, L. R. 11 Ch. Div. 363, as deciding that a material concealment avoids a policy of life insurance, but says (at p. 491, note m): "Probably a material fact means for this purpose a fact such that its concealment makes the statement actually furnished, though literally true, so misleading as it stands as to be in effect untrue."

Certainly, this was all that it was necessary to decide in that case, although the words of Sir George Jessel are much broader. And what is of prime importance to us, the Supreme Court of the United States has expressly approved the conclusion which the master of rolls reached in that case, on its facts, with an equally express dissent from the wider effect of his language. *Phenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, and the remarks of Mr. Justice Gray on page 192, and page 647, 30 L. ed.

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of fire and life policies. In *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. 481, 30 Am. Dec. 118, Chancellor Walworth, delivering the opinion of the supreme court of errors of New York, refers to the peculiar rule of construction applied to that "anomalous and informal instrument called a 'marine policy,'" and expresses the opinion that it is not to be applied in its strictness to fire policies. The same view is expressed in *Jolly v. Baltimore Equitable Soc.* 1 Harr. & G. 295, 18 Am. Dec. 288, by the court of appeals of Maryland. In *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 Am. Dec. 345, Bronson, J., speaking for the supreme court of New York, after referring to the rule by which nondisclosure of material facts avoids a marine policy, although no inquiry be made, and although it is the result of innocent mistake or inadvertence, said (p. 192, p. 347 of 40 Am. Dec.):

"But this doctrine cannot be applicable,—at least not in its full extent,—to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requir-

ing the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk."

The use of "concealment," in this last passage, should be remarked. It means there a failure fully to answer a question put; and it was such a concealment which Sir George Jessel had to consider in *London Assurance v. Mansel*, and was defined by Sir Frederick Pollock. It is not a mere silence upon a matter not made the subject of inquiry. It is necessary to determine in which sense the word is used in decided cases, before their bearing on the present question can be clearly understood. Here we are considering only the duty of the insured in respect to something not inquired about. The Supreme Court of the United States, in *Clark v. Manufacturers' Ins. Co.*, 49 U. S. 8 How. 285, 249, 13 L. ed. 1061, 1066, suggests a distinction between fire and marine insurance, in reference to the obligation of the insured to speak when not inquired of, and cites in support of it the Maryland and New York cases just referred to. In *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469, 55 Am. Dec. 860, the court of appeals held that in the case of a fire policy, where the insured makes a full answer to all the questions put to him, he is not answerable for an omission to mention the existence of other facts, about which no inquiry is made, unless he withholds mention of them with intent to defraud. "He has a right to suppose that the insurer, in making inquiries in respect to particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge, or waives information of them." See also *Browning v. Home Ins. Co.* 71 N. Y. 508, 27 Am. Rep. 867; *Woodruff v. Imperial F. Ins. Co.* 88 N. Y. 138; *Short v. Home Ins. Co.* 90 N. Y. 16, 48 Am. Rep. 188; *Haight v. Continental Ins. Co.* 92 N. Y. 55. In *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, which was a fire insurance case, the defense was made that, previous to the issuing of the policy, there had been a fire in the insured premises, which had not been disclosed to the insurer. The court charged the jury that, if they found the circumstance to be material to the risk, the policy was void, "whether concealment resulted from fraud, accident, or mistake." Judge Ranney—one of Ohio's greatest judges—presided at the circuit in this cause, and delivered the opinion of the supreme court. In the supreme court he expressed the view that he was in error in his charge, in thus enforcing the rule of marine insurance in a fire insurance case. Such an expression of opinion was not necessary to the conclusion in the case, but the high standing of the judge gives great weight to even his *obiter dictum*. He said: "It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect [*i. e.* as to the rule of concealment] between marine and fire insurance, nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or sup-

pressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former, the subject of insurance is generally beyond the reach, and not open to the inspection, of the underwriter, often in distant ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well appreciated by the underwriter as the owner. In marine insurance the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has, therefore, the right to exact a full disclosure of all the facts known to him, which may in any way affect the risk to be assumed. But in fire insurance no such necessity for reliance exists, and, if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities."

In Massachusetts, in the earlier authorities, the stringent rule of marine insurance as to concealments was declared applicable with all its rigor to fire policies. In *Curry v. Commonwealth Ins. Co.* 10 Pick. 535, 20 Am. Dec. 547, it was held that if the assured did not communicate facts within his knowledge which increased the risk, though he was not questioned concerning them, and though he supposed the facts not to be material, the policy was void. This can hardly be reconciled with the later cases in the same court. In *Washington Mills Emory Mfg. Co. v. Weymouth & B. Mut. F. Ins. Co.* 135 Mass. 503, the question was whether a failure to state that the insured did not own the land on which the buildings stood avoided the policy. No fraud appeared. The court said: "The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect;" citing *Com. v. Hilds & Leather Ins. Co.* 112 Mass. 186, 17 Am. Rep. 72; *Fowle v. Springfield F. & M. Ins. Co.* 123 Mass. 191, 23 Am. Rep. 808; *Walsh v. Fire Assn. of Philadelphia*, 127 Mass. 383.

Nor does Chief Justice Shaw's definition of "concealment" in a fire insurance case seem to be as broad as that prevailing in marine insurance. In *Daniels v. Hudson River F. Ins. Co.* 13 Cush. 416, 59 Am. Dec. 192, he said in defining the term as used in a fire policy (p. 425, 59 Am. Dec. p. 196): "'Concealment' is the designed and intentional withholding of any fact material to the risk, which the assured in honesty and good faith, ought to communicate to the underwriter. Mere silence on the part of the assured, especially as to some matter of

fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment."

There are many other cases of fire insurance in which it is held that a nondisclosure of a material fact not inquired about does not avoid the policy unless it appears to have been withheld with fraudulent intent. *Alkan v. New Hampshire Ins. Co.* 53 Wis. 186; *Vankirk v. Citizens' Ins. Co.* 79 Wis. 627; *Wylthville Ins. Co. v. Stultz*, 87 Va. 629, 636; *Sanford v. Royal Ins. Co.* 11 Wash. 658; *Petser Mfg. Co. v. St. Paul F. & M. Ins. Co.* 41 Fed. Rep. 271.

The number of life insurance cases in which the question has arisen is small. In *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 287, 84 Am. Dec. 280, the court of appeals held that, where an applicant for life insurance fully and truly answered all questions put to him by the company, the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy, on the ground that the applicant might presume that the insurer had questioned him on all subjects which he deemed material. In *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 57, 7 Am. Rep. 410, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See also *Cheever v. Union Cent. L. Ins. Co.* 4 Am. Law Rec. 155. In *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. 42, the supreme judicial court of Massachusetts announced the principle, as applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy. It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for, because the court uses in the opinion language which is incorporated in the headnote as follows: "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions applicable to all men are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy."

But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a nondisclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear, upon the authorities, as could be wished, and the text-writers find much difficulty in reconciling the cases. May, *Ins.* 3d ed. §§ 203, 208 L. R. A.

203, 207. We hold that the charge of the circuit court upon this question was correct.

It is also objected that the court was wrong in charging the jury that the burden of proof to establish the materiality of the misrepresentation or concealment, as well as the fraudulent intent, where that was necessary, was upon the defendant. Unquestionably, this is the general rule. 2 Greenl. Ev. 15th ed. § 898; *Tidmarsh v. Washington F. & M. Ins. Co.* 4 Mason, 439, 441; *Fiske v. New England Marine Ins. Co.* 15 Pick. 810; *Jones v. Brooklyn L. Ins. Co.* 61 N. Y. 79; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 877, 23 L. ed. 610; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308, 84 Am. Rep. 446. It is urged for the defendant, however, that, because it was admitted that Schardt made an untrue answer concerning his other insurance, the presumption was that it was intentionally untrue, and that the court should have so instructed the jury. Had the defendant requested such a charge, the question would then have been presented for decision. But, instead of requesting such an instruction, defendant framed a single charge, which instructed the jury that they should presume, not only that the failure to mention the fact was intentional, but also that it was material. This was erroneous, and the court rightly refused to give it. But we do not think that the defendant was entitled to the instruction that the admission that Schardt had a policy in the New York Life Insurance Company, and failed to mention it, raised the presumption that his omission was intentional, or, what is the same thing, that it was fraudulent. There is a natural, and perhaps a legal, presumption of the continuance of a state of knowledge as of the state of sanity or marriage, and, it being admitted that Schardt once knew that he had taken this policy for \$5,000, that he continued to know, and so remembered that he had the policy when he omitted to mention it. But the presumption is not conclusive. Men do forget entirely a fact previously known to them, and they do forget it temporarily, so that they may make an untrue statement inadvertently about it, though recently known to them. The possibility or probability of their doing so depends on the character of the fact in question, and all the circumstances under which the misstatement concerning it is made. There is also a presumption that a man does not make a fraudulent misstatement; but men frequently do nevertheless make such statements; and the question whether the presumption is overcome depends on the evidential weight to be given to all the circumstances, including possible motive, together with the positive evidence of witnesses. The two presumptions in this case covered the same ground, and were conflicting. Neither was conclusive, and it was for the jury to determine from all the circumstances what the truth was. It would seem proper that an instruction referring to one of these presumptions should also refer to the other, and should point out the duty of the jury to weigh the facts and circumstances in the light of both. Nothing here said, however, is intended to measure the duty of the court in instructing the jury as to presumptions from particular facts when other facts

and circumstances affecting the weight of the presumption, or rebutting it, appear in the case, or when other and conflicting presumptions may also have application to possible phases of the evidence. It is, and must be, largely within the discretion of the court, even when a special instruction on the subject is requested, to determine in such case whether it is useful to call the attention of the jury to presumptions from particular facts at all, when such presumptions do not shift, as between the parties, "the duty of going forward with the evidence," as it is sometimes called. Instructions as to such presumptions are more or less in the nature of comment on the evidence, the scope of which is always within the discretion of the trial court.

For the error already referred to in the exclusion of evidence, *the judgment of the Circuit Court is reversed*, with instructions to order a new trial.

A petition for rehearing was subsequently filed, in response to which, on April 14, 1896, Taft, Circuit Judge, handed down the following opinion:

This is a petition for rehearing by the Penn Mutual Life Insurance Company, plaintiff in error. The action below was on a policy of life insurance, and resulted in a verdict and judgment against the defendant, the insurance company. In the opinion heretofore filed in the case we reversed the judgment of the court below for an error in excluding evidence, and for the guidance of the court below in a new trial we considered other questions upon the record. The Pennsylvania statute (act June 23, 1885, Laws 1885, p. 184, No. 101), which controlled the construction of the policy, provided, in effect, that no misrepresentation in the application should avoid the policy unless it was either made in bad faith or was material to the risk. It appeared upon the trial that in answering a question as to other life insurance upon his life, John Schardt, the insured, had mentioned three policies, aggregating \$16,000, but had omitted to state one which he had for \$5,000. The court below refused to charge the jury that the misrepresentation avoided the policy, even though it was not material to the risk, because necessarily made in bad faith. In this we held there was no error, and we are pressed by the petition for a rehearing to examine the correctness of our holding. The argument of the learned counsel is that a misrepresentation in bad faith, within the meaning of the statute, is an untrue statement, made under such circumstances that it would, if resulting in injury, support a recovery in an action for deceit at common law; and that in such an action, if the fact misrepresented is one concerning the defendant's own affairs, of which he must at some time have had personal knowledge, he is held to a knowledge and recollection of it at the time of the statement, and cannot be heard in defense to say that inadvertently and through forgetfulness he made the statement in the honest belief of its truth. Therefore it is said that in this case the court below should have told the jury that, as the insured must have known of the omitted policy when he took it, he is conclusively presumed to have known it when he signed his applica-

tion, and so to have made the statement concerning his other insurance in bad faith. The argument is unsound. We have here to deal with the statutory meaning of the phrase "misrepresentation in bad faith." "In bad faith" is not a technical term used only in actions for deceit. It is an ordinary expression, the meaning of which is not doubtful. It means "with actual intent to mislead or deceive another." It refers to a real and actual state of mind capable of both direct and circumstantial proof. A man may testify directly to his knowledge and intention if they are in issue, and they may also be inferred from circumstances. If a man makes a statement in the honest belief that it is true, he does not make that statement in bad faith, even if his honest ignorance of the truth is the result of the grossest carelessness. The fact that he could only be ignorant through gross carelessness may be evidence to show that he was not ignorant, and therefore spoke in bad faith; but, grant his honest belief in his statement, and there cannot be bad faith on his part in the ordinary sense in which those words are used in the English language. This is the sense in which they are used in the Pennsylvania statute. Therefore it would clearly not have been bad faith in the insured if he made the statement concerning his other insurance in the honest belief in its truth, and omitted the \$5,000 policy through forgetfulness and inadvertence.

Whether actual bad faith must be shown in common-law actions for deceit to justify a recovery has been the subject of much controversy, and it has been finally settled in England by the decision of the House of Lords in *Derry v. Peek*, L. R. 14 App. Cas. 837, that there can be no recovery in such an action whenever the defendant made the statement complained of in the honest belief of its truth, however unreasonable such belief. Such, too, would seem to be the holding of the Supreme Court of the United States in *Lord v. Goddard*, 54 U. S. 18 How. 198, 14 L. ed. 111 (see also *Biggs v. Barry*, 2 Curt. C. C. 259), though, in view of some of its later cases, the question may still be an open one in the latter court. *Lehigh Zinc & I. Co. v. Bamford*, 150 U. S. 665, 37 L. ed. 1215. There is much authority in this country supporting the view that an action for deceit may be maintained against one making an untrue statement, though in the honest belief of its truth, if there was no reasonable ground for such belief; or, to put it in another way, if he ought to have known the truth. *Cooley, Torts*, 2d ed. p. 585. Nearly all the cases upon which the petitioner relies are cases in equity of rescission or equitable estoppel in which bad faith is never indispensable as an element, and such of them as are English are expressly distinguished on this ground in *Derry v. Peek*; *Burrowes v. Lock*, 10 Ves. Jr. 470; *Raley v. Williams*, 73 Mo. 810; *Bullis v. Noble*, 36 Iowa, 618. The other English cases relied on are, of course, controlled by *Derry v. Peek*. The other American cases are cases of misrepresentation in contracts of insurance made the basis of the contract, and given a contractual effect. *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Allen, 51; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 606, 35 Am. Rep. 623. The con-

dict of authority in regard to actions for deceit is whether actual bad faith is necessary to sustain the action, and not whether an untrue statement, founded on an honest belief in its truth, though inadvertently or forgetfully or negligently made, is a statement in bad faith. Here the statute expressly declares the material issue to be whether the misrepresentation was made in bad faith. This relieves us of all difficulty. The statute means what it says. It does not mean constructive bad faith. It does not mean gross negligence, which some courts

have held sufficient to sustain an action for deceit. It means the same actual intent to mislead that must be found in convicting one of the crime of false pretenses, and surely honest belief in the misstatement, through forgetfulness and inadvertence, is a defense to such a charge. The reference to the essential basis of recovery in common-law actions for deceit only tends to confusion because of the conflict of authority, and is in no way helpful in construing the statute.

The petition is denied.

CALIFORNIA SUPREME COURT.

Charles A. LEE, *App't.*,
v.

SOUTHERN PACIFIC RAILROAD
COMPANY, *Respt.*

(116 Cal. 97.)

1. The provision against leasing a franchise so as to relieve it or property held under it from the liability of the lessor, grantor, lessee, or grantee, made by Const. art. 12, § 10, does not give an employee of the lessee of a railroad a right of action against the lessor company upon the fiction that it is his employer, but merely enables him to enforce his judgment, based on the negligence of his employer, against the property.
2. The lessor of a railroad which is leased under statutory authority without any provision exempting the lessor from liability remains liable for an injury resulting from the negligent omission of a duty owing by it to the public, such as the proper construction of its road.
3. The lessor of a railroad is liable to an employee of its lessee who is injured by the imperfect construction and maintenance of the rails and track.
4. A variance between an averment that plaintiff was an employee of a railroad company and proof that he was employed by its lessee and injured through the lessor's negligent construction of its road is immaterial.

(February 19, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Reversed.*

The facts are stated in the opinion.

Messrs. Cole & Cole, for appellant:

A railway company leasing its road, even by consent of the legislature, does not thereby escape all responsibility to the public.

Boone, Corp., § 268.

But with the inhibition of the Constitution it is impossible to see by what refinement of reasoning it can be made to appear that a rail-

road corporation, by the mere act of leasing its railroad, escapes liability for injuries occurring in the operation of it.

The lease may be good and valid for all ordinary purposes; but the corporate property, the property held under and by virtue of the franchise, the property owned by the corporation, shall not, by the subterfuge of executing a lease, be exonerated from liabilities incurred in the operation, use, and enjoyment of that property.

If it had been intended to permit the limitation of liability by the act of leasing, that intention would have been expressed, but nothing of the kind appears.

It can hardly be maintained that a corporation, less powerful than the state, can thus divest itself of the obligations imposed by its charter.

Civ. Code, § 479; *Harmon v. Columbia & G. R. Co.* 28 S. C. 401; *International & G. N. R. Co. v. Dunham*, 68 Tex. 231; *International & G. N. R. Co. v. Underwood*, 67 Tex. 589; *Palmer v. Utah & N. R. Co.* 2 Idaho, 350.

If the constitutional provision possesses any significance whatever, the franchise and corporate property and the owner of them must be subject to prosecution for wrongs without regard to the control when the liability arose.

The right to exercise corporate power is itself a franchise.

People, Fraser, v. Selfridge, 52 Cal. 331; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *People, Williams, v. Horsley*, 65 Cal. 361; *Southern P. R. Co. v. Orton*, 32 Fed. Rep. 457.

The act in question is objectionable as embracing more than one subject, as well as in failing to express one of the subjects in its title.

People v. Parks, 58 Cal. 624; *Abel v. Clark*, 84 Cal. 226; *Ex parte Liddell*, 98 Cal. 633; *Lane v. State*, 49 N. J. L. 678; *State, Drury, v. Hallock*, 19 Nev. 371; *State, Gonzalez v. Palmes*, 23 Fla. 620; *Leach v. People, Patterson*, 123 Ill. 420; *Church v. Detroit*, 64, Mich. 571; *Loach v. St. Charles*, 65 Mich. 555; *State v. Wright*, 14 Or. 365; *Brown v. State*, 79 Ga. 324; *People, Standerfer, v. Hamill*, 184 Ill. 666; *Dolese v. Pierce*, 124 Ill. 140; *Ellis v. Hutchinson*, 70 Mich. 154; *Sanilac County Supers. v. Auditor General*, 68 Mich. 659; *Re Carbonate & P. Turnp. & Pl. Road Co. (Pa.)*

NOTE.—As to the effect of a lease of a railroad on liability, see *Fisher v. West Virginia & P. R. Co.* (W. Va.) 23 L. R. A. 758; also *Southern R. Co. v. Souknight* (C. C. App. 4th C.) 30 L. R. A. 823.

38 L. R. A.

13 Atl. 918; *Sewickley v. Shoes*, 118 Pa. 165; *Raggio v. State*, 86 Tenn. 272; *Henrico County Supers. v. McGruder*, 84 Va. 828.

Messrs. Bicknell & Trask for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff brought this action against the Southern Pacific Railroad Company to recover damages for personal injuries sustained by him. He pleaded that the defendant was the owner of a certain railroad in the county of Los Angeles, and of its roadway, tracks, and appurtenances; that, at the time of the injuries complained of, he was employed by the defendant as a brakeman; and that while in the performance of his duties as brakeman, at a siding called Honby, on the line of the road he was thrown from an engine upon which he was riding, and sustained serious injuries. The cause of the accident was alleged to be the negligence of the defendant in imperfectly constructing the rails and track of the road at Honby, and in allowing this defectively constructed track to remain out of repair, inadequate, and unsafe. The answer admitted the ownership by defendant of the road in question, denied that defendant was engaged in the business of operating the road, denied that plaintiff was or ever had been in its employ as a brakeman, or in any other capacity, and denied the imperfect construction and want of repair of the rails and track. The jury returned a general verdict in favor of plaintiff in the sum of \$8,000. It likewise made special findings of fact upon certain interrogatories presented. These findings, with certain other facts agreed to by counsel under stipulation, may thus be summarized: The defendant was the owner of the railroad upon which the accident complained of occurred, but, prior to the time of the accident, it had leased the road and all the rolling stock and property of every kind used upon or in connection with it to the Southern Pacific Company of Kentucky. The Southern Pacific Company was at the time of the accident in the exclusive operation of said railroad under the lease. The side track upon which the accident occurred had been constructed by the Southern Pacific Company as an aid or adjunct to the main line, but was the property of the defendant corporation. The plaintiff at the time of the accident, was in the employ of the Southern Pacific Company, and not of the Southern Pacific Railroad Company. The trial court determined that a conflict existed between the special findings and the general verdict, and holding that, under the special findings, defendant was entitled to judgment, rendered its decision accordingly.

Section 10 of article 12 of the Constitution declares: "The legislature shall not pass any law permitting the leasing or alienation of any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges." Upon this language, appellant contends that the Constitution gives one a right of action against the corporation which has owned property for an injury which has resulted to him in

the use of such property in the hands of a lessee or grantee of the original owner, and from this he insists that his right of action against the defendant is established by the Constitution itself. The section in question was adopted by the constitutional convention without debate. It is a provision peculiar to this state. It has not so far received judicial interpretation; yet we think no difficulty need be experienced in arriving at its true meaning. It is not to be construed as a grant of authority to lease, but as a restriction upon the power of the legislature to make such grant of authority. *Abbott v. Johnstown, G. & E. Horse R. Co.* 80 N. Y. 27, 86 Am. Rep. 572; *Central & M. R. Co. v. Morris*, 68 Tex. 49. It declares: (1) That, if a lease or sale shall be made of the franchise or property of a corporation, the lessee or grantee shall take such franchise or property *cum onere*, subject to any of the liabilities of the grantor at the time existing and enforceable against the franchise or property. This provision is for the very obvious purpose of preventing a corporation, by selling or assigning its franchise or property, from saving harmless the franchise or property, and leaving remediless one who but for the lease or sale could have enforced against the property a judgment which he might recover. It is designed, further, as a declaration that the forfeiture of a franchise for an act committed or omitted by the charter corporation while it owned such franchise may be enforced after transfer of the franchise by sale or lease. (2) That, in the hands of the lessee or grantee, the franchise or other property shall be subject to the liabilities which may be incurred in its occupation, use, or enjoyment. Thus, the corporation owning the property will not be allowed to save it harmless by conveying it to another corporation. In the hands of the operating corporation, the franchise and property will still be liable,—the one to forfeiture at the instance of the state, the other to execution levy at the instance of any individual who has sustained loss or injury by reason of the wrongful acts of the operating corporation. But it will be noted that the section does not attempt to give, and is not intended to give, a personal action against a corporation where none existed before. It is designed to subject the franchise and property of a corporation, whether the franchise be exercised or the property be used by the corporation itself or by another, to liability for breach of duty. Otherwise a corporation might own a fully-equipped railroad; it might convey the road and the property used upon and with it to a lessee corporation owning no property whatsoever, and leave the conduct and operation of its property entirely to the lessee. A judgment creditor seeking to make good his claim against the operating company would find no property owned by it upon which it could levy. To prevent this and many other such evasions as might be instanced, the constitutional provision in question was adopted. So far as the case at bar is concerned, it can have but this application, and no more. It would enable the plaintiff injured by the negligence of his employer, the lessee company, to make good his judgment under appropriate procedure out of the leased property; but it would not operate

to give the plaintiff, an employee of the lessee company, a right of action against the lessor company, upon the fiction that it was his employer.

Respondent contends that, having made a valid lease of all its railroad property to the Southern Pacific Company, it is absolved from all liability to plaintiff. Upon the part of the appellant it is contended that the lease is without sanction from the Constitution and laws of the state, and is therefore void. The question of the validity or invalidity of the lease is thus collaterally presented, but a decision upon it is not necessary to a determination of the rights of the parties hereto. If the lease were made without legislative sanction, it would be void, and, under all of the authorities, the lessor would continue liable for all the negligence of the lessee affecting the public, the latter being treated as operating the road as the mere agent of the lessor. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165; *Thomas v. West Jersey R. Co.* 101 U. S. 88, 25 L. ed. 952; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 80, 15 L. ed. 27; *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 21 L. ed. 675; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 628, 71 Am. Dec. 291; *Central & M. R. Co. v. Morris*, 68 Tex. 50; *Nelson v. Vermont & C. R. Co.* 26 Vt. 717, 62 Am. Dec. 614. But, conceding all that respondent claims as to the validity of the lease, it does not follow that respondent is relieved from liability to this plaintiff. The act which it is insisted affords legislative authority for the lease in question is entitled "An Act Permitting and Authorizing Railway and Other Corporations Organized under the Laws of This State, or of Any State or Territory of the United States of America, or Any Act of Congress of the United States of America, to do Business in This State on Equal Terms." It is found in the Statutes of 1880, at page 21. No terms of the act afford exemption in any respect to the lessor company. Where a statute authorizing leases contains no clause exempting the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses, etc.

In *St. Louis, W. & W. R. Co. v. Ouri*, 28 Kan. 622, a railway company constructed its track, and in the construction omitted to make sufficient cattle guards where the track entered and left a field. Thereafter the railroad was leased to another company, which, at the time of the injury complained of, was in the full possession and use of the track, and, by the terms of its lease, had contracted to discharge all statutory obligations and duties imposed upon the lessor company. The owner of land adjacent to the railroad brought his action against the lessor company to recover damages for injuries sustained to his crops by straying cattle. Justice Brewer, in delivering the opinion of the court, said: "Defendant contends that, where the statute authorizes the lease by one railway company to another of its track, the lessor company is not responsible for injuries caused by the torts of the lessee company, and in support of that doctrine cites

some authorities. To a certain extent this proposition is true. If the injury results from negligence in the handling of trains or in the omission of any statutory duty connected with the management of the road,—matters in respect to which the lessor company could in the nature of things have no control,—then the lessee company will alone be responsible; but when the injury results from the omission of some duty which the lessor itself owes to the public in the first instance,—something connected with the building of the road,—then we think the company assuming the franchise cannot devert itself of responsibility by leasing its track to some other company. Thus, for instance, in the case at bar the defendant was charged with the duty of placing sufficient cattle guards before it either used this track which it constructed, or permitted anyone else to use it; and it cannot devert itself of responsibility for injuries resulting from such omission by leasing its track to some other company. The injury resulted directly from its own wrong, and not from any mere negligence on the part of the St. Louis & San Francisco Railroad Company. It cannot relieve itself by contracting with some other party to discharge its statutory duty. . . . The defendant omitted this duty, and by the statute is responsible for all damages sustained by reason of such omission." In *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg road sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: "Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility." In *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. Rep. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of *East Linn & R. R. Co. v. Culberson*, 73 Tex. 875, 8 L. R. A. 567, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employee of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defect-

ive appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: "It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road."

In all cases where a valid lease is found (or as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or of want of skill and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employee may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists. As is said in *Nugent v. Boston & M. R. Co.* 80 Me. 62, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: "Our opinion, therefore, is

that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and re-pass by the Bethlehem station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor." So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and track of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.

As has been indicated, the plaintiff in this case has averred that he was an employee of the defendant corporation. The proofs in this regard disclose that he was in the employ of the Southern Pacific Company. The variance we think to be immaterial. The averment could be eliminated, and a cause of action would still remain. Plaintiff has pleaded and shown to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met with his injury, but that he was there under lawful employment; that, in pursuit of his vocation, he met with an injury occasioned by defendant's defective construction of its roadbed, for which injury the defendant is, in law, responsible. It follows that there is no irreconcilable conflict between the special findings and the general verdict of the jury, and the court should therefore have entered judgment for plaintiff.

The judgment is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of plaintiff and appellant, under the general verdict of the jury.

We concur: Temple, J.; McFarland, J.

Hearing in banc denied.

Beatty, Ch. J., dissented from the order denying a hearing in banc.

IDAHO SUPREME COURT.

Fanny COHN, *Resp't.*,

v.

Charles S. KINGSLEY, *Appt.*

(.....Idaho.....)

*1. The provisions of the Constitution requiring three several readings, the printing of

*Headnotes by QUARLES, J.

NOTE.—As to constitutional requirements respecting the passage of statutes, see also *Union Bank v. Oxford Commissioners* (N. C.) 84 L. R. A. 487; and *Lafferty v. Huffman* (Ky.) 32 L. R. A. 303, 38 L. R. A.

bills, and an aye and nny vote on final passage of any bill, are mandatory.

2. To ascertain whether or not the legislature, in the passage of a bill, complied with the requirements of the Constitution, the court may go back of the enrolled bill to see if the journals of both houses of the legislature show that the requirements of the Constitution were obeyed in the passage of the act in question.

3. The journals of both houses of the

As to the conclusiveness of an enrolled bill on the question of the validity of a statute, see the case last named and also the note to *State, Reed, v. Jones* (Wash.) 23 L. R. A. 340.

legislature must affirmatively show that the provisions of the Constitution in regard to the passage of any law were substantially followed by the legislature in the passage of an act the validity of which is questioned.

4. While the journals of both houses of the legislature are entitled to absolute verity, and cannot be contradicted, yet, if the journals fail to show that any step required by the Constitution in the passage of a law was taken, such failure to show that such step was taken is conclusive evidence that it was not taken.

5. Neither house of the legislature can suspend the provision of the Constitution which requires three readings on separate days in each house except in case of urgency, and then only on an ye and nay vote by two thirds of the house, voting with reference to only one bill then before such house.

(Sullivan, Ch. J., dissent.)

(July 9, 1897.)

APPEAL by defendant from a judgment of the District Court for Ada County in favor of plaintiff in a proceeding to determine the fees to which defendant was entitled for recording a deed; plaintiff claiming that he could demand only the fees allowed by the act of March 12, 1897, and defendant claiming that that act was void and that he could demand fees allowed by the act of March 18, 1891. *Reversed.*

The facts are stated in the opinions.

Messrs. Hawley & Puckett, A. A. Fraser, and W. E. Borah for appellant.

Mr. R. E. McFarland, for respondent, in support of petition for rehearing:

No one can point to a single provision of the Constitution, which requires that the journals show that the bill, together with the amendments thereto, was printed, or that it was read on three several days in each house previous to the final vote, or that the suspension of the the provisions of the Constitution were had by a yea and nay vote of two thirds of the members of either house, except as provided in § 18 at the request of three members present, nor is there a statutory provision requiring such to be had.

Can a court prescribe rules of procedure for a co-ordinate branch of the government?

Where the Constitution of a state requires certain procedure to be had in the passage of a bill, but does not require that the journals of the legislature show that such procedure was had, where it does not affirmatively appear by the journals that such procedure was not had, it will be deemed and held that such constitutional requirements were complied with.

Cooley, Const. Lim. 163-167; Sutherland, Stat. Constr. p. 47, §§ 146, 147; Black, Interpretation of Laws, p. 31, § 18; *Blessing v. Galveston*, 42 Tex. 641; *State v. McConnell*, 3 Lea, 311; *State, Atty. Gen., v. Francis*, 26 Kan. 724; *Miller v. State*, 3 Ohio St. 475; *McCulloch v. State*, 11 Ind. 424; *Schuyler County Supers. v. People, Rock Island & A. R. Co.* 25 Ill. 181; *Hall v. Steele*, 82 Ala. 562; *Glidewell v. Martin*, 51 Ark. 559; *People v. Dunn*, 80 Cal. 211; *State, Markens, v. Brown*, 20 Fla. 407; *State v. Peterson*, 38 Minn. 143; *State, Whitson, v. Algood*, 87 Tex. 163; *Hunt v. State*, 22 Tex. 38 L. R. A.

App. 320; *Re Roberts*, 5 Colo. 525; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93.

The enrolled bill on file in the office of the secretary of state, in all respects regular on its face, bearing the signatures of the presiding officers of the houses of the legislature, regularly approved by the governor and deposited in the office of the secretary of state, as required by the Constitution, is conclusively presumed to have been regularly passed by the legislature.

State, Reed, v. Jones, 6 Wash. 452, 23 L. R. A. 340; *Com. v. Shelton*, 18 Ky. L. Rep. 30; *Com. v. Hardin County Ct.* 18 Ky. L. Rep. 113; *Lafferty v. Huffman*, 18 Ky. L. Rep. 17, 32 L. R. A. 208; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294; *Kilgore v. Magee*, 85 Pa. 401; *Weeks v. Smith*, 81 Me. 533; *State, Scarborough, v. Robinson*, 81 N. C. 409; *Ex parte Tipton*, 28 Tex. App. 438, 8 L. R. A. 326; *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270; *Clare v. State*, 5 Iowa, 509; *Eld v. Gorham*, 20 Conn. 8; *Warner v. Beers*, 23 Wend. 172; *Hunt v. Van Alstyne*, 25 Wend. 605; *People, Purdy, v. Marlborough Highway Comrs.* 54 N. Y. 276, 18 Am. Rep. 581; *Fouke v. Fleming*, 13 Md. 892; *Bender v. State*, 53 Ind. 254; *Passaic County Chosen Freeholders v. Stevenson*, 46 N. J. L. 178; *People v. Burt*, 43 Cal. 560; *Green v. Weller*, 32 Miss. 670; *Territory, McMahon, v. O'Connor*, 5 Dak. 397, 3 L. R. A. 355; *State, Pangborn, v. Young*, 32 N. J. L. 29; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602; *Swann v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825; *Pacific R. Co. v. The Governor*, 23 Mo. 353, 66 Am. Dec. 673; *State, George, v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *Evans v. Brune*, 30 Ind. 514, 95 Am. Dec. 710; *Duncombe v. Prindle*, 12 Iowa, 1; *Koehler v. Hill*, 60 Iowa, 543; *Annapolis v. Harwood*, 32 Md. 471, 8 Am. Rep. 161; *People v. Devlin*, 33 N. Y. 269, 88 Am. Dec. 577; *Brodnax v. Groom*, 64 N. C. 244; *Miller v. State*, 3 Ohio St. 475.

Which would be more detrimental to the people, the wiping out of all laws from the adoption of the Constitution to the present time, or a decision holding that the ignoring of an insignificant rule of procedure in the passage of a bill does not invalidate a law?

The legislature is the sole judge of the facts constituting the urgency for dispensing with the constitutional provision requiring three readings on different days.

Sutherland, Stat. Constr. 48; *Hull v. Miller*, 4 Neb. 508.

The phrase "final passage" in § 15 of art. 3 of the Constitution is a technical parliamentary phrase, and means what in parliamentary law is meant thereby.

Cushing, Law and Pr. of Legislative Assemblies, p. 831, § 2129, pp. 864, 865, §§ 2228-2230, pp. 865-868, chaps. 15, 16, 17, and especially §§ 2232, 2233, 2235-2237, 2239, 2240, 2243, 2244, 2254, 2259 *et seq.* 2274; Jefferson's Manual, § 40, p. 86, § 42, p. 92, § 45, p. 95 *et seq.*; United States Senate Rules, 26; United States House Rules, 109, 110; United States Joint Rules, 12, 13, 16, 18; Cushing's Manual, cl. 218.

"Final passage" in this technical sense is the act whereby either house votes on the bill as

a whole and passes it. It is called "final" because usually it does not occur until other votes have been taken with regard to the bill and as to the passage of parts of it and amendments to it.

Leavenworth County Comrs v. Higginbotham, 17 Kan. 62; *State v. Pearman*, v. *Liebtke*, 9 Neb. 490; *State*, *Atty. Gen.*, v. *Buckley*, 54 Ala. 599; *People*, *Scott*, v. *Chenango Supers*, 8 N. Y. 327.

Amendments subsequent to final passage in either house do not need the yeas and nays nor entry of anything more than the result of the vote.

Hill v. Miller, 4 Neb. 508; *McCulloch v. State*, 11 Ind. 424; *People*, *Scott*, v. *Chenango Supers*, 8 N. Y. 327; *Division of Howard County*, 15 Kan. 194; *People*, *Atty. Gen.*, v. *Burch*, 84 Mich. 408; *State v. Doherty*, 2 Idaho, 1106.

Journals are records and in all respects touching proceedings under the mandatory provisions of the Constitution will be effectual to impeach and avoid the acts recorded as laws and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred; that amendments made by one branch, though extensive, were germane; that they were concurred in by the other branch, though the journals may be silent.

Sutherland, *Stat. Constr.* 48; *McCulloch v. State*, 11 Ind. 424; *Schuyler County Supers v. People*, *Rock Island & A. R. Co.* 25 Ill. 181; *Miller v. State*, 3 Ohio St. 475; *Pack v. Barton*, 47 Mich. 520; *State*, *Minnesota R. Constr. Co.*, v. *Hastings*, 24 Minn. 78; *Walker v. Griffith*, 60 Ala. 361; *Blessing v. Galveston*, 42 Tex. 641; *Vincent v. Knox*, 27 Ark. 279; *English v. Oliver*, 28 Ark. 317; *Usener v. State*, 8 Tex. App. 177; *Worthen v. Badgett*, 32 Ark. 516; *Bond Debt Cases*, 12 S. C. 200; *Osborn v. Staley*, 5 W. Va. 85, 18 Am. Rep. 640.

A substitute is not a new bill, and amendments are admissible during the progress of a bill throughout the process of enactment; and such substitutes are not subject to the same rules as the bills in regard to the number of readings.

Sutherland, *Stat. Constr.* p. 50, § 49; *Miller v. State*, 3 Ohio St. 475; *People*, *Beardsley*, v. *Wallace*, 70 Ill. 680; *State*, *Atty. Gen.*, v. *Platt*, 2 S. C. N. S. 150; *Hull v. Miller*, 4 Neb. 508.

An act will not be adjudged void, unless the journals affirmatively show a lack of compliance with the constitutional forms and requirements in its passage.

Prescott v. Illinois & M. Canal, 19 Ill. 324; *Detroit v. Detroit Board of Assessors*, 91 Mich. 78, 16 L. R. A. 59; *Black*, *Const. Law*, 76, 297; *Illinois v. Illinois C. R. Co.* 33 Fed. Rep. 730; *Opinion of The Justices*, 52 N. H. 622; *Hull v. Miller*, 4 Neb. 508; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294.

In the absence of an entry in the journals showing affirmatively that such provisions of the Constitution were ignored, it will be held

that the constitutional requirements were strictly followed.

Hunt v. State, 23 Tex. App. 396; *State*, *Whitson*, v. *Algood*, 87 Tenn. 163; *Cooley*, *Const. Lim.* 163, 167; *State*, *Markens*, v. *Brown*, 20 Fla. 407; *State v. Peterson*, 88 Minn. 143; *Sutherland*, *Stat. Constr.* p. 47, §§ 146, 147; *People v. Dunn*, 80 Cal. 211; *Glidewell v. Martin*, 51 Ark. 559; *Black*, *Interpretation of Laws*, p. 31, § 18; *Hall v. Steele*, 82 Ala. 562; *Schuyler County Supers v. People*, *Rock Island & A. R. Co.* 25 Ill. 181; *McCulloch v. State*, 11 Ind. 424; *Miller v. State*, 3 Ohio St. 475; *State*, *Atty. Gen.*, v. *Francis*, 26 Kan. 724; *State v. McConnell*, 8 Lea, 341; *Blessing v. Galveston*, 42 Tex. 641; *Re Roberts*, 5 Colo. 525; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93.

Charles, J., delivered the opinion of the court:

The controlling question in this case is, Is the act of March 12, 1897, regulating the fees and compensation of county and precinct officers, valid? Section 15, art. 3, of the Constitution, is as follows: "No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: provided, in case of urgency, two thirds of the House where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present." It is contended by the appellant that the provisions of said section of the Constitution were not complied with by the legislature in the passage of said act. The respondent contends that the presumption is that the legislature complied with all of the provisions of the Constitution, and that the court cannot go back of the enrolled bill for the purpose of ascertaining whether the provisions of the Constitution were followed or not. Upon this question there is some conflict of authority, but the great weight of authority and the soundest reasoning support the rule that the court not only may, but it is the imperative duty of the court, when this issue is before it, to look to the journals of the legislature, and see if, in passing the statute in question, the legislature had proceeded in the manner provided by the Constitution. By the terms of said section of the Constitution, *supra*, six things must be done in the passage of a law, to wit: First, the introduction of the proposed law by bill, necessarily in writing; second, the printing of the bill, with the amendments thereto; third, the reading of the bill on three several days in each house, previous to a final vote thereon; fourth, the reading of the bill on its final passage, section by section; fifth, a vote on the final passage by yeas and nays; sixth, the concurrence of a majority of the members present. These provisions are man-

datory, and it is the imperative duty of the legislature to obey them. As we said in the case of *Dunbar v. Canyon County Comrs.* (decided at the present term) 49 Pac. 409, the duty of supporting the Constitution of the state is imposed upon all public officers by the solemn obligations of the official oath, which obligations cannot be discharged by disobeying, ignoring, and setting at naught the plain provisions of the Constitution, but only by obedience thereto. In construing said section of the Constitution, it is necessary to inquire into the extent of the application of the proviso which we find therein, *viz.*: "In case of urgency two thirds of the house where such bill may be pending may upon a vote of the yeas and nays dispense with this provision." A careful reading of the section shows that that part of the section which precedes the proviso consists of three separate clauses disjunctively stated. The first clause relates to the introduction of the bill, the second to the printing of the bill, the third to the reading on three several days. We are of the opinion from the context, from the conditions which the framers of the Constitution thought might arise, and from the apparent object which they had in view, that said proviso applies, and was only intended to apply, to the last clause preceding the proviso. It was not intended to authorize the legislature to dispense with the introduction of the proposed law by bill, nor was it intended to authorize the legislature to dispense with printing the bill. The framers of the Constitution evidently intended by said provision to put it in the hands of the legislature, in case of necessity to act promptly, to pass a bill in one, instead of not less than six days, and we can imagine a case where such urgency would exist. For instance, an insurrection should take place, and in order to quell it an appropriation should be promptly made, or the executive should be given some power not then given by existing law, or it should be necessary to forthwith enlarge the militia. The object of requiring the printing and three several readings on separate days is a good one. It was to insure the rights and interests of the people against hasty and inconsiderate legislation. The people in making and adopting the Constitution were not content with requiring the printing and reading one time only of bills, but have absolutely required that all bills shall be read on three several days in each house; and these several readings cannot be dispensed with, except "in case of urgency, two thirds of the house where such bill may be pending may upon a vote of the yeas and nays dispense with this provision."

The history of the passage of the act in question, first known as "Senate Bill No. 2," afterwards as "Substitute Senate Bill No. 2," as shown by the journals of both houses, is briefly as follows:

In the senate: "January 7. Senate bill No. 2, introduced by Senator Thomas A. Davis, read for the first time and referred to the committee on judiciary. January 11. Judiciary reported, and recommended that the bill be printed. January 20. Bill reported printed. Same day, senate bill No. 2, by Davis, was read the second time by title and referred to committee on engrossment. January 22.

Taken from committee on engrossment, and referred to general calendar for action of the committee of the whole. January 23. Senate bill No. 2 made a special order of business for Monday, January 27, at 2:35 o'clock P. M. January 26. Committee of the whole, having the bill under consideration, reported progress, and further consideration postponed for one week. February 2. The committee of the whole reported progress, and asked leave to sit again. February 8. Consideration by the committee of the whole. The committee reported progress, and recommends that the bill retain its place on the calendar, and asked and was granted leave to sit again. On motion of Senator Joseph C. Rich, Senators Ballentine (of Blaine), Keller and Davis (of Oneida) were appointed a special conference committee on senate bill No. 2, and as such to report at two o'clock P. M. to-morrow, and the further consideration of the bill postponed until that hour. February 10. Thomas A. Davis, of the special conference committee on senate bill No. 2, informed the senate that the house had passed a resolution to confer with a like committee from the senate on said matter, and asked further time, which was granted. February 15. Committee reported, and submitted a substitute for senate bill No. 2, and recommended the passage of the same. Substitute for senate bill No. 2, introduced by conference committee: 'An Act Regulating the Fees and Compensation of the Various County and Precinct Officers within the State of Idaho.' Read the first time by title, under suspension of § 15, art. 8, of the Constitution, and senate rules, by unanimous consent, and referred to committee on public printing. February 17. Substitute for senate bill No. 2 reported back, printed, and placed on the calendar. February 24. The committee of the whole reported progress in consideration of substitute senate bill No. 2, and asked and was granted leave to sit again. On the same day the following report was adopted by an aye and nay vote of 12 to 7, *viz.*: 'Mr. President: Your committee of the whole reports that it has had under consideration substitute for senate bill No. 2, and reports same back, with the recommendation that it do pass.' Substitute for senate bill No. 2 was filed for second reading, and considered engrossed. Motion made to reconsider the report of the committee of the whole was laid on the table on an aye and nay vote of 13 to 7. Substitute bill No. 2 was considered engrossed, and filed for third reading. February 16. Substitute to senate bill No. 2 read the third time, and passed by an aye and nay vote of 15 to 5. March 8. On motion the senate concurred in house amendments to substitute senate bill No. 2, with the exception of the twenty-second amendment, and the house notified of such concurrence. On the same day the senate received a message from the house to the effect that the house of representatives had passed substitute to senate bill No. 2 by conference committee, as amended. On the same day the bill was reported correctly enrolled, and signed by the president of the senate and speaker of the house and transmitted to the governor."

In the house: "February 2. Message from the senate that the senate had passed substitute

to senate bill No. 2, and that same was therewith transmitted. March 1. Mr. Keat moved that the rules of the house, and article 3, § 15, of the Constitution, be suspended, and all senate and house bills, joint resolutions, and memorials on first and second reading be read first and second time by title, and referred to their appropriate committees, which motion was adopted by an aye and nay vote of 24 to 5; and under the said motion substitute for senate bill No. 2, by conference committee, 'An Act Regulating the Fees and Compensation of the Various County and Precinct Officers within the State of Idaho,' was read the first and second time by title, and referred to committee on county officers. March 2. The committee on county officers reported the bill back, and recommended its passage. The bill was then read a third time, and referred to the judiciary committee. March 4. The committee on judiciary reported the bill back, with amendments, and recommended that said amendments be considered *seriatim* the house, and recommended that the bill, with the amendments thereto, do pass. March 6. Mr. Keats offered two amendments which were adopted. Mr. Rogers offered an amendment which was rejected. Mr. Wright offered two amendments which were rejected. The committee of the whole recommended twenty amendments, numbered from one to twenty, respectively. The question was then put, 'Shall the bill as amended be passed to third reading?' and which question prevailed. Mr. Rice then offered an amendment which was adopted. Then, on an aye and nay vote, 21 to 18, the vote to pass the bill to third reading was reconsidered. Mr. Workman moved, as a substitute to amendment No. 13 by committee of the whole, the amendment herein referred to, as an amendment to the amendment by the committee of the whole, being amendment No. 13. The question was then put, 'Shall the substitute motion be adopted?' and carried by an aye and nay vote of 25 to 10, and so the substitute motion was adopted. It was then ordered that the bill be passed to third reading. Mr. Elder then moved that the rules of the house and § 15 of art. 3 of the Constitution be suspended, and senate bill No. 2 be considered engrossed, read a third time, and placed upon its final passage, which motion was, on an aye and nay vote of 23 to 8, declared carried. And so the rules and Constitution were suspended, and the house passed to the order of third reading of house bills. Senate bill No. 2 by conference committee, 'An Act Regulating the Fees and Compensation of the Various County and Precinct Officers within the State of Idaho,' was read a third time. The bill was then put on its final passage, on an aye and nay vote, and carried, the vote being 32 to 3. March. 8. Message received from the senate as follows: 'Mr. Speaker: I am instructed to inform your honorable body that the senate has had under consideration and concurred in house amendments to substitute to senate bill No. 2, with the exception as to the 22d amendment, which has been amended as follows: In line 1, after the word "subdivision," strike out the figure "5" and insert the figure "3," in line 2, strike out the figures "79" and insert the figures "78,"—

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which is herewith transmitted. Respectfully, Wm. V. Helfrich, Asst. Secretary.' On the same day the committee on printing reported that it had had printed amendments to substitute for senate bill No. 2, original amendments returned. Workman moved that the House concur in, the amendment proposed by the senate as to senate bill No. 2, in 22d amendment; subdivision 5 to be changed to 3, and to be in line 78 instead of line 79, which motion prevailed."

And this is the record as it appears in the journals of the two houses. While many irregularities worthy of criticism appear in this record, we will only call attention to some of the more flagrant violations of the Constitution. As shown by the senate journal, substitute to senate bill No. 2, offered by the conference committee, which was in effect and in fact a new bill, was read the first time by title; the senate assuming to suspend § 15 of art. 3 of the Constitution without an aye and nay vote, a thing which cannot be done under the provisions of the Constitution. It does not appear from the journal of the Senate that substitute to senate bill No. 2 was read the second time. The recital that it "was filed for a second reading" does not show that it was read a second time. Each house is required by § 13, art. 3, of the Constitution, to keep a journal of its proceedings. This means that the journal shall show all the proceedings of the house, and all of the steps taken in the passage of every bill. By reason of this provision the journal becomes, not only the best evidence, but the exclusive evidence, of what was done by the house keeping such journal, and courts must impute to the record and statements in the journal absolute verity. The recitals in the journal are conclusive and cannot be contradicted. *Burkhart v. Reed*, 2 Idaho, 470; *Clough v. Curtis*, 2 Idaho, 489; *Wright v. Kelly* (Idaho) 48 Pac. 565; *Bellevue Water Co. v. Stockslager*, Id. 503; *Blaine County v. Heard* (Idaho) 45 Pac. 890. In the passage of a bill by either house, the journal of such house must show affirmatively that all the requirements of the Constitution were complied with by such house. To suspend the provision in regard to reading all bills on three several days in each house, an urgency must exist; and the suspension must be by an aye and nay vote, and by two thirds of the house. It is difficult to see that an urgency could possibly exist in the passage of ordinary measures like the act in question, but, waiving that question, it appears that the senate assumed to suspend the reading of the bill at length without an aye and nay vote thereon, in absolute violation of the Constitution. If either House can disregard one plain provision of the Constitution, then it may disregard all of its provisions, and the Constitution, instead of being the fundamental law of the land, is a mere sham, an idle mockery, a nullity. In the house of representatives it does not appear from the journal that the bill was read a first and second time on several days, or that the provision in this regard was suspended. True it is that on the 1st day of March Mr. Keat introduced in the house an omnibus motion suspending § 15, art. 3, of the Constitution, and dispensing with the reading in full of the first and second

times of "all senate and house bills, joint resolutions, and memorials," and permitting the same to be read the first and second time by title only. This provision of the Constitution is to be suspended only in case of urgency, and only with reference to a bill which is then pending and before the house for consideration at the time of the suspension. It cannot be suspended generally. It cannot be suspended for one day. If the legislature, or either house thereof, can suspend it for one day, then such house could suspend it for the entire session, and as to all business, and the provision would be an idle toy to be played with and tossed aside at will. The house adopted twenty-two amendments, and it does not appear from the house journal that these amendments were read on three several days. This is required by the Constitution. Nor does it appear that these amendments were printed prior to the final passage of the bill by the house, which the Constitution absolutely requires. The journal of the senate fails to show that the bill was read on three separate days in the senate after it had been amended twenty-two times by the house, or that it was read in the senate at all after it was amended by the house, or that the bill with the house amendments thereto was ever finally voted on in the senate after it had passed the house. A bill may originate in and pass one house, and then be sent to the other house, and be amended in the latter house so as to change the entire purpose of the bill. In such event, if the amended bill is permitted to become a law without having been read or passed by the other house, it would be a violation of the Constitution. It was the intention of the framers of the Constitution to require amendments that might be adopted to a pending bill to be read three times on several days, the same as original bills, or sections of the pending bill which is amended. In the case at bar, speaking from the journal of the senate, the bill in question which passed the house after being materially changed, was never read in the senate or put to a vote on final passage in the senate. A bill which passes the house, and is materially changed by amendment by the other house, and then sent back to the house where it first originated, must go through the same procedure as to reading and final vote as if it was an original bill. The reason for this rule is obvious. In the case at bar, substitute to senate bill No. 2, after it was amended in twenty-two instances, was not the bill which the senate passed and sent to the house, and must, under the Constitution, when returned to the senate, be treated (at least, so far as the amendments are concerned) by the senate as if it originated in the house. The mere declaration by the senate that "we concur in the house amendments" does not answer the requirements of the Constitution.

The plaintiff, in preparing his case, procured a transcript of the journals of both houses, certified by the secretary of state to be full and correct. This is the correct practice, and we commend it.

The court should treat the enrolled bill (the fact that it is regularly enrolled) as presumptive evidence that the legislature, in passing it, performed all of its duties; but this presump-

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tion is subject to rebuttal. And when the validity of a statute is attacked the party attacking should show by the journals that at least one requirement of the Constitution was disregarded, and the failure of the journals to show that any constitutional requirement was obeyed is conclusive evidence that such requirement was not obeyed. If all the requirements of the Constitution had been complied with, as to reading, printing, and voting on final passage, in regard to the bill in question, by both houses, then those portions of the act in question which relate to state officials are void for the reason that such matter is not embraced in the title to said act, as required by § 16, art. 3, of the Constitution. We only refer to this for the reason that it tends to show how lightly the legislature treated the provisions of the Constitution in passing the act in question. The object of the act in question, which was to cut down the excessive cost of litigation, and correct abuses in the regulation of fees of county and precinct officers, is a good one, and one with which this court is in full sympathy. It is therefore with great reluctance that we hold the act in question to be void, but there is no other alternative.

The conclusions reached, after a careful and full consideration, are: First. To determine the validity of a statute, the court can and should, in the proper case, go back of the enrolled bill to the journals of both houses, to ascertain whether the requirements of the Constitution were complied with by the legislature in enacting such statute. Second. The act in question is void *in toto*, by reason of the failure of the journals of the legislature to show a compliance with the requirements of the Constitution in passing said act.

The judgment appealed from is reversed, and the cause remanded, with instructions to the trial court to enter judgment in favor of the defendant. Costs of appeal awarded to the appellant.

Sullivan, Ch. J., and Huston, J., concur.

A petition, for rehearing having been filed, **Huston, J.** on August 24, 1897, handed down the following response:

The learned attorney general, on behalf of the respondent, has filed a voluminous petition for rehearing which we have carefully considered. A perusal of the same shows that the acquaintance of the attorney general with the arguments of appellant, printed and oral, is as limited as is his knowledge of the decision heretofore rendered in this case. In the petition he says: "No reference is made in the opinion of the court herein to said § 13 [art. 3], and we are of the opinion that the court, in deciding said case, overlooked said section." An inspection of the opinion will show that we did refer to § 13, art. 3, of the Constitution; and for the benefit of the learned attorney general, whose knowledge of the said opinion seems to have been derived from newspaper articles and street-corner talks, we will here repeat what we said in the original opinion in regard to said section, to wit: "Each house is required, by § 13, art. 3, of the Constitution, to keep a journal of its proceedings. This means that the journal shall show all of the proceedings of the house, and all of the

steps taken in the passage of every bill. By reason of this provision the journal becomes, not only the best evidence, but the exclusive evidence of what was done by the house keeping such journal, and courts must impute to the record and statements in the journal absolute verity." We will add to what was said before that said section requires each house to keep a full, not a partial, record of its proceedings. If, in the face of this provision, the legislature can omit from its journals part of its proceedings, it may omit other parts of its proceedings without limit, and the section would be almost, if not wholly, ineffectual. The authorities cited to establish the rule that mere silence of the journal to show that a certain thing was done does not prove that it was not done, we apprehend, arose under Constitutions in many respects unlike ours. An examination of many of the authorities cited by the respondent to support this contention seems to limit the rule to those acts which the Constitution does not require to appear in the journal. But our Constitution clearly intends that all of the proceedings of each house shall appear in the journal. Hence we must presume that everything done by each house, all of its proceedings, and nothing else, appear in the journal. In fact, the legislature seems to have taken this view, and has caused the minute details of its proceedings to be recorded in its journals.

Again, the attorney general is in error when he says in the petition for rehearing, at page 5, that "appellant has never contended that the journals do not show that the yea and nay vote was taken upon the final passage of the bill." We respectfully refer the attorney general, and all other persons who entertain erroneous ideas of the court's rulings and what was argued before the court, to page 9 of appellant's brief, where the following language is found, to wit: "Calling the court's attention to the final passage of this act through the senate, we find the following journal entry in regard thereto (p. 12, folio 85, of the transcript): 'Motion. Senator J. C. Rich moved to concur in the house amendment to substitute senate bill No. 2, with the exception of the 22d amendment. Carried, and the house was notified.' Appellant contends that, as this was the final passage of the act through the senate, it was a violation of, and did not comply with, the requirements of the Constitution as to such final passage, as there was no vote taken by ayes and nays, which the Constitution requires to be done." So the record does show that the appellant argued and contended that the senate never passed the act in question; this contention being necessarily based upon the idea that the bill which the senate first passed was materially changed by the house, and after being so changed was not read or passed on an aye and nay vote in the senate.

It is a matter of regret that the attorney general of the state should ridicule any of the provisions of the Constitution, or speak of them as "insignificant," or use this language, which we find in the petition for rehearing: "We admit that the Constitution of the state is surrounded with a halo of sanctity and solemnity, a great part of which is fictitious." The Constitution requires certain things to be done in

connection with the passage of any and all laws. It is true that the doing of these things is a matter of procedure. But by what right shall anyone be permitted to say that any of the things required by the Constitution to be done are "insignificant," and may therefore be omitted? Has anyone more right to say that one of the things required by the Constitution is insignificant and may be omitted than he has to say that any other thing required is insignificant and may therefore be omitted? If the right to ignore one provision exists, the right to ignore all exists. If the court must wink at one violation of the Constitution, it must wink at other violations of it. If the court must approve one violation of the Constitution, it must, to be consistent, approve other violations of it. We must be subject to the Constitution, or else subject to the whims of those individuals who treat the sanctity of the Constitution as fictitious and its provisions as insignificant. We cannot serve both God and Mammon. We must travel either the one road or the other. We think that safety and security demand that we stick to the letter and spirit of the Constitution, that we obey all of its mandates, until the people, the source of all power, who made it, change its provisions. Let us obey the Constitution in all of its requirements, and treat all of its provisions as important.

Mr. Sutherland, in his work on Statutory Construction, speaking of another provision at § 79, says: "The efficiency of this constitutional remedy to cure the evil and mischief which has been pointed out depends on judicial enforcement; on this constitutional injunction being regarded as mandatory, and compliance with it essential to the validity of legislation. The mischief existed notwithstanding the sworn obligation of legislators; it might be expected to continue notwithstanding that that obligation is formulated and emphasized in this constitutional injunction, if it be construed as addressed exclusively to them, and only directory. It would, in a general sense, be a dangerous doctrine to announce that any of the provisions of the Constitution may be obeyed or disregarded at the mere will or pleasure of the legislature, unless it is clear beyond all question that such was the intention of the framers of that instrument. It would seem to be a lowering of the proper dignity of the fundamental law to say that it descends to prescribing rules of order in unessential matters which may be followed or disregarded at pleasure. The fact is this: that whatever constitutional provision can be looked upon as a directory merely is very likely to be treated by the legislature as if it was devoid of moral obligation, and to be therefore habitually disregarded." Mr. Black, in his work on Interpretation of Laws, at § 18, quotes from the above section of Mr. Sutherland's work with approval, and adds: "As a rule, therefore, whenever the language used in a Constitution is prohibitory it is to be understood as intended to be a positive and unequivocal negation." Judge Cooley, in his work on Constitutional Limitations (5th ed. p. 93), says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to

the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication." Continuing, Judge Cooley says (p. 94): "There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." And at page 156 he further says: "It is a necessary attribute of sovereignty that the expressed will of the sovereign is law; and while we may question and cross-question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet, when the intent is made out, it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not. But when the legislative power of a state is to be exercised by a department composed of two branches, or, as in most of the American states, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the lawmakers be clearly expressed, but it is also essential that it be expressed in due form of law since nothing becomes law simply and solely because men who possess the legislative power will that it

shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." Mr. Black, in his work on Constitutional Law, at page 836, says: "The constitutions of many of the states require that a bill, before it shall become law, shall be read a certain number of times (usually two or three) in each house. In respect to the manner of such reading the provision is considered merely directory, but not so with regard to the fact of its being read. If the constitution is not obeyed in this latter particular the statute is void." In harmony with the above views, with which we are in full accord, we are compelled to hold that the provisions of our Constitution limit the power of the legislature in the enactment of laws to the mode therein prescribed.

The persistent contention of the respondent that the court should not go back of the enrolled bill to the legislative journals to see if the act in question was passed in the mode required by the Constitution in face of the fact that this court has repeatedly held that it may do so, is ill advised and not worthy of consideration. To hold in accordance with this contention of respondent would make the provisions of the Constitution merely directory and subject to the whims of either house of the legislature, contrary to the expressed will of the people. That the court may go to the journals of the legislature to see if the provisions of the Constitution were obeyed by the legislature in the enactment of a law had become the established doctrine of this state before the convening of the last session of our legislature, and the legislature was fully aware of this settled rule when it attempted to pass the act in question. The rules of construction applicable to statutes and constitutional provisions should be permanent and unchangeable. On this point Judge Cooley, in his work cited *supra*, at page 67, says: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying modes of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed, and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legisla-

ture which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and, if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

There is no intention disclosed in the Constitution to make the legislature the exclusive judges of the constitutionality of its acts. The legislature must, in the very nature of things, use its judgment, in the first instance, as to whether a proposed action by it is constitutional or not, or whether it is acting in the manner required by the Constitution. But whether the legislature should make an honest mistake, or perversely violate the Constitution, the remedy for such violation exists, nevertheless, and courts must refuse to aid and abet such violations of the Constitution. The court does this by refusing to recognize the validity of any act passed in violation of the mandates of the Constitution.

The learned counsel for respondent (the attorney general) cites the provisions of § 9, art. 3, of our Constitution, to the effect that each house "shall determine its own rules and proceedings," etc. We are somewhat at a loss to understand the pertinency of this quotation in the consideration of the questions involved. Does the learned attorney general desire to be understood as claiming that this is a controlling provision of the Constitution, and is to be taken literally, without regard to the provision of § 15, art. 3? This would be a strange and unheard-of rule of construction, but without it the quotation of counsel is idle.

In preparing his petition for rehearing the learned attorney general says: "Nor have they [counsel for appellant] ever claimed that the journals affirmatively show that the other requirements of the Constitution relating to the passage of the bill were not complied with." This proposition is on a par with that other proposition so often reiterated, that this court, in its opinion in this case, assumed to be the judge as to whether an "urgency," as provided in § 15 of art. 3, existed. Is it carelessness or fatuity which causes such an entire misstatement of fact as well as conclusion? What the court did say, in effect, was this: That as the Constitution authorized the suspension by the legislature of the provisions of § 15, art. 3, of the Constitution, with reference to the reading of bills on three several days, only when an urgency requiring such suspension existed, the fact of such urgency must appear upon the record; otherwise the

whole purpose and intention of the provision would be defeated. To sum up this whole matter in one sentence: What this court has held is this: Where the mandatory provisions of the Constitution require certain things to be done by the legislature in the enactment of laws, the court will hold that where a law has been passed without a compliance with such mandatory constitutional provisions, the same is unconstitutional. Against this conclusion as a legal proposition, we have not been, nor shall we ever be, cited to a single authority or principle predicated upon principles upon which our government is founded.

We cannot better answer the oft reiterated claim, not argument, against the decision in this case, that it assumes that the amendments to a bill must be subjected to the same constitutional rules as the original bill, than by quoting from some of the very numerous authorities cited by the learned attorney general in his petition for a rehearing, as illustrative of the utter inutility of the rule contended for by him. We cite from *Cooley on Constitutional Limitations*, 5th ed. p. 167, note 3: "A practice has sprung up of evading these constitutional provisions by introducing a new bill after the time has expired when it may constitutionally be done, as an amendment to some pending bill, the whole of which, except the enacting clause, is struck out to make way for it. Thus, the member who thinks he may possibly have occasion for the introduction of a new bill after the constitutional period has expired, takes care to introduce sham bills in due season which he can use as stocks to graft upon, and which he uses irrespective of their character or contents. The sham bill is perhaps a bill to incorporate the city of Siam. One of the member's constituents applies to him for legislative permission to construct a dam across the Wild Cat river. Forthwith, by amendment, the bill entitled a bill to incorporate the city of Siam has all after the enacting clause stricken out, and it is made to provide, as its sole object, that John Doe may construct a dam across the Wild Cat. With this title and in this form it is passed; but the house then (considerately) amends the title to correspond with the purpose of the bill, and the law is passed, and the Constitution at the same time saved. This trick is so transparent, and so clearly in violation of the Constitution, and the evidence at the same time is so fully spread upon the record, that it is a matter of surprise to find it so often resorted to." In the case of *People, Barnes, v. Starnes*, 35 Ill. 121, 85 Am. Dec. 343, it is said the courts should not enforce a legislative act unless there is record evidence from the journals of the two houses that every material requirement of the Constitution has been satisfied. In the case of *Miller v. State*, 3 Ohio St. 475, much relied upon by respondent, we find that the constitutional provision was as follows: "Every bill should be fully and distinctly read on three different days, unless, in case of urgency, three fourths of the house in which it shall be pending shall dispense with this rule." The court held that as the record did show that the bill had been read a third time, although omitting to show that it had been read "fully and distinctly," there was a suffi-

cient compliance with the constitutional provision. In commenting upon this case, Judge Cooley says (Cooley, Const. Lim. 5th ed. p. 162, note 1): "The distinctness with which any bill must be read cannot possibly be defined by any law; and it must always, from the necessity of the case, rest with the house to determine finally whether in this particular the Constitution has been complied with or not; but the rule respecting three several readings on different days is specific, and capable of being precisely complied with, and we do not see how, even under the rules applied to statutes, it can be regarded as directory merely, provided it has a purpose beyond the mere regular and orderly transaction of business. That it has such a purpose, that it is designed to prevent hasty and improvident legislation, and is therefore not a mere rule of order, but one of protection to the public interests and to the citizens at large, is very clear; and independent of the question whether definite constitutional principles can be dispensed with in any case on the ground of their being merely directory, we cannot see how this can be treated as anything but mandatory."

The respondent seriously attacks that part of the decision in this case which holds that amendments to a pending bill must be read on three several days, in each house, unless in case of urgency the three readings on several days be dispensed with by two thirds of the house on an aye and nay vote. That this rule is correct, and in harmony with the letter and spirit of our Constitution, we are fully convinced. A "bill," within the contemplation of the Constitution, means a draft of a proposed law, and nothing else. After a bill has been introduced in one house, and an amendment which changes one or more of its original features or adds new features is adopted by such house, the amendment then enters into and becomes a part of the bill or draft of the proposed law, and is as much a part of the bill as if it had been incorporated in the draft of the proposed law before it was introduced into such house. The Constitution provides (art. 3, § 15) that "no law shall be passed except by bill," and further says: "Nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon." *Ibid.* The term as here used is generic, and means not only the draft of the proposed law as originally introduced, but such draft with all of the graftings which may be made thereon. In other words it means the full draft of the law which the legislature passes. It is argued that the procedure prescribed by the Constitution is burdensome, and will seriously impede legislation. If we admit this to be true, the answer is that the remedy is in a change of the Constitution, not in violations of its mandates. The court did not make, nor can it change, the provisions of the Constitution. We are asked to give our assent to the act in question, and pronounce it valid, when it was unquestionably passed, not in the manner required, but in a manner forbidden, by the Constitution. We cannot do so, and, should we do so, it would be an attempt on the part of one branch of the government to modify the provisions of the Constitution and usurp

a power which beong to, and can only be exercised by, the people in their sovereign capacity. The object of these provisions is twofold: First, to insure against hasty and inconsiderate legislation, by giving the opportunity to each member of the legislature to familiarize himself with all of the provisions of every proposed law, and afford sufficient time for reflection as to the effect and consequences of the enactment of any proposed law; second, to give the people the opportunity of learning what is being done or proposed to be done by their legislature, thus affording them opportunity to remonstrate against the passage of any proposed law which they might regard as detrimental or obnoxious. These objects are thwarted and wholly defeated if amendments are not treated as parts of the bill, and read three times on several days, and read section by section on final passage, and then passed by an aye and nay vote. If, under the guise of an amendment, a proposed law which has never been read in both houses is permitted to have the sanctity of law, the provisions of the Constitution amount to nothing, and the will of the people may be ignored, and the object of the provisions entirely defeated. More than this, the floodgates of fraud would be thrown wide open, as to the enactment of laws, and the people would be without remedy. To show how easily this could be done, just suppose that one senator and one representative desire to pass a certain measure which they know will be obnoxious to the people; that, by agreement they should draft a bill which is entirely different in intent and effect from the one which they desire passed; that it is introduced into the senate, and perchance known as "Senate Bill No. 2," where it is read on three several days, and properly passed on an aye and nay vote; that it is then sent to the other house, where it is read on three several days, when the member who is in collusion with the senator who introduced it in the senate offers his amendment, which the house adopts, and which changes the entire object, scope, and effect of the proposed law, and which, although relating to the same subject and the same title, is in fact a new and different bill from the one introduced in the senate; that this new bill, called an "amendment," is then printed and passed by the house without being read but one time; that the house then sends a message to the senate saying that "the house has passed senate bill No. 2 as amended;" and that thereupon a senator "moves that the senate concur in the house amendments to senate bill No. 2," which motion should be declared passed without the amendment having been read or voted on by an aye and nay vote in the senate. Would this not be "whipping the devil around the stump," and doing indirectly what the Constitution directly forbids? Yet this was done in the case at bar, in violation of all established law, and in contravention of the provisions of the Constitution.

In this connection, and in approval of what is therein said, we will quote extensively from the decision of the Kentucky court of appeals in *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 556, as follows: "Section 46 of our Constitution provides: 'No bill shall become a

law, unless on its final passage it receives the votes of at least two fifths of the members elected to each house, and a majority of the members voting, the vote to be taken by yeas and nays, and entered in the journal: provided, any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each house.' The act originated in senate, and passed that body, upon a yea and nay vote, entered upon its journal, by the required majority. It then went to the other house, where, after being amended, it passed, upon a like vote, entered upon its journal by a like majority. It then came back to the senate, where the amendments were concurred in without a yea and nay vote, and without the vote of a majority of the members elected. It is conceded by the counsel for the appellees, and seems plain, that this mode of proceeding did not conform to the Constitution. It complied with it in neither letter nor spirit. The object of the section above cited was to have the assent of a majority of all of the members elected to each house to all the provisions of the act, and that this should appear by a yea and nay vote entered upon its journal. If a bill, after passing one house in the proper manner, and then, after amendment, passing the other house in like manner, could come back to the house in which it originated, and be adopted by a majority of those voting, or a quorum, it would defeat this object, and render the section ineffectual. Let us look at it practically. An appropriation bill of \$100 originates in the senate, and is properly passed. It goes to the house, where it is amended by making the sum \$10,000, and is then properly passed by it. It returns to the senate for concurrence, and is adopted, as amended, by a majority of those present, without a yea and nay vote. Can it be well contended that this would be a compliance with the Constitution? If so, then, there being thirty-eight senators, it would require twenty, or a majority of them to pass a bill for a trifle, but, after being amended in the house so as to perhaps bankrupt the treasury, it could be concurred in by the senate by the votes of eleven members, or a majority of a quorum; and in case of the house with its 100 members, it would require 51 to pass the bill, if it originated there, but only twenty-six, or a majority of a quorum, to concur in it after it had been changed in like manner by the senate. Further illustration seems needless. It is true, it has been held that the 'final passage' of a bill means when it first passes the body, and not when it returns to it, after amendment, for adoption; and it is said that the constitutional provision as to the number of votes, and the entry of the yea and nay vote on the journal, does not apply to amendments, or the reports of conference committees. If so, then no matter how material the change, a majority vote of a quorum may pass the bill. The words 'final passage,' as used in our Constitution, mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may, by reason of amendment, become the least important. If so, then the

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body may pass what is practically a new bill in a manner counter to both the letter and spirit of the Constitution. When the bill was voted on in the senate, as amended, and after its return from the house, there never was any further action by the senate. It was the final vote, and therefore its final passage; and being so, a majority vote of all the members elected, with an entry by yea and nay vote upon the journal, was necessary to its constitutional enactment. The bill, as approved by the speakers of the two houses and the governor, never was passed by the senate, by a majority of all of its members, nor by a yea and nay vote. It is said, however, upon the one side, that, having been enrolled, signed by the presiding officer of each house, and approved by the governor, the act must be conclusively presumed to have been constitutionally enacted; that public policy requires this rule, else confusion will result, by our statute law being reduced from a state of certainty to one of doubt. Upon the other side, it is urged, with equal ability, that a prima facie case only is thereby presented, and that resort may be had to the journals of the legislature, which are required by the Constitution to be kept, and are kept, under the supervision of all the members, as to the truth of the matter. Each position is supported by numerous authorities, and, whether the one rule or the other obtains, more or less abuse and danger may result. There is some dynamite either way, but perhaps not as much in the latter as some apprehend, as the party questioning the enrolled and approved act must at the outset overcome a prima facie case. The first view is the English one, where there is no written constitution. It has been followed by our supreme court [U. S.] and by at least nine of the supreme courts of the states. The weight of authority in this country, as declared in perhaps as many as nineteen states, is, however, the other way."

Since the rendition of the opinion *supra* the court of appeals of Kentucky have held, in *Lafferty v. Huffman*, 18 Ky. L. Rep. 19, 82 L. R. A. 208, that a bill which has been properly enrolled, signed by the presiding officer of each house, and approved by the governor, cannot be impeached by reference to the journals of either house to show the mode of its enactment. The latter decision was followed by the same court in two later cases, *Com. v. Shelton*, 18 Ky. L. Rep. 80, and *Com. v. Hardin County Ct.* reported in 18 Ky. L. Rep. 118. Whether this change in the opinion of that eminent court was caused through fear of appearing guilty of indelicacy and disrespect towards a co-ordinate branch of government, or through fear that the rules enunciated in *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition* would entail upon the court considerable labor which otherwise would not devolve upon it, or other grave reason, we are at a loss to determine. But the doctrine announced in *Lafferty v. Huffman* simply places it in the power of the legislature to violate the provisions of the Kentucky Constitution in regard to the passage of bills. Look at it practically, taking our illustration from the decision in *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 93 Ky. 587, 18 L. R. A. 556. A bill originates in the sen-

ate, appropriating \$100, and properly passes the senate. It then goes to the house, where it is amended by making the sum \$10,000, and is then properly passed by the house. It then returns to the senate for concurrence, and is adopted by the senate without the yea and nay vote required by the Constitution, and by a majority vote of those present, but less than a majority of all the members elected to the senate. By the Kentucky Constitution this appropriation bill could not be law, for the reason that it did not receive a majority of the votes of all the members elected to the senate, voting by ayes and nays entered on the journal. The language of the Kentucky Constitution is prohibitory,—“No bill shall become a law unless,” etc., and, in the language of Mr. Black, “is to be understood as intended to be a positive and unequivocal negation.” The bill is pronounced by the Constitution to be “no law,” yet the court, by adopting the convenient rule that it will not go back of the enrolled bill, but presume, from the fact that the bill was signed by the presiding officers of both houses and approved by the governor, that all of the requirements of the Constitution relating to the passage of bills were complied with by the legislature, substituting fiction for fact, and recognizing said act as valid, simply nullifies the provisions of the Constitution relating to the passage of bills. More than that; the court pronounces that to be law which the Constitution says is not, and shall not be, law; thus making that which is void valid, and infusing life into that which never before had life. In such case it would be pertinent to inquire who made the act appropriating this \$10,000. The legislature did not, because a majority of all the members elected to the senate did not assent thereto on an aye and nay vote, for which reason the Constitution declares it shall not be law. But the court, by recognizing it as law, gives it the effect and force of law. This, in our opinion, encroaches upon the constitutional rights which the people have reserved, and invades the realm of the lawmaking branch of the government. It is not the province of the court to make law. But when a court, in effect, nullifies provisions in a Constitution, and recognizes statutes which are declared to be void by the Constitution as valid, it is simply making law. That eminent patriot and statesman, Thomas Jefferson, entertained grave fears lest the republic should be undermined and destroyed by encroachments on the part of the courts upon the constitutional rights of the people. Neither branch of government must encroach upon the constitutional rights of the people. The people of this state have reserved to themselves the constitutional right to have all of their laws made in a certain mode, and have withheld from the legislature the power to make laws in any other mode. Shall the legislature and the judiciary connive together to overthrow this constitutional right? Do the obligations of the official oath rest so lightly upon judicial officers that they may obey those obligations or not, support the Constitution or not, as they may deem expedient or inexpedient? May they enforce the fundamental law or refuse to do so at pleasure? If so, then constitutional government is in the last stages of dissolution.

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and the people have no constitutional rights which must necessarily be respected.

Respondent, in the petition for rehearing, says: “Can it be said that § 15 of art. 8 of our Constitution requires each amendment to a bill to be printed, or to be read on three several days? If such are the intent and purpose of the Constitution, one member in either house can obstruct all legislation by simply offering amendments thereto. If all amendments, however numerous, are required to be printed, and read on three several days after printing, it would cause untold delay.” To this we answer: The offering of an amendment or proposition to change a bill is not an amendment and does not become such until the house in which it is offered accepts or adopts it. Then, under the express commands of the Constitution, an amendment which has been offered and accepted, and thus enters into and becomes a part of the bill, must be printed, and the whole bill, not a part of it, must be read on three several days, unless, owing to the existence of an urgency, the three readings on several days be dispensed with by two thirds of the house on an aye and nay vote entered in the journal. The presumption is that no member of either house will offer amendments merely for the purpose of delay. And if an amendment is offered to a meritorious bill which is pending in either house, merely for delay, the house presumably will reject it, or should do so. But, if an amendment is offered which possesses merit, then the house in which it is offered should, in the interests of the people, and acting in the line of official duty, accept it, have it printed, and give it that mature and deliberate consideration which the Constitution clearly intended should be given to all bills and to all parts of every bill. The position of respondent is absurd, and the argument advanced in this particular is without merit.

Respondent contends that it is not necessary for the journals to show anything except what the Constitution expressly says must be entered upon the journals. This would dispense entirely with the office of the journal, and limit the entries therein to a record of the vote upon the expulsion of a member and on final passage of bills. The idea is not in accord with the spirit, and is opposed to the letter, of our Constitution.

Respondent also contends that, except as to the entry of the vote on final passage and the vote on expulsion of a member, it is unnecessary to enter any vote in the journal unless demanded by three members under § 13, art. 8, of the Constitution. It is the settled rule in nearly all of the courts that when an aye and nay vote is required by the Constitution an entry of such vote must appear in the journal. Our Constitution says that the reading on three several days cannot be dispensed with unless two thirds of the house, “voting by yeas and nays,” should, in case of urgency, dispense with this provision. This means that such vote shall be entered on the journal. Under § 13, three members, when they desire it, may have the vote on any motion, committee report, or any other question taken by yeas and nays, and entered in the journal. But the vote on final passage of any bill, or on a suspension

of the provision which requires the reading of bills on three several days, or on the expulsion of a member, must, whether demanded by three members or not, be by yeas and nays, and entered in the journal.

Respondent contends that some reliance and confidence must be bestowed upon the proceedings of the legislature. This is true, and clearly intended by our Constitution. The legislature is required to keep a record of its proceedings. Courts must rely upon that record, and presume it to be absolutely correct, and refuse to permit it to be contradicted. The Constitution points out the mode in which all laws shall be passed, and requires the legislature to furnish through its journals the evidence showing the mode in which it passed every bill. By the evidence thus furnished by the legislature it must affirmatively appear that any act, when questioned, was passed by the legislature in that mode only authorized by the Constitution. The object of the journals, principally, is to enable the people to ascertain that any and all laws were enacted in the manner required by the Constitution, so as to determine whether such was constitutionally passed, and therefore valid and binding. If we refuse to go back of the enrolled bill,—close our eyes and ears to the evidence which the legislature furnishes, and is required by the Constitution to furnish,—the object of these constitutional provisions may be wholly defeated.

It has been said that the decision in this case abrogates the principle of majority rule. Does it? The people adopted the Constitution, and have expressed in it the will of the majority as to the manner in which laws shall be enacted. Shall forty-nine members or any part thereof, in one house, or twenty-one members, or any portion thereof, in the other house, be permitted to enact a law in any other manner? If so, the will of the people is set at naught and the will of a small number of individuals substituted for the will of the great majority. The creature must not be regarded as greater than the creator. Each of the three coordinate branches of our government is the creature of the Constitution, subject and necessarily subordinate, thereto. In construing constitutional provisions, certain fixed and absolute rules, which the court cannot disregard, must be observed, viz.: The words of the instrument are to control. The intent of the people in adopting it is to govern. The intent of the people is to be found in the words used. The whole instrument must be examined. Words are not to be regarded as used without occasion. The words used are to be considered with reference to their usual signification. Effect must be given to the whole instrument, etc. It is needless to use further illustrations or cite additional authorities. After another full and careful consideration of this case in all its bearings, I see no reason for changing our views concerning the questions involved.

A rehearing is denied.

Quarles, J., concurring:

I concur with the views expressed in the opinion of Mr. Justice Huston in this case. His conclusions and the reasons given therefor, I regard as being in perfect harmony

with the letter and spirit of our Constitution. Mr. Chief Justice Sullivan, while concurring with the conclusion reached in this case, does not agree with the majority opinion on two points which I will briefly discuss.

First, that the legislative journals must affirmatively show a compliance with the requirements of the Constitution in the passage of a bill, the validity of which is questioned. Upon this point we are cited to a number of authorities, and furnished with a number of quotations. But a careful study of the authorities cited is all that is needed to show that the rule therein announced is based merely upon precedent,—because some court has so decided,—and not upon reason and common sense, the basis and foundation of all law. The careful and painstaking student finds many inconsistencies in the authorities touching constitutional questions. A careful study of the adjudicated cases leads to the conclusion that both the legislative and judicial departments of government of several of our states have chafed under the limitations and restrictions imposed by constitutions, and that they have at times done indirectly what the Constitution directly forbids. In one case cited by Mr. Chief Justice Sullivan the Constitution prohibited the introduction of any bill after the fiftieth day. A bill to incorporate a township had been introduced in due season, but after the fiftieth day a substitute for this bill, incorporating a city outside of the limits of the proposed township was introduced and adopted. The title and subject-matter of the original bill were entirely changed, and in lieu thereof a new title and a new proposition or subject-matter was substituted. The substitute bill passed, and was approved by the governor. The court held the act valid. In another case which he cites from the same court a bill to incorporate a township had been introduced before the fiftieth day, but after the fiftieth day a substitute for such bill, for the purpose of incorporating a county out of the same territory, was introduced, adopted, and passed. The court held this bill valid. It is apparent that the object of said provision was to prevent the introduction and "rail-roading" of bills through the legislature during the last days of its session, and that the legislature should have the last ten days of its session to devote to those propositions which had been submitted to it prior to the fifty-first day of its session. But in both of these cases the object of the provision was wholly defeated, and the legislature, under the guise of amendment or substitute, did indirectly what was expressly prohibited by the Constitution. The object and purpose of creating a city, a township, or precinct, and a county, as well as the powers exercised by each, are so entirely different that it is difficult to see how the court held the amendment or substitute in either of these cases germane to the original bill. In the first case it is easy to see that the entire population of the county might be heartily in favor of creating the proposed township. It is easily conceived that the people of the county might have been opposed to creating the new city, and perhaps a good majority of the residents of the new city were opposed to the incorporation of it; and it requires no

great stretch of imagination to surmise that in the last case the great majority of the people of the old county were opposed to any division of such county, or the creation of a new county out of part of their territory. Perchance, in both cases, the people immediately interested, after carefully watching the proceedings of the legislature to see if any proposition affecting their local government and interests, to which they were opposed, should be introduced into their legislature, at the end of the fiftieth day saw that none had been introduced, and relying upon the aforesaid provision in their Constitution, and believing that no such proposition could thereafter be proposed, ceased their vigilance, and quit watching the proceedings of their legislature. The existence of such conditions is suggested by the fact that the proposition to create the city in the one case, and the new county in the other, came in under mask, and not openly and in the usual way. It was doubtless through such apparent violations of plain constitutional provisions that Judge Cooley was induced to comment upon such frauds by giving the illustrations of substituting, by amendment, for the proposition to incorporate the city of Siam, the proposition to dam the Wild Cat river, so aptly quoted by Mr. Justice Huston. The lessons to be learned in these two cases show the wisdom of obeying the Constitution in letter and spirit, the necessity of refusing to recognize as law any act which is expressly prohibited by the Constitution, whether passed directly and above board, or passed indirectly, under cloak, or the habilliment of fraud, and show the ease with which the plain provisions of the supreme law of the land can be evaded and effectually defeated by the joint action of the legislature and the courts. Now, courts do not make, but must obey and enforce, the law. In our Constitution we find the supreme standard by which all statutory enactments are to be measured and judged. If, in a given case, the court must and does apply this standard, and finds that the statute falls short of the required measure, the court's duty is plain. In such case the court has no discretion, but must follow the Constitution, or else, as was said by Judge Cooley, be guilty of "a violation of official oath and public duty." If courts, through fear of appearing indelicate, recognize acts which are prohibited by the fundamental law, when such acts are indirectly committed, they are not discouraging, but encouraging, fraud, and are not closing the gates to fraud, but opening them and inviting entrance thereto.

As evidence of the inconsistencies of writers upon constitutional law, read the quotations from Mr. Sutherland, Judge Cooley, and Mr. Black given by my associates in this case. Then carefully study all of the authorities cited. How, then, are we to determine whether a bill becomes a law or not? In my opinion there is but one way to ascertain, and that is to look to the journals to see if the legislature has done those things commanded by the Constitution. The object of requiring the legislature to keep a journal of its proceedings, in my opinion, is that the people, from whom all power comes, may have positive and permanent record evidence as to what has become law and what has not. Under this view it becomes abso-

lutely necessary that the journals show that the steps expressly commanded by the Constitution in the passage of a bill were taken. I confess it is embarrassing for a court to take this position. To avoid such embarrassment, for reasons of expediency, and on account of a so-called public policy, some of the courts have adopted the view of Mr. Chief Justice Sullivan,—that, in order to hold a statute void for the reason that it was not passed in the mode required by the Constitution, it must affirmatively appear by the journals that some constitutional requirement was not obeyed, and that the silence of the journal as to whether a requirement was obeyed or not is not sufficient to authorize the court to hold that such requirement was not obeyed. This proposition involves the absurd anomaly of requiring the plaintiff to prove a negative, and to prove it by a dumb witness,—one who does not speak, but is silent upon the question at issue. We will illustrate the absurdity of the proposition by supposing the following case, to wit: A bill is introduced into the senate, and read one time. When the second reading of bills is reached the next day, this bill, owing entirely to oversight, is overlooked, and not read the second time. Under these circumstances, the senate journal is silent as to the second reading, and does not say whether it was read the second time or not. Afterwards what should have been the third reading occurs, and the journal so shows. The bill passes both houses, and is signed and approved. Now, bear in mind that the bill was not read three times in the senate, but only twice. The journals show what was done, but do not show what was not done. By the express terms of the Constitution, this bill is not law, because it was not read three times by each house of the legislature. Now, applying the doctrine of presumption contended for by Chief Justice Sullivan, that because the journal does not say in so many words "this bill was not read three times," the court must, by presumption, supply the second reading, and thus make a law which the legislature did not, according to the Constitution, make, and you effectually eliminate this provision from the Constitution. If the court can read the bill for the legislature one time, it may do so two, or even three times. If the journal need not necessarily show anything in regard to the passage of a bill except the final vote thereon, then the legislature may fail to read a bill at all, and by refusing to say anything about the reading of it the court must say that it was read three times, because the journal does not expressly say that "this bill was not read three times." The idea is monstrous, and the danger of such a rule is fully apparent, and its adoption would be tantamount to a refusal to obey and support the Constitution.

The functions of the legislature consist exclusively in making laws, with but few exceptions. Then why command it, in the supreme law of the land, to "keep a journal of its proceedings," unless the journal is to show what bills have been enacted into law? Mr. Chief Justice Sullivan says in his opinion that the first clause of § 18, art. 8, of the Constitution, "commands the legislature to keep a full and complete journal of its proceedings." This is

undoubtedly true, and it is apparent that the object of this provision is to make the legislature show what it has done, leaving nothing whatever to implication. And, when the legislature says what it has done with regard to the passage of any bill, it negatives the idea that it has done anything else in regard thereto. Silence proves nothing where one is commanded to speak. But in such case the refusal of the witness to say that he did that which he should have done would justify the presumption that he did not do it. Our Constitution commands certain things to be done in regard to the passage of a bill, and says that no bill shall become a law unless these things are done. It seems a travesty upon our supreme law to say that it guarantees to the people the right to have their laws made in this manner only, and that there is no way of enforcing this right, or for the court to say that this is law when the Constitution says it is not law. There is one safe course which is in harmony with the Constitution, and that is to adhere to the rule that the legislature must show, as commanded by the Constitution, that it has done everything required by the Constitution to be done in the serious and important matter of making laws. This is the rule of evidence provided by the Constitution. It is not presumptuous in the courts, nor disrespectful to the legislature, to judge the acts of the legislature by its own evidence; and, as said by Mr. Chief Justice Sullivan in his opinion herein: "The commands found in §§ 13-15, art. 3, of the Constitution of this state, are directed to the members of the legislature, and their oaths of office require them to see to it that the provisions of these sections are conscientiously complied with." The only difference between us is that he thinks that, in courtesy to the legislative department, the judiciary should, by presumption, supply its omissions, while I cannot think so. To deal fairly with the legislature, and at the same time support the Constitution in letter and intent, we should judge the acts of the legislature by its own evidence, —neither adding anything thereto nor taking anything therefrom. It is not presumptuous, indelicate, or disrespectful for the court to say: "We presume that the legislature obeyed the obligations of the official oath, and recorded in its journal every step taken by it in the passage of this bill. And because the journals do not show that this bill was read the second time in the senate, or that such reading was, on account of urgency, dispensed with by two-thirds of the senate on an aye and nay vote, we presume that the second reading was inadvertently overlooked in the senate, and did not occur. And, because this bill was not read three times in each house, the Constitution says it is not law, and we cannot recognize it as law." This is, to my mind, the only safe and correct rule. It imposes no duty not enjoined by the Constitution, and works no hardship. Its observance simply carries out the provisions of the Constitution, in letter and spirit, preserves the constitutional right of the people to have their laws made in a careful and considerate manner, and properly respects the integrity of the legislative department. But violations of the express mandates of the Constitution by the legislature whether occurring

through inadvertence or otherwise, cannot be tolerated. To prevent fraud, and to avoid the probable error of the court adjudging an act passed by the legislature to be law which by the Constitution is not law, the court is compelled to adopt the rule that the journals of the legislature must affirmatively show that the express requirements of the Constitution were complied with in the enactment of any law which is attacked on the ground that it was not passed in the manner required by the Constitution. The journal is read in each house daily, and it is proper to conclude that the members and officers will see that it is correct. In fact, the journal is kept under the immediate supervision of each member. It is no great burden for the members to see that bills are reported, printed, read three times, and passed by an aye and nay vote, and that these steps are shown by the journals. The Constitution requires it, and, being so required, courts should take the journals for what they say, and regard them as telling "the truth, the whole truth, and nothing but the truth." We do not impugn the integrity of the legislature. We think the fault lies principally in the fact that the legislature has followed the procedure of its territorial predecessors and that of our national Congress, inadvertently overlooking the fact that our state Constitution imposes limitations and restrictions upon the legislature which were not imposed upon the territorial legislature or upon Congress, there being no provision in the Federal Constitution requiring Congress to read all bills three times, etc.

Our views of the good faith and integrity of the legislature can best be expressed by quoting the language of the supreme court of the state of California in the case of *Weill v. Kenfield*, 54 Cal. 111, as follows: "To our respect for a co-ordinate department of the state government is added our personal regard for the distinguished gentlemen who have so ably presented the view of this case from which we have felt constrained to dissent. We might freely admit that none of the restrictions of the Constitution would be necessary to the proper discharge of their duties by the honorable gentlemen who compose the present assembly. But the people may not always be so happy in the choice of their representatives, and we deem it our duty to require a strict compliance with mandatory provisions intended to prevent evils which have exercised in the past, and which may reappear in the future." The doctrine of presumption, as applied by Chief Justice Sullivan to the passage of bills, originated in England, where they have no written Constitution. The English rule stops all inquiry at the enrolled bill, while the rule contended for by Mr. Chief Justice Sullivan permits the court to go back of the enrolled bill to the journal, to see if it passed by the required aye and nay vote, supplying everything else that the journal is silent about. The rule for which he contends is the English rule with a slight modification. If the court is to supply the principal part of the evidence by presumption, it would be more consistent to supply it all, and refuse to go back of the enrolled bill. In *Weill v. Kenfield*, 54 Cal. 111, the supreme court of California, in discussing the question under consideration

says: "It was intended by and declared in the clause so often referred to, that the reading of a bill shall no longer be implied from the mere silence of senators or assemblymen, but that the consent of the house in which the bill is pending, to a waiver of the actual reading, shall be indicated only by a formal vote of 'yeas and nays,' when two thirds shall declare that an 'urgency' has arisen which renders it proper to dispense with the reading. The vote upon dispensing with the reading goes upon the record, so that each representative may be held responsible to his constituents for his conduct in respect to this as well as other questions. The entry must now accord with the fact. It is not to be entered in the journal (as was often formerly the case), that a bill is read when it is not read. It must either be read, or the members be called on to declare affirmatively that it shall not be read, because of pressing and urgent necessity. We do not dare to determine that any constitutional prerequisite to the validity of a law is of no practical service. It may be, as suggested, that the evil effects of the delays caused by the interpretation of the language of the Constitution we have adopted may more than counterbalance any benefits that may accrue to legislation by the additional opportunities afforded each lawmaker to become acquainted with the contents of all bills. But we are not permitted to consider the policy of a provision, where its language, as in the present instance, seems to us plain and positive. The whole of this line of argument is disposed of by the phrase, *Iulex scripta est.*" In *People, Barnes, v. Sterne*, 35 Ill. 121, 85 Am. Dec. 348, the supreme court of Illinois uses this language: "Were it not for the somewhat peculiar provision of our Constitution, which requires that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law. But this provision having been adopted, to prevent improvident legislation, and to prevent the enforcement of bills that were never enacted into laws, the means for its enforcement are implied. It is true that these means are negative and not positive in their character. Whilst neither of the other co-ordinate branches of the government have authority to command its observance, the judicial and executive departments are not bound to enforce such bills as laws. Whilst they are *prima facie* binding, still, when it appears from the journals that either of these constitutional requirements is wanting, the provisions of the bill will not be enforced. According to the theory of our legislation, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law. And this evidence is found upon the journals of the two houses." In the last two sentences the learned Illinois court simply expresses in other words the rule announced in the original opinion in this case, *viz.*, that the journals must affirmatively show that the requirements of the Constitution were complied with by the legislature in the passage of a bill the validity of which is questioned. With all due deference to Judge

Harlan, for whose learning and eminent ability I have the profoundest respect, I must say that his interpretation of the above language of the supreme court of Illinois seems strained and unauthorized. The same learned court in *Ryan v. Lynch*, 68 Ill. 160, held that the certificate of the secretary of state, giving "full and true copies of the journals of the senate and house of representatives, so far as the same relate to the passage of the bill," was competent evidence to prove "the nonexistence of any particular fact." The nonexistence of the fact is shown by presenting the journal, or full copies thereof, from which it appears that certain steps were not shown. The journal showed what facts existed. It should have shown other facts. Its failure to do so proved nonexistence.

Touching the second point discussed by Mr. Chief Justice Sullivan, I shall content myself with saying that Mr. Sutherland cites as sustaining the rule that amendments need not be read three times only three cases, to wit: *Miller v. State*, 3 Ohio St. 475; *People, Beardsley, v. Wallace*, 70 Ill. 680; *State, Atty. Gen., v. Platt*, 2 S. C. N. S. 150, 16 Am. Rep. 647. The two last-named cases merely mention the rule, and do not attempt to give any reason whatever in support of it. And in the Ohio case, after saying that "It is not unusual in parliamentary proceedings, to amend a bill by striking out all after the enacting clause and inserting a new bill," the court proceeds to say: "When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days, but when there is no such vital alteration three readings of the amendment are not required." Notice that the vital alteration consisted in wholly changing the subject or proposition of the bill. Did the learned court mean to convey the idea that, if some part of the subject or proposition remained,—a one-hundredth part, for instance,—it was not necessary to read the amendment, although it should wholly change ninety-nine hundredths of it? Such a rule is not based upon reason. The reasoning on this point in the opinion of Mr. Justice Huston herein is so clear and consonant with common sense, and so apparently in harmony with the evident intent of our Constitution, that I accept it fully, and refuse to blindly follow a small number of precedents that are not based upon reason and common sense, but opposed to the letter and intent of our Constitution. For the reason that it is the unanimous opinion of the court that the act in question is void, a rehearing is properly denied.

Sullivan, Ch. J., dissenting:

I think the original opinion in this case should be modified upon two points, at least: First, wherein it holds that the journals must affirmatively show that each and every requirement of the Constitution has been complied with in the passage of a bill; second, wherein it holds that the constitutional provisions require bills to be read on three several days in each house before the final vote thereon.

As to the first point: Section 18, art. 3, of the Constitution of this state is as follows: "Each house shall keep a journal of its pro-

ceedings; and the yeas and nays of the members of either house on any question shall at the request of any three members present be entered on the journal." In the opinion it is held that the meaning of the first clause of said section is that the journal must show all of the proceedings of the house and all of the steps taken in the passage of a bill. While that may be true, I do not think the silence of the journal as to some of the proceedings required by the Constitution to pass a bill should be held conclusive evidence, or any evidence, to show that such bill was not regularly passed. The last clause of said section refers to and commands the entry on the journal of the yeas and nays on any question when requested by three members. Voting is a proceeding required in the passage of motions, resolutions, etc. And, if it was intended by the framers of the Constitution that the first clause of said section was mandatory as to every act and proceeding of either house, what was the necessity for the last clause of said section? If the first clause absolutely required the entry on the journals of the yeas and nays whenever a vote was so taken, the last clause of said section adds nothing thereto, and was a work of supererogation. I am of the opinion that it was not intended by the first clause of said section to have all laws held invalid where the journals failed to show that each and every step required by the Constitution in the passage of a bill had not been taken. Said section clearly intimates, to my mind, that in the passage of motions, resolutions, etc., when a yea and nay vote is taken, it need not be entered on the journal, unless requested by three members, although said section requires each house to keep a record of its proceedings. Section 15 of said article 8 provides, among other things, that on the final passage of a bill the vote shall be by yeas and nays, and entered upon the journal. Why provide in said section 15 that such yea and nay vote shall be entered on the journal, if such act was commanded by the first clause of § 13 of said article 8? Thus it is shown that the framers of the Constitution, after directing each house to keep a journal of its proceedings, expressly and specifically commands that the yea and nay vote on any question must be entered on the journal on the request of three members, and also commands that on the final passage of any bill the vote must be by yeas and nays, and entered on the journal. I find no provision in the Constitution that expressly requires either house to enter on its journal the fact that a bill was printed, or that it was read on three several days, before being placed on its final passage. The rule for which I contend has obtained in the state of Illinois, and many other states of this Union, for many years, and not a single instance has been called to my attention where a legislature has resorted to the means suggested by my associates in the enactment of laws in violation of said provisions of the Constitution.

In *Miller v. State*, 3 Ohio St. 475, Chief Justice Thurman, speaking for the court, said: "Thus we find, *inter alia*, the provision before quoted, 'that every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three fourths of the house

in which it shall be pending shall dispense with this rule.' This is an important provision, without doubt, but nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences." It is said by Mr. Sutherland in his work on Statutory Construction (p. 48): "Journals are records, and in all respects touching proceedings under the mandatory provisions of the Constitution will be effectual to impeach and avoid the acts recorded as law and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred; that amendments made by one branch, though extensive, were germane; that they were concurred in by the other branch, though the journals may be silent." Touching the question under consideration, it is stated in Black on Constitutional Law (p. 297) as follows: "But if the journal entries are ambiguous, or if they fail to show facts which the Constitution does not expressly require them to show, this will not raise any presumption against the validity of the action of the legislature. On the contrary, the courts will presume that the legislature fully complied with the constitutional requirements, although the journals do not show the fact." In *Illinois v. Illinois C. R. Co.* 88 Fed. Rep. 730, under constitutional provisions like our own in regard to reading a bill upon three different days, it is held that the failure of the journal of the senate to show compliance therewith will not invalidate the bill or act. The case is from the United States circuit court in and for the northern district of Illinois, and the opinion is by Mr. Justice Harlan, of the Supreme Court of the United States, who presides in the seventh circuit. In that case it was contended that the general assembly, in passing the act under consideration in that case, did not meet the requirements of the Constitution in that the journals fail to show that the bill was read on three different days in each house. Nothing appeared in the senate journal to show that the bill had been read a second time in that body, and after stating the facts, Mr. Justice Harlan states that the question for determination was, "Is it essential to its [the bill's] validity that it should appear in the journal that the bill was 'read on three different days in each house?' Does the mere silence of the senate journal as to whether the bill was in fact read a second time in that body, on some one of the three different days, raise a conclusive presumption that it was not so read?" The learned justice then calls attention to the fact that counsel, to support the proposition that the mere silence of the journal as to whether a bill was read on three different days was fatal to the validity of the act, cites *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571, in which that court said: "In our opinion, it is clearly competent to show from the journals of either branch of the legislature, that a par-

ticular act was not passed in the mode prescribed by the Constitution, and thus defeat its operation altogether. The Constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of a law, shall be stated therein. If those facts are not set forth, the conclusion is that they did not transpire. The journal is made up under the immediate direction of the house, and is presumed to contain a full and complete history of its proceedings. If a certain act received the constitutional assent of the body, it will so appear on the face of its journal. And when a contest arises as to whether the act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it the act must stand or fall. It certainly was not the intention of the framers of the Constitution that the signatures of the speakers and the executive should furnish conclusive evidence of the passage of a law. The presumption indeed is, that an act thus verified, became a law pursuant to the requirements of the Constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made in the journal. But when the journal is in existence, and it fails to show that the act was passed in the mode prescribed by the Constitution, the presumption is overcome, and the act must fall." In commenting upon that quotation the learned justice said: "But we are not satisfied that the court intended to express an opinion upon that precise point [the point as to the silence of the journal as to the second reading of the bill]. Although it did not appear, in that case, that the bill was read the third time before it went to the senate, or that the ayes and noes were called, no special comment was made by the court upon the silence of the journal as to the bill not being read the third time. Plainly, its language had reference to the fact that the journal did not show the passage (final) of the bill by ayes and noes. It was with reference to that fact that the language above quoted was used." Justice Harlan in that case also comments upon the case of *Turley v. Logan County*, 17 Ill. 152. He quotes the following therefrom, to wit, "The journals should show the readings, and the passage of the law by a constitutional vote," and says: "But nothing was said as to what would be the result where the journal did not show that each of the required readings was had." And further on he says: "That we do not misinterpret these decisions is shown in *Schuyler County Supers. v. People, Rock Island & A. R. Co.* 25 Ill. 188, where one of the grounds of objection to an act was that the senate journal did not show that the bill was read three times before it was put on its final passage. The court said: 'The Constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law,' but the Constitution does not say that three several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the Constitution to be entered on the journals, in order to make them valid, and among these are the entries of the ayes and

nays on the final passage of every bill, and we held in the case of *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571, that where the journal did not show this, the act never became a law. But, where the Constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journal affirmatively shows that it was not done." After using the language above quoted it is said: "This decision was expressly reaffirmed in *Wabash R. Co. v. Hughes*, 38 Ill. 186. Nothing to the contrary was decided in *People, Barnes, v. Starnes*, 35 Ill. 141, 85 Am. Dec. 348, or in *Ryan v. Lynch*, 68 Ill. 161, which is relied upon as modifying or overruling *Schuyler County Supers. v. People, Rock Island & A. R. Co.* The case in 35 Ill. recognizes the doctrine of the *Schuyler County Case*, and goes upon the ground that the ayes and noes were not called, and spread upon the journals of the house, on the passage of the bill. In *Ryan v. Lynch* it appeared from the journal that the bill was read twice in the senate, but the journal was silent as to the third reading, and it did not show any call of the ayes and noes on the final passage of the bill. The decision was that as the proceedings in the senate, certified by the secretary of state, were competent proof of the facts therein stated the failure of the journal to show a call of the ayes and noes was fatal to the bill. Indeed, we do not find that any of the numerous decisions of the state court relating to the passage of bills by the legislature have modified or overruled the doctrine announced in *Schuyler County Supers. v. People, Rock Island & A. R. Co.* With that doctrine we are entirely satisfied. It is in harmony with the adjudications in many of the states whose Constitutions have provisions similar to those in the Constitution of Illinois which we have been considering. We therefore hold that the mere silence of the senate journal as to whether the act of 1869 was read the second time in that body does not justify us in holding it to be invalid." The constitutional provision of Illinois under which said decision was made is as follows: "Each house shall keep a journal of its proceedings. The yeas and nays of the members shall on any question, at the desire of any two of them, be entered on the journal." Const. 1848, art. 3, § 13. Section 18, art. 3, of our Constitution is as follows: "Each house shall keep a journal of its proceedings; and the yeas and nays of the members of each house on any question shall at the request of any three members present, be entered on the journal." The purpose and intent of the said sections are substantially the same. In Illinois the yeas and nays must be entered on the journal at the "desire" of any two members, and in Idaho at the request of any three members. And, so far as the question under consideration is concerned, §§ 13 and 21 of art. 3 of the Constitution of Illinois are substantially the same as §§ 14 and 15 of the Constitution of Idaho. Said § 21 of the Illinois Constitution provides that on the

final passage of all bills the vote shall be by yeas and nays, and shall be entered on the journals, while § 15 of art. 3 of the Idaho Constitution provides substantially the same.

The weight of authority under Constitutions similar to ours, so far as I have examined, is that, unless the journal affirmatively shows that some requirement of the Constitution in the passage of a bill has been omitted, the presumption is that such requirement has been complied with, although the journal be silent in regard thereto, except where the Constitution commands such act to be entered on the journal. For example, where the Constitution declares that on the final passage of a bill the vote must be by yeas and nays, and entered on the journal, in such a case the act would be held invalid if the journal failed to affirmatively show that such vote was taken and entered as commanded by the Constitution. In the case of *Schuyler County Supers. v. People, Rock Island & A. R. Co.* 25 Ill. 183, it is held, under that provision of the Constitution requiring a bill to be read in either house on three different days, that, if the journal is silent as to the readings of the bill, it will be presumed that the bill was read. It is stated in *Illinois v. Illinois C. R. Co.* 88 Fed. Rep. 730; that the decision in the *Schuyler County Case* is in harmony with the adjudications of many states, and the court cites *Miller v. State*, 8 Ohio St. 475; *McCulloch v. State*, 11 Ind. 424; *State, Minnesota R. Constr. Co., v. Hastings*, 24 Minn. 78; *English v. Oliver*, 28 Ark. 317; *Chicot County v. Davies*, 40 Ark. 266; *State, Atty. Gen., v. Francis*, 26 Kan. 724; *Re Vanderberg*, 28 Kan. 243; *State, Atty. Gen., v. Mead*, 71 Mo. 268. See also to the same effect *Pack v. Barton*, 47 Mich. 520; *Detroit v. Detroit Board of Assessors*, 91 Mich. 78, 16 L. R. A. 59; *Walker v. Griffith*, 60 Ala. 367; *Blessing v. Galveston*, 42 Tex. 641; *Prescott v. Illinois & M. Canal*, 19 Ill. 824. In *McCulloch v. State*, 11 Ind. 424, it was held: "Where the legislative journals are silent touching a step in the proceedings which the Constitution requires to be taken [in the passage of a bill] it will be presumed by the courts that the constitutional requirement was complied with." It is stated by Judge Cooley, in *Constitutional Limitations*, 6th ed. at page 167, as follows: "The journals which each house keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the Constitution must be presumed, in accordance with the general rule which presumes the proper discharge of official duty."

On the second point in the opinion in this case we held that amendments to a bill must be read three times on three several days, the same as the original bill. In *People, Beardsley, v. Wallace*, 70 Ill. 620, it is held that the constitutional provision requiring bills to be read on three several days before their passage does not apply to amendments to such bills. Mr. Sutherland, in his work on *Statutory Construction* (§ 49) says: "The readings re-

quired on bills are intended to afford opportunities for deliberate consideration of them in detail, and for amendment. Hence, amendments are admissible during the progress of a bill through the process of enactment; they are not subject to the same rule as bills in regard to the number of readings. They must be germane to the subject of the bill, and are not required to be read three times. Nor does concurrence by one house in amendments made by the other require the yeas and nays, and their entry on the journal, under the provision for these things, on the final passage of bills." See also *Miller v. State*, 8 Ohio St. 475. The rule for which I contend does not relieve the members of either house from keeping their oaths of office, and, if they conscientiously keep them inviolate, they will see to it that each and every constitutional requirement in the enactment of laws is fully and fairly met. The commands found in §§ 13-15, art. 3, of the Constitution of this state, are directed to the members of the legislature, and their oaths of office require them to see to it that the provisions of those sections are conscientiously complied with. The rule holding that, if the journal is silent upon matters which are not expressly required to be entered thereon in the passage of a bill, the presumption is that the legislature complied with the requirements of the Constitution, does not relieve the legislature from keeping a full and complete journal of its proceedings; and under the first clause of § 18, art. 3, it is commanded to do so. My conclusion is that a law passed by the legislature should not be held invalid because of the fact that the journals fail to show that each and every act required by the Constitution to be done in the passage of such law had been done, unless such act or proceeding is expressly commanded by the Constitution to be entered on the journal. As, for instance, the vote on the final passage of a bill is commanded by the Constitution to be taken by yeas and nays and entered on the journal. If the journal was silent as to the yeas and nays being taken, in such case the court would have jurisdiction to hold such bill invalid, and should do so; but if the journal was silent as to the printing of the bill, and the three several readings in each house, and of the adoption of an amendment by yeas and nays vote, as those acts are not expressly commanded to be entered in the journal, the presumption would be that those necessary acts were done, and such bill held valid. Otherwise if the journal fail to show the final passage of such bill by a yeas and nays vote, as the final passage of a bill is expressly commanded to be by yeas and nays, and entered on the journal. And, further, that amendments to a bill are not subject to that provision of the Constitution requiring bills to be read on three several days in each house. The original opinion should be modified as above indicated, or a rehearing granted.

INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY, *Appt.*,v.
William P. KEEFER.

(146 Ind. 21.)

1. A contract by an express company authorized by a messenger in its employ, that in consideration that the express company be permitted to do business on a railroad the railroad company will be exempted from all liability for injuries to the messenger, is binding on the messenger, since the railroad company in making it acts, not as a public, but as a private, carrier.
2. A railroad company cannot enforce a contract between a messenger and an express company that the railroad company will not be held liable for accidental injuries to the messenger, of the making of which the railroad company has no knowledge.

(October 1, 1894.)

APPPEAL by defendant from a judgment of the Circuit Court for Greene County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Baker & Daniels and Davis & Moffett for appellant.*Messrs. Matson & Giles* for appellee.*Monks, Ch. J.*, delivered the opinion of the court:

Appellee was employed as an express messenger by the American Express Company, which was carrying on the express business over the road of appellant between Bedford and Switz City, Indiana. While so employed, and engaged in his usual duties on the express car of said train, the place provided by appellant for him to ride, he was injured by the falling of appellant's railroad bridge, and brought this action against appellant to recover damages therefor. A demurrer to the complaint for want of facts was overruled. Appellant answered in three paragraphs, and appellee's demurrers to the second and third of said paragraphs were sustained. The case was tried by a jury, and a verdict returned in favor of appellee, and, over a motion for a new trial, judgment was rendered against appellant. The action of the court in overruling the demurrer to the complaint, and in sustaining the demurrer to the second and third paragraphs of answer, is assigned as error. It is first insisted that the court erred in overruling the demurrer to the complaint. While the allegations are not as specific and complete as they should have been made, we have concluded that the complaint was sufficient on demurrer. The third paragraph of answer avers that the appellee was at the time of injury upon the

train, and in the express car, as a messenger of the American Express Company in charge of its express matter then therein; that he had not paid or tendered fare or compensation for his carriage, nor had he agreed to pay; that his right to be upon the train was secured to him and to the express company by a contract in writing between the railroad company and the express company, and that he was then riding upon the train in pursuance of the contract, and not otherwise, and that the only compensation the railroad was to receive was the compensation to be paid by the express company, under the contract for the express privileges granted it thereby. It is also alleged: That appellee, in consideration of his employment by the express company, and at the time thereof, executed a contract in writing (which is set out in the answer) in which appellee covenanted and agreed as follows: "And whereas such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage, or steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees: Now, therefore, in consideration of the premises and of my said employment, . . . I do hereby assume all risks of accidents and injuries which I shall meet or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel or vehicle, or of any employee of any such corporation or person otherwise, and whether resulting in my death or otherwise. And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employee of any person or corporation, or otherwise. And I hereby bind myself, my heirs, executors, and administrators, with the payment to such express company, upon demand, of any sum which it may be compelled to pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith. I do further agree that, in case I shall at any time suffer any injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or person owning or operating the railroad, stage, or steamboat line upon which I shall be so injured a good and sufficient release, under my hand and seal, of all claims, demands, and causes of action arising out of such injury, or connected with or resulting therefrom. I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage, or steamboat line in which such

NOTE.—For express messengers as passengers, see also *Brewer v. New York, L. E. & W. R. Co.* (N. Y.) 11 L. R. A. 483, and other cases cited in *note* thereto.

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express company has agreed, in substance, that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party; and I agree to be bound by each and every such agreement, in so far as the provisions thereof relating to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto. And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporation or person operating any railroad, stage, or steamboat line, for my transportation as messenger or employee, free of charge, upon the condition and consideration that neither I nor my personal representative, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporation or persons, or of any employee of such corporation or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me. And I do further agree that the provisions of this agreement shall be held to inure to the benefit of any and every corporation, and to all persons, upon whose railroads, stage, or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporation or persons." That, under the contract between the express company and appellant, said express company was granted express privileges and facilities on the railroad lines of appellant, and the express company agreed with appellant that "it is mutually understood and agreed by and between the parties hereto that the express company will assume all risks and damages to its property, freight, and valuable packages, and also assume all risks and damages to its agents and messengers, while on the said road."

Appellee insists that a common carrier cannot protect itself by contract from liability for negligence to a person riding as appellee was on appellant's train, for the reason that such a contract is void, as against public policy. This is a correct statement of the law in this state, where the carrier is at the time performing a duty it owes to the public as a common carrier.

A common carrier may, however, become a private carrier or bailee for hire, where, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. *New York C. R. Co. v. Lockwood*, 24 U. S. 17 Wall. on page 377, 21 L. ed. 639; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Robertson v. Old Colony R. Co.* 156 Mass. 525; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161. Was appellant, in the carriage for the express company of goods and appellee, its agent in charge thereof, performing a duty as a common carrier, or was it performing a service foreign to its duties as a common carrier, and which it could not have been compelled to perform? Railroad companies are not required, by usage or common law, to transport the traffic of independent express companies over its lines, in the manner in

which the traffic is usually carried and handled; and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon their passenger trains. *Sargent v. Boston & L. R. Corp.* 115 Mass. 416; *Memphis & L. R. R. Co. v. Southern Exp. Co.* ("Express Cases,") 117 U. S. 1, 29 L. ed. 791. In the case last cited the railroad companies had undertaken to perform for the public the express business before that time done over the same lines by express companies. The express companies applied for space in the express cars for their goods and messengers, and the railroad companies refused to furnish the space or carry their messengers, and these suits were brought to compel the railroad to furnish the desired express facilities. The court held that it was not the duty of railroads to carry the goods and messengers of express companies, and that a railroad in such service was not performing a duty it owed to the public, as a common carrier; that such right could only be acquired by an express company by contract with the railroad company. The court, by Mr. Chief Justice Waite, said: "The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had, for the most part on passenger trains. It requires, not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory

manner. . . . The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. . . . The exact question then is, whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them."

In the case of *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 874, the plaintiff, the proprietor of a circus, sued the defendant railway company, as a carrier, for injuries to the proprietor's cars and equipment, and to persons and animals, received by reason of a collision of two trains on defendant's road while plaintiff's circus train was being hauled over the road under a special contract exempting the railroad company from liability for such injuries, although caused by the negligence of defendant's servants. The railway company, under the contract, furnished the engines and train crews to transport plaintiff's cars, loaded with circus performers, animals, tents, etc.; and the contract provided that plaintiff was to pay a certain fixed sum "for the use of said machinery, motive power and men, and the above-mentioned privileges," the price "for the run" to each of several cities to be paid at the times named therein. It was stipulated that the defendant did not act in the premises "as a carrier," but merely as a "hirer of said machinery, motive power, right of way, and of the men to move and work the same," etc. The contract provided that the railroad company should not be responsible for injury resulting from its own negligence "in running the cars or otherwise," and provided that two advertising cars of plaintiff should be hauled in defendant's passenger trains. The circus train ran in two "sections." The forward one—for some cause not shown—was stopped, and the second section was allowed to collide with it, causing the injuries sued for. It was held that it was legal and proper, in such a contract, to stipulate that the railroad company should not be responsible for damages caused by its negligence. The court, by Campbell, J., said: "Unless this undertaking was one entered into by the defendant as a common carrier, there is very little room for controversy. . . . If it was not a contract of common carriage, we need not consider how far in that character contracts of exemption from liability may ex-

tend. In our view, it was in no sense a common carrier's contract, if it involved any principle of the law of carriers at all. . . . It cannot be claimed on any legal principle that plaintiff could, as a matter of right, call upon defendant to move his trains under such circumstances and on such conditions, and if he could not, then he could only do so on such terms as defendant saw fit to accept. . . . We think the defendant was not liable in the action, and it should have been taken from the jury and a verdict ordered of no cause of action." A case very similar to the last was the Massachusetts case of *Robertson v. Old Colony R. Co.* 156 Mass. 525. In that case the plaintiff was an employee of a circus proprietor, and sued for injuries received while he was riding over defendant's road in a car of his employer, which was being hauled under a special contract. The trial court ordered a verdict for defendant. The court, in affirming the case, said: "Unless the defendant was under a common-law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and the plaintiff cannot recover." The contract provided for hauling the cars of the circus, and the circus proprietor assumed all risk, and agreed to "exonerate and save harmless" the defendant "from any and all claims for damages to persons and property." "This contract," the court said, "the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

In *Chicago, M. & St. P. R. Co. v. Wallace*, 14 C. C. A. 257, 66 Fed. Rep. 506, 24 U. S. App. 590, 30 L. R. A. 181, the United States circuit court of appeals (seventh circuit) held that when a railroad company, by special agreement, hauls the cars and property of a circus over its lines, it is not a common carrier, but is acting outside of its duties as such, and therefore may lawfully contract for entire exemption from liability for its negligence. The court said: "But if the company, in carrying the plaintiff's property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties will be bound by its terms. That the company in carrying the goods under the contract was a private, and not a common or public carrier, is the conclusion which the court has reached." See also *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 17 C. C. A. 62, 70 Fed. Rep. 201, 36 U. S. App. 152, 80 L. R. A. 193.

In *Bates v. Old Colony R. Co.* 147 Mass. 255, an express messenger was injured while riding as messenger in a baggage car in a passenger train. The contract by which the express company's freight and messenger were carried provided that the messenger should be in the express car, and that the railroad company would issue to him "a season ticket" at season-ticket rates, being below regular full fare. The contract between the two companies further provided that the express company and its messengers should "assume all risks of accidents and injuries," and that the railroad com-

pany should be free and discharged from all claims and demands growing out of any injuries received by the messenger while on the road. The messenger, at the request of the express company, executed and delivered to the railroad company, in pursuance of the agreement between the two companies, an agreement reciting that, by the rules of the railroad company, passengers were not permitted to ride in the baggage cars, and reciting that the passenger was the holder of a "season ticket," and was an express messenger, and as such desired to ride in the baggage car, "for the more convenient despatch of his business" as such. The agreement then continued, "that, in consideration of said company allowing him to ride in baggage cars on its trains, the undersigned will assume all risk of accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding." The messenger executed this agreement unwillingly, and only because he understood that he could not retain his employment as messenger unless he did execute it. The season ticket prohibited its use for express business, but had stamped upon it a statement that "the holder of this ticket, having released the company from all liability, will be permitted to ride in the baggage car." There was a notice posted in the baggage car, and the rule it announced was uniformly enforced, that "no passenger will be allowed to ride in the baggage car on any train unless he has signed a release discharging the company from all claims and demands in any way growing out of any accident or injuries while riding in such car," etc. It happened in this case that the injury would not have been received if the messenger had been in the passenger car, instead of the express car. The court held that the contract was blinding, and worked a release of such injuries as were received by reason of the plaintiff's riding in the baggage car. The court said: "The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers, by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See *New York, C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627, and *Griswold v. New York & N. E. R. Co.* 53 Conn. 871, 55 Am. Rep. 115. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger." In a later case in the same court, *Hosmer v. Old Colony R. Co.* 156 Mass. 506, an express messenger riding in the baggage car under a similar contract, and with a similar ticket, was injured in a wreck which involved the whole train, and in which many passengers in the ordinary passenger cars were killed, and others injured. The train was derailed by defendant's negligence. The court refers to the case in 147 Mass., and states that the decision was then 38 L. R. A.

limited to injuries occasioned by riding in the baggage car, and did not involve the application of the release to injuries otherwise received. The court said: "This question is now presented to us, and we are of opinion that the contract does include such injuries. The contract, after reciting that the railroad company does not allow passengers to ride in the baggage cars of any of its trains, and that the undersigned (the plaintiff) 'is desirous of riding in such car for the more convenient despatch of his business as an expressman,' proceeds as follows: 'It is understood and agreed that, in consideration of said company allowing him to ride in baggage cars on its trains, the undersigned will assume all risks of accidents and injuries resulting therefrom, and will hold said company free and discharged from all claims and demands in any way growing out of any injuries received by him while so riding.' It seems to us that the natural and fair import of the words used was that the plaintiff should take the risk of all injuries received by him while riding in the baggage car, however arising. The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience. That it was a valid contract cannot be questioned since the decision in *Bates v. Old Colony R. Co.* 147 Mass. 255. See also *Quimby v. Boston & M. R. Co.* 160 Mass. 865, 5 L. R. A. 846."

Under the doctrine declared in the *Express Cases*, *supra*, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier; the right to have it and him carried having first been secured to the express company by private contract,—the only way known to the law by which the right either as to the goods, or appellee as express messenger in charge, could be acquired. Appellee, when he went upon the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train. That was merely incidental. His purpose was not to be upon the train in the cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant, as a common carrier, could not have been compelled to grant. *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Bates v. Old Colony R. Co.* 147 Mass. 255; *Hosmer v. Old Colony R. Co.* 156 Mass. 506.

The contracts set out in the third paragraph of answer were not in regard to any duties appellant was required to perform as a common carrier, nor did such contracts attempt to limit the liability of appellant for negligence in the discharge of its duties as a common carrier. The same are therefore binding upon all the

parties thereto. Appellee, by his contract, assumed all the dangers of the trip, however occasioned, and undertook and agreed to release and discharge appellant from all liability if he in any way should be injured in his person by the negligence of appellant, and authorized and empowered the express company to enter into a contract exempting appellant from all liability for injuries to appellee. The contract of the express company with appellant was therefore binding upon appellee, the same as if he had executed it in person. It follows that the court erred in sustaining the demurrer to the third paragraph of answer.

It is not alleged in the second paragraph of

answer that the express company or appellee, in any contract with appellant, ever assumed any risks or damages of any kind, or that the appellant had notice or knowledge of the terms of the agreement between appellee and the express company. The mere fact that appellee had entered into the contract alleged with the express company would not entitle appellant to the benefit thereof. The court did not err in sustaining the demurrer to the second paragraph of answer.

Judgment reversed, with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this opinion.

MARYLAND COURT OF APPEALS.

BOSTON & ALBANY RAILROAD COMPANY *et al.*, Appts.,
v.

**MERCANTILE TRUST & DEPOSIT
COMPANY OF BALTIMORE** *et al.*,
and
Nineteen Other Cases.

(*American Casualty Insurance Company's Case.*)

(39 Md. 536.)

1. A deposit with a state treasurer of securities as a guaranty for the payment of

policies of an insurance company, whether made as a statutory requirement or voluntarily, and whether held by him in his official or in his individual capacity, creates a trust for the benefit of such policy holders in case of the insolvency of the company, to the exclusion of other claims, except a paramount claim for taxes.

2. A surrender of a trust fund by a state treasurer under order of court, when he held it for the benefit of the policy holders of an insurance company, does not affect their rights therein.

3. Policy holders of an insolvent insurance company have the right to participate

NOTE.—Distribution of assets of insolvent insurance company.

- I. *Who is to distribute.*
 - a. *As between different territorial jurisdictions.*
 - b. *As between courts and officers.*
- II. *Valuation and adjustment of claims.*
 - a. *Date when claims become fixed.*
 - b. *Finding value of immature policies.*
 - c. *General rules.*
 - d. *Presentation of claims.*
- III. *Priorities.*
 - a. *In general.*
 - b. *Among policy holders.*
 - c. *Set-off.*
 - d. *Claims entitled to preference.*
- IV. *Special funds.*
 - a. *In general.*
 - b. *Reinsurance.*
 - c. *Stockholder's liability.*
- V. *Contract rights.*
- VI. *Surplus assets.*

I. *Who is to distribute.*

a. *As between different territorial jurisdictions.*

One of the important questions which is likely to arise in case of a company doing business not only in many of the United States but in foreign countries also is, By what court shall the assets be collected and distributed? Many of the states require companies doing business within their borders to keep a fund on deposit there for the protection of local policy holders, and even in the absence of such requirement the failure of the company is very likely to occur when the assets are widely scattered. The question whether these assets shall all be gathered and sent to the company's home for distribution, or whether each court shall gather and distribute the funds found within its

jurisdiction, has not been very satisfactorily answered, although the weight of authority and reason favors the transmission of the fund to the home office except possibly in case of matured claims.

If the statutes of the state in which the company was created have provided for winding up the affairs of the company by a receiver appointed there, policy holders in other states cannot attach assets there for the recovery of their claims, but all the assets must be gathered by the receiver and distributed by him unless there is a domestic statute establishing a different rule. *Rockover v. Life Asso. of America*, 77 Va. 85.

Where the charter of the company provides that upon its dissolution all its property shall vest in the officers of the state of its creation, policy holders in other states cannot acquire a priority for payment out of assets in the state of their domicile. *Rundel v. Life Asso. of America*, 4 Woods, 94.

The mere fact that the company provided for departments in which its assets should be kept will not give the holders of policies in these departments any prior right to the assets there. *Taylor v. Life Asso. of America*, 13 Fed. Rep. 497.

The foreign policy holder impliedly agrees to the statutes of the state in which the company is organized, so that a receiver appointed in that state will control all of the company's assets. *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 205.

A resident of a state other than that where the company is incorporated will not be permitted to attach the reserve fund within his state to compel payment of his claim on the policy where the company is in process of being wound up in the state of its domicile. *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197.

And the same ruling applies in case of the holder of a death claim. *Wetlgartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314.

with all other creditors in the general fund of the company's assets after they have exhausted a special fund which is held in trust for them alone.

4. Taxes upon the shares of stock in an insurance company which are by statute charged to and made payable by the corporation are a demand payable out of its assets in the hands of its receiver in case it becomes insolvent after they become due.

5. A preference of claims of clerks, servants, and employees of an insolvent corporation does not extend to a trust fund devoted to a special purpose, as in case of a deposit for the benefit of policy holders of an insurance company.

6. An insurance adjuster, or a person rendering services of a higher degree than a clerk, is not included among the "clerks, servants, and employees" of an insurance company to whom the statutes give a preference in distribution of the company's assets when it is insolvent.

7. On the breach of the contract of an insurance policy by insolvency of the company the policy holder has a claim for the value of the destroyed policy, which consists solely of an unearned or return premium, against the assets of the company.

8. Losses which happen after the insolvency of an insurance company are not provable against the funds in the hands of a

The members of a mutual insurance company belonging to the state department of the general company have no right to retain the assets of the company in that state for the payment of their claims, but must permit them to go to the home office of the company to be distributed equitably among all policy holders. *Davis v. Life Asso. of America*, 11 Fed. Rep. 781. In that case the court says that a provision that a certain fund should be kept in the state in which the company is doing business as a contingent fund to pay the expenses and losses from year to year as the same become due and payable, does not dedicate this fund to the payment of policy holders in that state.

The placing of the insurance company in the hands of a receiver, and an assignment to him of assets under order of the court, will pass to him a right to premium notes of debtors residing in other states which will take priority to subsequent attachment at the residence of the debtors. *Taylor v. Life Asso. of America*, 18 Fed. Rep. 497.

In *Hamilton v. Chouteau*, 2 McCrary, 509, the court refused to take jurisdiction of a suit by policy holders against an insolvent insurance company for the reason that a receiver had been appointed in another court, and that if it took jurisdiction it would be compelled to bring in all parties and take custody of the assets, for equality is equity.

But, on the other side, it has been held that a fund deposited by a foreign insurance company with the state officers in accordance with state laws for the protection of local policy holders will not, on the ground of comity, be remitted to a foreign jurisdiction until the claims of the domestic policy holders have been satisfied. *Hughes v. Hunner*, 81 Wis. 118.

So, the courts of a state may wind up the affairs of a foreign insurance company which has become insolvent so far as to administer assets within its jurisdiction and distribute them among domestic creditors. *Smith v. St. Louis Mut. L. Ins. Co.* 6 Lea, 564, Affirming 8 Tenn. Ch. 502.

And in *Piedmont & A. L. Ins. Co. v. Wallin*, 58 Miss. 1, where insolvency did not appear, it was held that the sum deposited in accordance with the Mississippi statutes by a foreign company for the privilege of doing business in that state was for the benefit of persons who took out policies in that state, and could not be reached by those obtaining policies elsewhere.

Under the Virginia statutes the holder of a policy in a foreign company which has deposited bonds with the state treasurer may subject these bonds to the payment of a claim for the return of premiums paid on the policy. *Universal L. Ins. Co. v. Cogbill*, 30 Gratt. 72.

And it has been held in that state that holders of policies in a foreign company could enforce their claims by attachment against property found in the state. But in that case proceedings to declare the company insolvent had not been instituted

when the attachment suits were filed. *Universal L. Ins. Co. v. Binford*, 76 Va. 103.

But after the claims of domestic creditors have been satisfied the fund which has been deposited with the state treasurer by a foreign corporation is not subject to attachment by foreign creditors, but must be turned over to the receiver of the company. *Rollo v. Andes Ins. Co.* 23 Gratt. 509, 14 Am. Rep. 147.

If the state statute provides that in case the laws of another state where the company is doing business require the maintenance in that state of a fund upon which holders of policies there shall have a lien, such policy holders shall not be entitled to share in the assets in the state of the company's creation until the amount of the assets in the other state shall be deducted from the claim; the holder of such policies is entitled to no greater sum than is sufficient to make him equal to creditors of the same class in the state of the creation of the company. *Re Life Asso. of America*, 91 Mo. 177; *S. C. sub nom. Bockover v. Superintendent of Ins. Department* (Mo.) 8 West. Rep. 322.

If before the proceedings are instituted for the appointment of a receiver, policy holders in another state bring suit there and appropriate part of the assets of the company there to the payment of their claims they are entitled to prove for the residue in the proceedings to dissolve the company, and the amount they have received cannot be used to reduce their demand beyond that amount. *People v. Universal L. Ins. Co.* 42 Hun, 616. And the case of *People v. Knickerbocker L. Ins. Co.* 101 N. Y. 636, is distinguished, where the circumstances were similar except that in the latter case the assets in the foreign state were appropriated after the appointment of the receiver, and it was held that the amount so obtained should be deducted from his proportionate share of the assets of the company.

In *Garham v. Mutual Aid Soc.* 161 Mass. 357, it was held that policy holders from other states who had attached property or proved their claims there would not be permitted to prove their claims in Massachusetts unless they discharged their attachment and canceled their proofs so that the fund could be distributed ratably.

The settlement of the affairs of the Order of Iron Hall has given rise to much discussion as to whether or not the funds would be transmitted to the receiver in the state of the company's organization or would be distributed to domestic creditors. Although the order was not an insurance society in its strictest sense; the rulings in those cases may throw light on the general question as to whether or not the assets will be sent to the parent state. In the cases of *Buwell v. Supreme Sitting*, O. of I. H. 161 Mass. 224, 23 L. R. A. 831; *Baldwin v. Hosmer*, 101 Mich. 119, 25 L. R. A. 743; *Ware v. Supreme Sitting*, O. of I. H. (N. J. Ch.) 28 Atl. 1041; *Durward v. Jewett*, 46 La. Ann. 559; *Kean v. Su-*

receiver of the company, although the value of destroyed policies may be proved.

9. A loss or injury insured against which takes place before the insolvency of the insurance company, but the amount of which is not ascertained or paid until after the insolvency, entitles the policy holder to prove for a sum equal to his loss or damage plus the return premium, if any.

10. The importance of distributing assets of an insolvent insurance company at an early date prevents postponing the settlement to await the determination of every contingency on which its policy engagements are suspended, and the court may fix a reasonable time within which claims must be filed in order

to participate, although this may result in a misfortune to those whose claims are cut off.

11. A special fund for the benefit of policy holders of an insolvent insurance company cannot be charged with any portion of the costs and commissions incurred in administering the general fund which is totally distinct.

12. Insurance of a carrier of passengers against liability for injuries to them is not contrary to public policy.

13. An extension or renewal of a policy of insurance under an option of the holder is not effected on the insurer's refusal to renew without payment or tender of the premium.

14. Interest cannot be allowed on a claim for taxes or any other claim against an

premise sitting, O. of I. H. 3 Pa. Dist. R. 323; Schroder v. Supreme Sitting, O. of I. H. 1 Ohio, Dec. 408; Bakup v. Iron Hall, cited in 1 Ohio Dec. 409,—the court remitted the proceeds to the receiver in the parent state, while in Fawcett v. Supreme Sitting, O. of I. H. 64 Conn. 170, 24 L. R. A. 825, and Lindquist v. Glines, 3 Misc. 214, it refused to do so.

In Failey v. Fee, 88 Md. 83, 32 L. R. A. 311, it was held that in so far as actual debts existed the fund would be distributed by the court in whose hands it was, but that as to persons who still remained members of the association by reason of the fact that their claims had not yet matured they must go to the parent state and seek payment from the receiver appointed there.

In Failey v. Talbee, 55 Fed. Rep. 882, the court held that it was competent to transmit the assets to the foreign receiver, but that the facts before it were not sufficient to cause it to do so, and so held the case for further proof before entering such a decree.

In Ware v. Supreme Sitting, O. of I. H. (N. J. Ch.) 23 Atl. 1041, the ruling was placed squarely upon the terms of the contract itself, the court saying that the rule that courts will not direct the transfer of funds to an officer in another state for distribution, but will rather provide for and take care of the just claims of its own citizens in preference to those of any other state or territory, applies only in cases of a contest or race between different creditors of the same debtor which creditors are under no obligation to each other and have entered into no mutual compact, this cannot be said of the case we are now dealing with. Here there is but a single contract, and all the persons interested in these assets are bound each to the other by the terms of that contract. This contract provides for an equal distribution of the funds among all those who comply with its terms.

In Buswell v. Supreme Sitting, O. of I. H. 161 Mass. 224, 23 L. R. A. 361, it was held that the title to the 20 per cent which was retained by the local branches was in the general order, and that by comity a receiver in one state may be ordered to pay over the fund to the parent receiver where the same principle governing the distribution of the fund would be acted on in both states, and it appears that the domestic creditors would be fairly treated in the distribution. The court says that in the distribution of such a fund when the property of the trust is found in many different states, comity requires that the court should do all that should be done to enforce, as far as practicable, a speedy equitable distribution of the whole property among those entitled to it.

In Durward v. Jewett, 46 La. Ann. 559, it was held that the reserve fund was a trust fund held, not alone for the benefit of the members of the local branch, but for all the membership of the order. And the fact that the trust cannot be carried out as originally intended cannot deprive those members of the rights each has acquired in the fund.

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The decision is put expressly on the contract of the members.

In Schroder v. Supreme Sitting, O. of I. H. 1 Ohio Dec. 408, it is said that no member of one branch can have any preferred rights over any other members of any other branch, nor is there any distinction made as to territorial or state divisions. The duty of each branch is to send its fund to the supreme body or its receiver, who, under the directions of the court, must distribute to each member *pro rata*. It is not honest to appropriate to the Ohio members exclusively that which they only have an undivided share in, and a court of equity will not sanction it.

In Baldwin v. Hoamer, 101 Mich. 119, 25 L. R. A. 743, the court says that the local branches and their officers and members are part and parcel of the corporation and cannot refuse to turn over the assets for distribution by its receiver, but the court adds that such order should be made only when it is made certain to the court that the members from its state would share proportionately with the other members throughout the organization.

Kean v. Supreme Sitting, O. of I. H. 3 Pa. Dist. R. 323, was decided on the ground that the members of the branches were not creditors of the association, and therefore their claims were not adverse to, but under, it.

In Fawcett v. Supreme Sitting, O. of I. H. 64 Conn. 170, 24 L. R. A. 825, Judge Hamersley held to the duty of the court to transmit the fund to the parent receiver in ordinary cases, but claimed that the rule did not apply in this case because the scheme of the Iron Hall was so far against public policy that it was not lawful under the laws of Connecticut; but the majority of the court places its ruling upon the fact that equity will best be done as between the parties before it by retaining the funds in controversy in the hands of the receiver appointed by it for distribution among the certificate holders of the order by whose contribution they were originally accumulated. As against a demand of a foreign receiver the members of each branch whose contributions created this reserve fund have, under the conditions discussed, an equitable lien upon it which the courts of their own state can best protect, especially where the parent receiver claims the fund for distribution among the creditors of the corporation generally without any distinction in favor of certificate holders.

In Lindquist v. Glines, 3 Misc. 214, it was held that the reserve fund of each local branch should be repaid to the members whose assessments had contributed to make it up. The court says it would certainly appear to be inequitable to take this fund and send it to a foreign jurisdiction to be distributed among the members of the order when by the very terms of the law creating it it was to be retained by each branch. To allow this money to be paid into a foreign jurisdiction merely for the purpose of distribution would be to appropriate the money paid for the purpose of establishing a re-

insolvent insurance company when the failure to pay it was merely the result of insolvency.

(March 24, 1896.)

APPPEALS by creditors of the American Casualty Insurance & Security Company of Baltimore City from a decree of the Circuit Court of Baltimore City distributing the assets of the debtor which had become insolvent and had been placed in the hands of the Mercantile Trust & Deposit Company of Baltimore and D. K. Este Fisher as receivers. *Affirmed in part; reversed in part.*

serve fund for their own benefit to be applied for the use of other members of the association.

But in *Mosher v. Supreme Sitting, O. of I. H. 88 Hun, 394*, it was stated that there was a stipulation that an order had been made upon petition of the local branches of the Order of Iron Hall in the state of New York to turn over to the Indianapolis receiver the funds of the order in the state, except such as would be sufficient to pay judgment creditors in case they established priority of their claims.

b. As between courts and officers.

The question has also arisen as to whether or not the court could take possession of funds which had been placed in the hands of a special depository:

The court will not take from a trustee funds placed in his hands for a specific purpose and distribute them through its receiver to the exclusion of the trustee. *Re Home Provident Safety Fund Assn. 129 N. Y. 233.*

If the articles of an association created a trustee to administer and distribute the reserve fund the insolvency of the association will not destroy his rights. *Farmers' Loan & T. Co. v. Aberle, 18 Misc. 227.*

Under the Missouri statutes the court and not the insurance commissioner has the superintendence of the distribution of the assets. *Relfe v. Spear, 6 Mo. App. 123.*

Under the New York statutes the courts have no power to control the insurance commissioner in the distribution of the securities which have been deposited with him by the company under the laws of the state. *Ruggles v. Chapman, 59 N. Y. 163; Affirming Ruggles v. Chapman, 1 Hun, 324; Ruggles v. Chapman, 2 Thomp. & C. 600; Re Guardian Mut. L. Ins. Co. 13 Hun, 115. Affirmed in 74 N. Y. 617.*

The court cannot compel the superintendent to turn the funds over to its receiver. *People, Ruggles, v. Chapman, 64 N. Y. 557.*

And these cases were recognized in *Atty. Gen. v. North America L. Ins. Co. 92 N. Y. 654*, although the court in that case says that the court could determine who were entitled to share in the funds and how they were to be divided among those interested therein.

But under the New York act of 1869 it is the duty of the insurance department to turn the securities over to the receiver. *Atty. Gen. v. North American L. Ins. Co. 85 N. Y. 485, 80 N. Y. 152.*

The New York act of 1892, permitting receivers to take possession of the funds in the insurance department, includes only companies issuing registered policies and annuity bonds. *People v. American Steam Boiler Ins. Co. 147 N. Y. 23, Reversing 87 Hun, 230.*

The laws have provided for two classes of insurance, one by policies unregistered but protected by a deposit with the insurance department, the other by registered policies secured by an additional deposit when the company becomes insolvent. The former are to be distributed under an order of the court, and the latter to be sold and the proceeds turned over to the receiver for dis-

Messrs. Bernard Carter and Charles J. Bonaparte, for appellants:

The deposits made by the insolvent corporation with the treasurer constituted, in the view of a court of equity, perfected trusts for the purposes stated in the certificate, *i. e.*, as a guarantee for the payment of the policies of insurance issued by said company.

Lloyd v. Brooks, 34 Md. 27.

The company having created these trusts "in order to strengthen itself" or, in other words, to induce persons to take out policies and pay premiums on the faith of such guarantee, and, presumably, having thereby increased

tribution. *People, Stout, v. Chapman, 5 Hun, 222.*

Prior to the act of 1892 the New York court had no power to compel the insurance commissioner to transfer to a receiver a fund deposited with him by a casualty insurance company. *People v. American Steam Boiler Ins. Co. 81 Hun, 498.*

The right of any person to share in the assets is to be determined in the action or proceeding in which the appointment of the receiver is made. *Rinn v. Astor F. Ins. Co. 59 N. Y. 143.*

II. Valuation and adjustment of claims.

a. Date when claims become fixed.

There is considerable difference in the statements of the rule as to the time when the character and amount of the claim become fixed so that subsequent events will not change it. Some cases place it at the time of the insolvency of the company; others at the time of dissolution of the company; others at the appointment of the receiver; others at the time of presentation of the claim. There is probably no great difference in the first three cases because the finding of insolvency, the dissolution of the company, and the appointment of the receiver may occur at or about the same time. But it would seem that correct principles would hardly justify an extension of the time until the claim is actually presented at some of the cases do.

In case of an insurance of credit the insolvency of the company will terminate the risk and entitle the policy holder to recover unearned premiums. *Smith v. National Credit Ins. Co. 65 Minn. 233, 33 L. R. A. 511.*

So in *Boston & A. R. Co. v. Mercantile Trust & D. Co.* it is held that in case of insurance against liability for accidents, the insolvency of the company will cancel all policies, so that there will be no liability on accidents happening after that time, but the holders of the policies will be entitled only to unearned premiums.

The holder of a policy in a credit insurance company which becomes insolvent is not entitled to prove for losses sustained by him after the insolvency of the company whether on sales made before or after that date, but is only entitled to a return of the unearned premium. *Gray v. Reynolds (N. J. Err. & App.) 37 Atl. 461.*

But it has been held that the mere fact of an assignment by a fire insurance company for the benefit of creditors does not terminate all existing policies so as to entitle the holders to the unearned premium from that date. *Relfe v. Commercial Ins. Co. 10 Mo. App. 393.*

The rights of creditors become fixed by the decree ordering the dissolution of the company. *Dean's Appeal, 88 Pa. 101; Insurance Co. v. Furulture Co. 80 Phila. Leg. Int. 81.*

When a mutual endowment association is dissolved the maturing of unmaturing certificates is arrested and the holders are entitled to share merely as members in the assets of the company. *Re Educational Endowment Assn. 56 Minn. 171.*

If a loss occurs subsequent to the date of dissolution the holder of the policy is entitled to only the

the volume of its business and the amount of its general assets, it and anyone claiming under it, whether as receiver, general creditor, or otherwise, would be estopped to deny the validity of the trust, even if this could be impeached.

Pollard v. Mohler, 55 Md. 284.

The decree of December 12, 1898, having become enrolled when the term at which it was passed elapsed, the rights of all parties were determined by its declaration that the stock in question or its proceeds, if sold, should be held by the receivers "for the benefit of the policy holders of the defendant corporation."

amount of unearned premium at the time of the dissolution. *Carr v. Union Mut. F. Ins. Co.* 23 Mo. App. 215.

The rights of the policy holders to share in the reserve fund are fixed by the date of the commencement of the proceeding for dissolution of the corporation. *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354.

In a very late New York case the status of claimants is fixed by the initiation of proceedings for the dissolution of the society. *People v. Commercial Alliance L. Ins. Co.* 17 App. Div. 376. The court says in some of the earlier cases a different view seems to have been taken, and the implication seems to be that the earlier cases were wrongly decided, and that the rule in that state now is as stated in that case.

If the receiver gives notice that he will receive no more premiums, the fact of death after premiums are overdue will not prevent the claim from sharing in the distribution of the assets, but the share will be the value of the policy at the time of the dissolution of the company deducting the amount of premiums unpaid at the time of death. *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 82 N. Y. 338.

Losses which accrue after the appointment of the receiver cannot be allowed by him. *Re Commercial Ins. Co.* 20 R. I. pt. 1, p. 7.

Holders of policies on the mutual plan are not entitled to prove for losses which occur after the insolvency of the company and appointment of a receiver, although they are not given notice of such facts or of the intention to cancel their policies. *Reliance Lumber Co. v. Brown*, 4 Ind. App. 62.

A mutual company is not liable for a loss which occurs after the appointment of receivers. *Com. v. Massachusetts Mut. F. Ins. Co.* 119 Mass. 45.

A death claim arising after the appointment of a receiver is not payable out of the death fund, but must be paid in the same manner as that of a general creditor. *Re Equitable Reserve Fund Life Assn.* 61 Hun. 299.

Losses occurring after the appointment of the receiver are not entitled to share in the distribution. *Doane v. Millville Mut. Marine & F. Ins. Co.* 48 N. J. Eq. 622.

The holders of certificates which had not matured when the bill for a receiver was filed are not entitled, in case their certificates mature, to have them paid in full out of the endowment fund before other payments are made from it, or in preference to payments upon indemnity certificates. *Williams v. United Reserve Fund Associates*, 166 Mass. 450.

One who has purchased an annuity from an insurance society which becomes insolvent is not bound to wait until the payments become due before proving for the claim, but may prove at once for its present value. *Re English & Irish Church & University Assur. Soc.* 1 Hem. & M. 79, 8 L. T. N. S. 724, 11 Week. Rep. 681.

The cases which have attempted to extend the time do not seem to have established any rule. 83 L. R. A.

Trayhern v. National Mechanics' Bank, 57 Md. 590.

All such parties and those in privity with them are, moreover, estopped to question any material fact in issue in the proceeding in which such a decree was passed.

Keene v. Van Reuth, 48 Md. 184.

The propriety of so much of the order of August 8 as recognizes the special fund cannot be successfully assailed.

Miller's Appeal, 35 Pa. 491; *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 186; *Burdon v. Massachusetts Safety Fund Assn.* 147 Mass. 368, 1 L. R. A. 146.

other than a discretionary one to allow such claims as seem equitable.

The amount of the claims will be fixed as of the time when they are presented for payment. *Re Albert Life Assur. Co.* L. R. 9 Eq. 708, 39 L. J. Ch. N. S. 539, 23 L. T. N. S. 697, 18 Week. Rep. 684.

The holder of a policy issued by a fire insurance company is entitled to prove for the full amount of a loss which occurred after the date of the winding-up order during the course of the proceedings. *Macfarlane's Claim*, L. R. 17 Ch. Div. 337, 50 L. J. Ch. N. S. 273, 44 L. T. N. S. 299.

If the holder of an annuity bond dies before the claim is presented the value of the bond cannot be computed as of the time when the receiver was appointed rather than in the light of the subsequent fact of death. *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172.

In case of a fire after the receiver has given notice to forward the policy for cancellation the dividend will be only on the surrender value of the policy, and not on the fire loss. *Dean's Appeal*, 95 Pa. 101.

Where after the time for presentation of claims has elapsed certain policy holders die, the court may allow a revaluation of their claims. *Atty. Gen. v. Continental L. Ins. Co.* 88 N. Y. 77.

If the policy matures by the death of the assured before completion of the proceedings for proving claims, the policy should be valued upon the basis of a death claim, and not as a continuing policy. *People v. Knickerbocker L. Ins. Co.* 34 Hun. 476.

Where after the claim had been filed, but before the valuation had taken place, the assured died, and it appeared that at the time of the suspension of business he was not insurable because of mortal disease, and no disturbance in the accounts or injustice to other claimants would result from valuing it as a death claim, it was held proper to do so. *People v. Knickerbocker L. Ins. Co.* 40 Hun. 44.

If the death occurs after the last day for the presentation of claims to the receiver the policy will not be revalued as a death claim. *Atty. Gen. v. Continental L. Ins. Co.* 61 How. Pr. 73.

After the claim has been valued and placed upon the dividend list it should not be reopened for revaluation because of the death of the assured. *People v. Security L. Ins. & A. Co.* 23 Hun. 601.

Although the death of a policy holder after his claim has been presented cannot increase the amount of his claim, yet it will be taken into account by the court as affording evidence of the value of the life at the time of taking in the claim. *Re Albert Life Assur. Co.* L. R. 9 Eq. 708, 39 L. J. Ch. N. S. 539, 23 L. T. N. S. 697, 18 Week. Rep. 683.

b. Finding value of immature policies.

There must be a common method by which the amount due by or to each policy holder shall be ascertained. *Rundel v. Life Assn. of America*, 10 Fed. Rep. 720.

Insurable policy holders should be given such damages as will procure annuities equal to the dif-

It is very doubtful whether the receivers could have sustained their petition had the treasurer seen fit to dispute in his answer their right to apply for the relief sought or the jurisdiction of the court to take this trust fund out of the hands of a trustee selected by the settlor (*i. e.* the insolvent corporation) except by original bill filed to remove the trustee.

People v. American Steam Boiler Ins. Co. 147 N. Y. 25.

The corporation itself is under no duty or obligation to pay the taxes assessed upon the shares of stock of the individual stockholders, except as provided by the statute.

ference between the premium paid and the required premium to procure other insurance of a like amount in a solvent company. *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 468.

Where the policies have not become payable at the time of the winding up of the society, the damages to be awarded to the addressee will be the increased cost of obtaining similar insurance in other similar companies. *Re Albert Life Assur. Co.* L. R. 9 Eq. 706, 39 L. J. Ch. N. S. 639, 22 L. T. N. S. 897, 18 Week. Rep. 688; *Holdich's Case*, L. R. 14 Eq. 72, 42 L. J. Ch. N. S. 612, 28 L. T. N. S. 415, 20 Week. Rep. 567, *Disapproving Lancaster's Case*, L. R. 14 Eq. 72, *note*.

The holder of an unmaturing life policy is a creditor and entitled to share with the other creditors in the assets. And the amount of his claim is the value of the policy destroyed. And this is to be based upon the amount of premiums paid without regard to the insurable condition of the policy holder's health. *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 34 Am. Rep. 522.

The value of an annuity bond is such a sum as will purchase a similar bond in a solvent company for the remainder of the life. *Atty. Gen. v. North America L. Ins. Co.* 82 N. Y. 172.

The holder of an unmaturing policy is entitled to recover the difference between the cost of a new policy and the present value of the premiums yet to be paid at the date of the breach, subject to a deduction on the unpaid premium notes with interest. *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 740.

Each policy holder is entitled to a sum of money which on the day of the insurer's insolvency would purchase from a solvent company a policy of the same kind for the same amount and for the same rate of premium. *Universal L. Ins. Co. v. Binford*, 76 Va. 103.

The amount of claim of each holder of an unmaturing life policy is the net value of the policy at the date of the dissolution of the company without regard to the health of the holder, less the outstanding premium notes. *Com., Atty. Gen., v. American L. Ins. Co.* 182 Pa. 586.

If the life is not insurable at the time of the insolvency of the insurer the policy holder is entitled to a return of all premiums paid and interest thereon. *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 466.

The value of an unmaturing paid-up policy is to be computed in the same way as that of a policy upon which the premiums are still paid. *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 34 Am. Rep. 522.

If a policy holder who is not insurable at the date of insolvency dies before distribution his claim must be rated as a death loss discounting the face of the policy for the period between the insolvency and the time after death, when the policy would have been payable. *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 466.

Each holder of a certificate is entitled to a dividend in proportion to the amount he has paid in. 38 L. R. A.

American Coal Co. v. Allegheny County Comrs. 59 Md. 185.

The effect of insolvency upon contracts of insurance is to cancel them for the future.

Dewey v. Davis, 82 Wis. 503; *Davis v. Shearer*, 90 Wis. 250.

Therefore, as soon as the insolvency of the American Casualty & Security Company of Baltimore city was judicially established by the decree appointing receivers, every holder of an existing policy had a claim to have that portion of his premium returned to him which he had already paid for a period to extend beyond the date of insolvency.

Williams v. United Reserve Fund Associates, 108 Mass. 450.

Amounts paid to a member as sick benefits are to be deducted from the amounts paid in by him in determining his dividend. *Fogg v. Supreme Lodge*, U. O. of G. L. 159 Mass. 9.

* A new policy has been taken in lieu of the old one the claim of the policy holder will be calculated on the new policy. *Atty. Gen. v. Continental L. Ins. Co.* 91 N. Y. 647.

c. General rules.

In ascertaining the amount due a creditor the court will follow, as far as practicable, the rule established by statute in proceedings in insolvency or bankruptcy. *Com. v. Hide & Leather Ins. Co.* 119 Mass. 156.

In calculating a dividend in favor of a policy holder the amount due by him on premium notes must be deducted. *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 34 Am. Rep. 522.

The insured is not entitled to unearned premium in case of the insolvency of the company, in the absence of statutory provision or contract. *Dewey v. Davis*, 82 Wis. 500.

Where the risk has not matured the policy is not a debt, although all premiums have been paid. *Mayer v. Atty. Gen.* 32 N. J. Eq. 815.

In case the policy insuring credit provides for a deduction of 1 per cent from the total sales which are stipulated to be of a certain amount for the year for the purpose of ascertaining the excess loss which the policy is to cover if the company becomes insolvent before the expiration of the year, the 1 per cent is to be reckoned on sales up to that time, and not on the guaranteed amount for the year. *Smith v. National Credit Ins. Co.* 65 Minn. 233, 33 L. R. A. 57.

d. Presentation of claims.

It is held in *Boston & A. R. Co. v. Mercantile Trust & D. Co.* that a date may be fixed for the presentation of claims beyond which no claims shall be presented or allowed.

If the court has fixed a day before which all claims must be presented or they will be barred, the fact that a claimant is a nonresident and did not know of the order will not furnish a sufficient ground, in case he does not present his claim in time, for extending the time and permitting him to come in and file his claim after the date fixed has expired. *Abraham v. Mercantile Trust & Dep. Co.* (Md.) 37 Atl. 646.

Claims which were presented to and allowed by the company before the receiver was appointed may be allowed by him, although they are not proved before him in accordance with the terms of the decree for the proof of claims. *Re Commercial Ins. Co.* 20 R. I. pt. 1, p. 7.

After the time fixed by statute for the presentation and proof of claims has expired, the court will not require the receiver to take proofs of claims which have not been presented in time. *Re Harmony Ins. Co.* 9 Abb. Pr. N. S. 347.

United States F. & M. Ins. Co. v. Tardy, 2 Ins. L. J. 672; *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 466; *Atty.-Gen. v. North American L. Ins. Co.* 83 N. Y. 173.

The duty of the trustee was clearly to use the fund to pay all claims covered by this indemnity, so far as this was necessary to satisfy the contracts of insurance made by the insolvent corporation with its policy holders. In so far as these contracts related to a time after the insolvency, they were abrogated by the law, and his obligation would be fulfilled when he repaid the policy holders the amounts of the unearned premiums; but for the consequences of accidents which had occurred prior to the

insolvency, such repayment would in no manner comply with the terms of the contract of insurance.

Com. v. Union Mut. F. Ins. Co. 112 Mass. 116; *Com. v. Mechanics Mut. F. Ins. Co.* 112 Mass. 192.

No reason seems to exist why the general principle of equity, well recognized in cases of fire, marine, and life insurance, that the interest of the policy holder is, so far as possible, the equivalent of the consideration for which he paid his premium, should not apply in such a case.

People v. Security L. Ins. & A. Co. 78 N. Y. 114, 84 Am. Rep. 522; *Holdich's Case*, L. R. 14

A person who has begun a suit against the company may be permitted to come in and share ratably with other creditors, but he cannot claim to share in a dividend which has been paid out without notice of his claim, nothing having been reserved for payment on his demand. *Smith v. Manhattan Ins. Co.* 4 Hun, 127.

It is the duty of the receiver, so far as possible, to see that each claimant has an equal opportunity to enforce his claim. So, if through a circular sent out by him claimants have omitted to properly present their claims, further time may be given them to do so. *People, Atty. Gen., v. Security L. Ins. & A. Co.* 79 N. Y. 237.

III. Priorities.

a. In general.

The court will endeavor to secure to the creditors an equal distribution of assets. *Rawsley v. Tren-ton Mut. L. Ins. Co.* 9 N. J. Eq. 95.

The moment the funds get into the hands of the official liquidator they are to share *pro rata*. *Re Albert Life Assur. Co. L. R. 9 Eq. 708*, 30 L. J. Ch. N. S. 530, 23 L. T. N. S. 697, 18 Week. Rep. 683.

The claims cannot be paid in the order of their date, but all must share *pro rata*. *Richards v. New Hampshire Ins. Co.* 43 N. H. 281.

Creditors are to be paid ratably without reference to the times when their several debts accrued. *Lowene v. American F. Ins. Co.* 6 Paige, 482.

Under the New York statutes the receiver must apply the assets after the payment of debts entitled to a preference under the laws of the United States and judgments which have become liens, equally among all other creditors as their demand existed at the time of his appointment. *People v. Universal L. Ins. Co.* 42 Hun, 616.

There is no priority on the part of either policy holders or general creditors. And it is immaterial that the policy contains the provision that the assets remaining at the time of the claim undisposed of in pursuance of the deed of settlement shall be liable. *Re State Fire Ins. Co.* 1 Hem. & M. 457, 23 L. J. Ch. N. S. 123, 1 DeG. J. & S. 634. The case of *Re Athenæum Life Assur. Soc.* 1 Johns. V. C. (Eng.) 633, which held that the claims ought to be marshaled in order of time, was overruled; and the court on appeal in affirming that decision says it was not within the power of the directors to appropriate the stock and funds of the company to the payment of the policies so as to create a charge paramount to all other claims of the company. *Re State Fire Ins. Co.* 1 DeG. J. & S. 634, 1 Hem. & M. 457, 23 L. J. Ch. N. S. 123.

One branch of *Re Athenæum Life Assur. Soc.* 1 Johns. V. C. (Eng.) 633, was appealed, but the question of priority was not considered on appeal. *Re Athenæum Life Assur. Soc.* 3 DeG. & J. 620.

Previously accrued profits of an insurance company which becomes insolvent do not belong to 38 L. R. A.

policy holders, but must go into the fund for payment of losses. *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116.

Claimants of unearned premiums, and of the surrendered value of policies, stand on an equal footing with general creditors whose claims have been duly allowed. *Carr v. Union Mut. F. Ins. Co.* 33 Mo. App. 231.

A creditor does not by the presentment of his claim obtain a vested right to a certain dividend to the exclusion of others. *Grinnell v. Merchants' Ins. Co.* 16 N. J. Eq. 283.

Death claims maturing before the dissolution of the company are not entitled to a preference over the claims of holders of unmatured policies; all are entitled to share alike in the assets in proportion to the amount of their claims. *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 84 Am. Rep. 522.

But it was held in an early case that unearned premiums must be returned upon accepting a surrender of the policy before making a dividend among creditors generally. *LeBoys v. Globe Ins. Co.* 2 Edw. Ch. 657.

The holder of a policy which was canceled before the insolvency of the company, who is entitled to a return of the unearned premium, is entitled to share in the assets. *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116.

The holders of unmatured life policies are not entitled to have a *pro rata* portion of the premiums paid by them refunded before payment of other creditors. The provision of the New York statute for a refunding of premiums does not apply to life policies. *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 84 Am. Rep. 522.

A person who, prior to the insolvency of the company, advances money to enable it to pay a loss, is not entitled to a priority in payment out of the fund which the company had at the time of insolvency. *DePeyster v. American F. Ins. Co.* 6 Paige, 486.

Policy holders who fail to pay assessments after the stopping of the company do not forfeit their rights to a share in the funds. *Re Home Mut. Aid Asso.* 8 Ohio N. P. 145.

Policy holders having claims for unearned premiums are entitled to participate in the funds in the hands of the insurance commissioner. *Smith v. National Credit Ins. Co.* 65 Minn. 233, 33 L. R. A. 511.

In *Evans v. Coventry*, 8 DeG. M. & G. 835, 8 Jur. N. S. 1225, 23 L. J. Ch. N. S. 400, the vice chancellor decreed that the funds of the company should be liable to answer to the claims of the plaintiffs and all other persons insured in the company. But the appellate court modified the decree so that the funds were made liable to answer the claims of the plaintiffs and all other parties insured in or depositors with the company. *Evans v. Coventry*, 23 L. J. Ch. N. S. 400, 8 DeG. M. & G. 835, 8 Jur. N. S. 1225.

Dividends paid while the society is insolvent

Eq. 72; *Carr v. Hamilton*, 129 U. S. 252, 83 L. ed. 669; *Universal L. Ins. Co. v. Binford*, 78 Va. 110; *Smith v. Charter Oak L. Ins. Co.* (Mo.) 5 Bigelow, Life & Acci. Ins. Rep. 214; *People v. Knickerbocker L. Ins. Co.* 84 Hun. 476; *Atty. Gen. v. Continental L. Ins. Co.* 88 N. Y. 77.

Mr. William A. Fisher, for appellees:

To give a valid claim under a policy of the character of those in this case, it would be necessary that the judgment should be paid or settled by the assured, and then the assured would have a claim upon the insurance company only for the amount of money actually paid on the judgment. If the judgment was settled for less than the face amount of it, the

insurance company would be entitled to the benefit of such a settlement. If the judgment never was paid, the insurance company would be liable for nothing.

1 May, Ins. §§ 1, 2; *Franklin F. Ins. Co. v. Hamill*, 6 Gill, 95.

It is a right of a policy holder of an insurance company, during the period for which he is insured, that the company shall continue solvent and able to pay losses on the policy.

Mason v. Cronk, 125 N. Y. 503; *People v. Empire Mut. L. Ins. Co.* 92 N. Y. 108.

When an insurance company becomes insolvent and unable to meet its obligations on its policies, its contracts represented thereby are broken, and the policy holders thereupon be-

may be recovered back. *Osgood v. Laytin*, 8 Keyes, 621.

The court will not undertake to determine claims of creditors of creditors of the company. *Com. v. Hide & Leather Ins. Co.* 119 Mass. 155.

The fund in the insurance department for the security of policy holders will be applied first to the holders or assignees of death claims and then *pro rata* to such claims as those of subscribers for stock who never received it but left their money in the possession of the company for several years, claims of persons who have loaned money to the company to pay claims, judgments, and general creditors, and the claims of a landlord for rent. *Kitchen v. Conklin*, 51 How. Pr. 308.

b. Among policy holders.

The courts do not fully agree as to how far claims which have matured before the insolvency of the company are entitled to be treated as preferred claims in the distribution of assets. But it seems that the tendency of a majority of the courts is to treat the claim as one for the face of the policy and let it share *pro rata* with the others although there are cases giving it preference in payment.

All the outstanding policies at the date of sequestration of the assets of the company must be made to stand upon the same footing, and the holders are entitled only to the surrender value of the same. *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198.

A death loss recognized by the company prior to its insolvency has no priority in the distribution of the fund. *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 468.

Where the policy provided that after satisfying all assurances granted by the company previously payable and all prior charges on its funds and property, the funds and property would be liable for its payment, the court held that the sum which had become payable on the policy before the commencement of the winding-up proceedings had no priority over the claims of policy holders whose policies had not become due. *Re International Life Assur. Soc. L. R. 5 Ch. 424*, 28 L. T. N. S. 88, 18 Week. Rep. 794.

If the policy is not a mutual one the right of the holder to a repayment of the unearned premium is not inferior to the claims of other policy holders who have suffered losses. *Re Minneapolis Mut. F. Ins. Co.* 49 Minn. 206.

In the absence of any statute to the contrary claims against a dissolved stock life-insurance company, founded upon death losses which accrued prior to the date of dissolution, are not entitled to priority of payment over claims founded upon policies which were running at that date. *Kelfe v. Columbia L. Ins. Co.* 78 Mo. 594.

If the assets of an insurance company have passed into the hands of a receiver the holder of a policy which matured before his appointment cannot demand payment of the claim before all the claims
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are adjusted and ready for payment. *People, Atty. Gen., v. Security L. Ins. Co.* 71 N. Y. 222.

Death claims which have accrued but not become payable prior to the commencement of proceedings for dissolution of the company are not entitled to a priority. *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354.

The holder of a death claim which has matured before the insolvency of the company has no lien on the assets of the company prior to its dissolution, and is not entitled to payment in full, but only to a dividend from the assets in the hands of the receiver. *Com., Kirpatrick, v. American L. Ins. Co.* 170 Pa. 170.

Unmatured endowment policies have no advantage or priority over ordinary unmatured claims in the distribution of assets. *People v. Security L. Ins. & A. Co.* 7 Abb. N. C. 193.

Most of the cases which have given the matured claims a preference have dealt with peculiar facts which seemed to make it equitable to do so.

Where the reserve fund is dedicated to the payment of reserve certificates to the maximum limit in case of the death of members, the holders of death claims under such certificate of members who died before the commencement of the action of dissolution are entitled to have their claims paid in full before any portion of the fund is distributed among holders of unmatured certificates. *People, Atty. Gen., v. Life and Reserve Assn.* 150 N. Y. 94.

In a mutual company the holders of policies matured at the time of insolvency are preferred creditors, and they are not liable to contribute to losses. *Mayer v. Atty. Gen.* 33 N. J. Eq. 815.

The holder of a matured certificate for the payment of a sum of money by a mutual benefit association is a creditor of the association, and as such is entitled to priority in payment over unmatured certificates, and has a right to attach the fund of the association when insolvent. *Falley v. Fee*, 83 Md. 82, 32 L. R. A. 311.

But it has been held that there is no priority of claim for a death loss which occurs but is not adjusted before the appointment of a receiver, over that of policy holders, to a return of unearned premium, although the policy holders are entitled to share in the profits, such right not making them partners in the concern. *Re Security L. Ins. & A. Co.* 11 Hun. 93.

So, in case of a mutual aid association the holders of matured certificates and death claims are not creditors of the association in such sense as to entitle them to a preference over other certificate holders. *Re Home Mut. Aid Assn.* 3 Ohio N. P. 145. The court puts its rulings upon the ground that the form of contract was illegal. But it says that, even assuming that the contract was valid, yet under the statutes of the state the claimants were not entitled to a preference. But it further says it would certainly be inequitable in a fraternal

come claimants for damages, and the damages are the values of their policies destroyed.

People v. Security L. Ins. & A. Co. 78 N. Y. 125, 34 Am. Rep. 529; *Smith v. Charter Oak L. Ins. Co.* (Mo.) 5 Bigelow, Life & Acc. Ins. Rep. 214; *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 740.

The values of the policies are not their values at some future date; but on the date when the corporation parted with control of its assets.

Miller's Appeal, 85 Pa. 481; *Smith v. Charter Oak L. Ins. Co.* (Mo.) 5 Bigelow, Life & Acc. Ins. Rep. 214; *Carr v. Hamilton*, 129 U. S. 255, 32 L. ed. 670; *Atty. Gen. v. North America L.*

Ins. Co. 82 N. Y. 186; *Bardon v. Massachusetts Safety Fund Assn.* 147 Mass. 368, 1 L. R. A. 146; *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 741; *Uniteral L. Ins. Co. v. Binford*, 76 Va. 110; *People v. Security L. Ins. & A. Co.* 78 N. Y. 127, 34 Am. Rep. 522; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198; *Re Minneapolis Mut. F. Ins. Co.* 49 Minn. 206; *Fogg v. Supreme Lodge U. O. of G. L.* 159 Mass. 13.

All its contracts were broken, and the company was virtually dissolved, when the receivers were appointed.

Taylor v. North Star Mut. Ins. Co. 46 Minn. 198.

benefit society where mutuality is the basis of the contract that the member whose certificate matured the day before dissolution should receive the maximum amount named therein, and the member whose certificate would have matured the next day should receive comparatively nothing in the distribution of the fund of the association.

If, owing to the impracticable plan upon which an association is founded, it has never been solvent, the holders of certificates which have matured at the time it makes an assignment are not entitled to a preference over the holders of unmatured certificates. *Re Order of Tontis*, 178 Pa. 464 and 487.

Where the scheme of a benefit association required payment of a certain amount to shareholders at the end of each three and a half year period, and before the first payment was made the company became insolvent, the court held that persons whose certificates were more than three and a half years old were not entitled to preference over those whose certificates were under that age, but that all should share *pro rata*, the scheme being so impracticable that no payment could have been provided for from the earnings. *Fraternal Guardians' Assigned Estate*, 159 Pa. 504.

In *Stamm v. Northwestern Mut. Ben. Assn.* 65 Mich. 317, where the company ceased to do business with a surplus on hand, it was held that all death losses which had accrued at the time of cessation of business were to be paid in full, and the remainder of the assets distributed *pro rata* among the members then in good standing.

Claims of members for benefits in case of sickness or accident prior to the dissolution of the association, as well as death claims, are preferred and entitled to payment as such in the distribution of the assets. *Baltimore & O. R. Co. v. Baltimore & O. Employees' Relief Assn.* 77 Md. 566.

Claims which have matured at the time of the decree of insolvency are entitled to payment as debts in the order in which they severally accrued, but claims matured after such decree are not so entitled. *Vanatta v. New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 15.

c. Set-off.

The claim of right to priority in payment has generally arisen under a claim of right to set-off. The fact that the set-off would give a priority has not always been considered in such cases, and general rules applicable to set-off have been applied which in some cases would allow the right where it would be refused if the further question of preference had been in the mind of the court.

The general rule is that claims for losses may be set off against debts for borrowed money.

The debt for money borrowed to erect a building which is insured in the company which loaned the money, and is destroyed by fire, may be canceled by the amount due on the policy of insurance. *Re Globe Ins. Co.* 2 Edw. Ch. 625.

The holder of a policy in an insurance company who has borrowed money from the company on 35 L. R. A.

bond and mortgage is entitled to set off a claim for loss under the policy upon the amount due on the bond and mortgage. *Holbrook v. American F. Ins. Co.* 6 Paige, 220.

If a loss has accrued before the company is placed in the hands of the receiver the claim may be set off against a debt due from the assured to the company. *Com. v. Shoe & Leather Dealers' F. & M. Ins. Co.* 112 Mass. 181.

A holder of a policy in a life insurance company who is indebted to the company by note and mortgage may set off against the amount so due his claim to recover the amount which he has paid as premiums on his policy, or as much thereof as he is entitled to receive under the conditions incorporated in his policy. *Life Assn. of America v. Levy*, 33 La. Ann. 1233.

A claim for loss under an insurance policy may be set off by the insured against his indebtedness to the company for borrowed money. *Drake v. Rollo*, 3 Biss. 273.

The amount due on an endowment policy payable in any event at a fixed time, and sooner if the party dies before that time, should, in settling the company's affairs, be set off against the amount due on a mortgage debt from the holder on the policy to the company. And if the period of payment has not arrived the amount to be paid is the contingent interest to be determined by the tables ordinarily used for that purpose. *Carr v. Hamilton*, 129 U. S. 251, 32 L. ed. 669.

But the assignee of a claim against an insolvent insurance company for loss under its policies assigned after notice of the insolvency cannot set it off against his previous indebtedness to the company for borrowed money. *Hitchcock v. Rollo*, 3 Biss. 276.

Under the English statutes the holder of an endowment policy which matures after the petition for winding up but before the winding-up order, who has borrowed money from the society, may set off his debt against his claim upon the policy. *Sovereign Life Assur. Co. v. Dodd* [1892] 1 Q. B. 405. And this case was affirmed in *Sovereign Life Assur. Co. v. Dodd* [1892] 2 Q. B. 573.

A loan made by the company upon the policy may be satisfied out of the dividends due the policy. *Guy v. Globe Ins. Co.* (Va.) 9 Ins. L. J. 466.

Under the English statutes allowing set-off in case of mutual dealings, the insolvency trustee of a holder of policies in a life insurance company who has borrowed money from the company on the faith of the policies, cannot claim the right to set off the present value of the policies at the time the company becomes insolvent against its claim upon him for the amount of the borrowed money. *Ex parte Price*, L. R. 10 Ch. 648.

On the other hand, when the debt constitutes a part of the guaranty fund of the insurer it is not available for set-off.

One who gives a note to an insurance company as part of its guaranty fund under the agreement

If there has been no loss on the policy, the value of it is the unexpired premium only, if the policy had not expired.

Dean's Appeal, 98 Pa. 101; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198; *Re Minneapolis Mut. F. Ins. Co.* 49 Minn. 296; *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423.

If any loss to the policy holder ever resulted from an accident occurring subsequent to November 23, 1893, obviously it would be a loss occurring subsequent to the stoppage of the company's business and appointment of receivers, and the assets would not be liable in any respect therefor.

Dean's Appeal, 98 Pa. 101; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198; *Com. v. Massachusetts Mut. F. Ins. Co.* 119 Mass. 50; *Re Educational Endowment Assn.* 56 Minn. 176.

All policies were virtually canceled on November 23, 1893.

Re Minneapolis Mut. F. Ins. Co. 49 Minn. 296; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 200.

The fact that prior to November 23, 1893, there existed a liability unpaid which was paid after said date, does not give the claimant a right to prove as for a loss which occurred before November 23, 1893.

Re Educational Endowment Assn. 56 Minn.

that he shall have a certain commission on the amount of his note cannot set off his claim for commission against an assessment on the note, but becomes a general creditor for that amount with a claim only against the general assets of the company. *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51.

Holders of claims for losses in a mutual company, which occurred after the appointment of the receiver, cannot set off their claims in actions on their premium notes. *Standard Mut. Livestock Ins. Co. v. Crawford*, 2 Pa. Dist. R. 601.

A member of an insolvent mutual company is not entitled to set off against an assessment upon him a loss incurred while the company was apparently solvent. *Dettra v. Spielberger*, 5 Pa. Dist. R. 232; *Re Gain's Estate*, 5 Pa. Dist. R. 350.

A member of a mutual company cannot set off against an assessment a debt due to him by the company. *Care v. Brown*, 31 W. N. C. 501.

One who owes money on notes given for stock in the company cannot set off against them a claim for losses purchased from a third person to a greater extent than the *pro rata* dividend to which the claims are entitled from the assets of the company. *Long v. Penn Ins. Co.* 6 Pa. 421.

There can be no set-off against a stock note of a claim for money paid by the stockholder to the company for the purpose of repairing its capital stock under an agreement that as between the company and its creditors the payment is a donation, but as between the stockholders a debt, and upon the further agreement that such payment is to be regarded as a satisfaction *pro tanto* of the individual liability of the stockholder to creditors. *Union C. L. Ins. Co. v. Jones*, 35 Ohio St. 361.

The holders of policies in an insolvent mutual insurance company cannot, when sued on their premium notes, claim that the values of their policies should be set off against their liabilities. *Conigland v. North Carolina Mut. L. Ins. Co.* Phill. Eq. 341, 36 Am. Dec. 38; *North Carolina Mut. L. Ins. Co. v. Powell*, 71 N. C. 339.

A stockholder cannot set off against a claim for return of a dividend paid him after the insolvency of the corporation, claims for return of premiums and damages for a loss on the policy. *Osgood v. Ogden*, 4 Keyes, 70.

A policy holder cannot set off against his assessment the amount which he has paid as premiums on policies not yet due. *Vanatta v. New Jersey Mut. L. Ins. Co.* 31 N. J. Eq. 15.

When the losses suffered by a mutual insurance company have rendered it insolvent the holder of an unexpired policy has no right of set-off or of recoupment or claim for return of premium or for damages on account of the unexpired term of his policy. *Com. v. Massachusetts Mut. F. Ins. Co.* 112 Mass. 116.

A stockholder cannot set off against the amount unpaid on his stock a debt due him by the company. *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 731, *Affirming Sawyer v. Hoag*, 3 Bias. 236.

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In case of a mutual insurance company the holder of a policy cannot set off a loss upon it against the amount of his premium note unless the assets of the company are enough to pay all losses in full. *Hillier v. Allegheny County Mut. Ins. Co.* 3 Pa. 470. The court says such course would work most unjustly by enabling a member who stood in the double relation of debtor and creditor to get more than his share of the insolvent fund. Where the company is bankrupt each member is entitled to payment, not of his whole loss, but of a part of it in the proportion which the amount of all losses bears to the amount of the joint effects.

A member of a mutual marine insurance company cannot upon its insolvency set off against his indebtedness for premiums due upon policies a loss sustained by him adjusted and payable by the company. The premiums constitute a fund which as insurer he is bound to make good for the benefit of all creditors, and as assured he is bound to take a *pro rata* dividend from the fund. *Lawrence v. Nelson*, 21 N. Y. 153.

But notes given for premiums in an ordinary company are not part of the guaranty fund of the company so as to preclude the right of set-off.

Insurance brokers may set off against their liability for premiums, claims on policies which have been taken out in their own names which occurred before the underwriter stopped payment. *Koster v. Eason*, 2 Maule & S. 112; *Grove v. Dubois*, 1 T. R. 113; *Bize v. Dickason*, 1 T. R. 285.

A loss which has happened before the insolvency may be set off upon a note given for premiums. *Osgood v. DeGroot*, 36 N. Y. 343.

Claims against the company may be set off in a suit on the premium note. *Berry v. Brett*, 6 Bosw. 627.

In *Atty. Gen. v. North American L. Ins. Co.* 39 N. Y. 94, it is said that premium notes and loans made on policies are not assets upon which the receiver is entitled to commissions because they constitute proper offsets against the liability of the company.

Insurance brokers cannot set off their damages for losses on other policies which they have had to make good to their principals against a demand by the trustee in bankruptcy of the insurer for salvage money which has come into their hands upon losses which were paid by the insurer before his bankruptcy. *Elgood v. Harris* [1893] 2 Q. B. 491. This ruling is placed upon the ground that there is a want of mutuality in the accounts, the fund in the hands of the brokers not being on account of a credit given them by the bankrupt.

A banker may set off against claims on policies moneys which had been deposited by the company with him on call, although he is a director in the company. *Scammon v. Kimball*, 92 U. S. 362, 23 L. ed. 483.

If an endowment policy is payable to the wife of the assured in case of death before its maturity, and to him in case of its maturity, the present

176; *Taylor v. North Star Mut. Ins. Co.* 46 Minn. 198.

The decisions all mean that the date when the company stops business and its assets are sequestrated is the date at which policies are to be valued.

Mayer v. Atty. Gen. 33 N. J. Eq. 824; *Holdich's Case*, L. R. 14 Eq. 80; *Relfe v. Columbia L. Ins. Co.* 76 Mo. 632; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 408; *Dean's Appeal*, 98 Pa. 101; *Craig's Case*, L. R. 9 Eq. 703.

It is of the utmost importance that the earliest possible period for a distribution should be taken.

Fogg v. Supreme Lodge U. O. of G. L. 159 Mass. 11; *Com. v. Massachusetts Mut. F. Ins. Co.* 119 Mass. 51.

value of it cannot be set off by him against an amount due by him individually to the company, since the question as to who will be ultimately entitled to the fund cannot be determined. *Newcomb v. Almy*, 96 N. Y. 308.

A person who has assigned his policies to a mortgagee cannot claim a right to set them off against money which he has borrowed from the insurer since the title to them is no longer in him. *Swords v. Blake*, 3 Edw. Ch. 112.

The right of set-off must exist, if at all, at the time the assignment for benefit of creditors is made. *Franzen v. Zimmer*, 90 Hun. 103.

d. Claims entitled to preference.

Certain claims are entitled to preference.

Costs.

The special fund in the hands of the insurance department is chargeable with its proportionate part of the expenses in closing up the affairs of the company. *Atty. Gen. v. North America L. Ins. Co.* 25 Hun. 294.

But in *BOSTON & A. R. CO. v. MERCANTILE TRUST & D. CO.* it is held that when a special fund has been deposited with the state treasurer for the benefit of policy holders it will not be chargeable with the costs of administering the general fund.

The expenses of the winding up, including the receiver's commissions, should be paid *pro rata* by the two funds where the plan of the organization provides two funds, one for the payment of death claims and the other for the benefit of policy holders. *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354.

The fees of the referee appointed to take proof of claims are to be paid out of the fund. *Atty. Gen. v. Continental L. Ins. Co.* 93 N. Y. 45.

The special fund in the insurance department is properly chargeable with its proportionate share of the expenses of the trust. *Atty. Gen. v. North American L. Ins. Co.* 89 N. Y. 94.

The expenses of the suit brought for the appointment of the receiver and the incidental expenses in collecting the assets are proper charges against the fund. *Howard v. Whitman*, 29 Ind. 557; *Embree v. Shideler*, 36 Ind. 423.

The costs of all the parties to the proceedings will be paid out of the fund. *Re Professional Life Assur. Co.* L. R. 3 Eq. 668, 36 L. J. Ch. N. S. 442, 15 Week. Rep. 544.

The costs of actions necessary to establish the debts of the concern will be treated as general debts not subject to the provisions of the policies. *Re Athenaeum Life Assur. Soc.* 3 De G. & J. 600, 38 L. J. Ch. N. S. 535, 5 Jur. N. S. 558.

A successful defendant in an action by the receiver to enhance the fund in his hands is entitled to costs which he may receive immediately out of any fund in the receiver's hands, without waiting for the distribution of the assets. *Columbian Ins. Co. v. Stevens*, 37 N. Y. 538.

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The settlement of an insolvent life insurance company's affairs cannot be postponed to await the determination of every contingency on which its policy engagements are suspended.

Carr v. Hamilton, 129 U. S. 256, 32 L. ed. 670; *Baltimore & O. R. Co. v. Baltimore & O. Employee's Relief Assn.* 77 Md. 566.

If the street railway company intended to rely upon the contract it was its duty to have paid the premium, or at least to have done what was equivalent to it—to have tendered the premium and demanded the renewal.

Dungan v. Mutual Ben. L. Ins. Co. 46 Md. 493.

The railway company having failed to make a tender of the premium, and the contract contemplating the issue of a new policy, which

The receiver must show that allowances paid for counsel fees are justified by the services rendered. *Re Commonwealth F. Ins. Co.* 32 Hun. 78.

The costs of winding up must be borne by the stockholders. *Re Albert Life Assur. Co.* L. R. 9 Eq. 706, 39 L. J. Ch. N. S. 539, 22 L. T. N. S. 697, 18 Week. Rep. 668.

The costs may be charged against the personal liability of stockholders. *Re State Fire Ins. Co.* 34 L. J. Ch. 438.

Taxes.

It has been held that the assets in the hands of a receiver awaiting distribution are not subject to taxation. *Brooks v. Hartford*, 61 Conn. 125.

The assessment for taxes required to be made upon shares of stock in the corporation is not payable by the receiver. *Relfe v. Columbia L. Ins. Co.* 11 Mo. App. 374.

But in *Schmidt v. Falley* (Ind.) 87 L. R. A. 412, which involved funds of a mutual benefit assessment society, it was held that a claim of nonresidents to distributive shares of the property on final settlement will not prevent the taxation of funds in the hands of the receiver as property within the jurisdiction of the state, although the fund had been collected in other states in which the company also did business, and turned over by orders of the courts to the receiver, with the understanding that all holders of certificates in the different states should be ratably paid on final settlement.

So, taxes assessed upon the company before the appointment of the receiver are debts which he must pay, and they have a preference over other claims. *Re Commercial Ins. Co.* 20 R. I. pt. 1, p. 7.

So, when an insurance company is at the time of its dissolution by decree of court a debtor to the state for taxes on gross premiums, the claim is a charge on the assets in the hands of the receiver. *Com. v. American L. Ins. Co.* 14 Pa. Co. Ct. 216.

And in *BOSTON & A. R. CO. v. MERCANTILE TRUST & D. CO.* it is held that if the state imposes a tax on the shares, and requires the company to pay them should the company become insolvent, such taxes if due are debts for which the assets are liable, and will constitute a prior lien for which all funds of the association are liable.

Salaries, etc.

Rent for premises occupied by the receiver should be paid. *People v. Universal L. Ins. Co.* 30 Hun. 142.

The officers are not entitled to have their salaries paid in full in preference to the claims of other creditors. *Re Croton Ins. Co.* 3 Barb. Ch. 642.

A general agent who is employed for a term extending beyond the insolvency of the company cannot recover from the funds in the hands of the receiver the salary becoming due after the company's insolvency. *People v. Globe Mut. L. Ins. Co.* 64 How. Pr. 240.

never was asked for nor issued, it is submitted that after August 1, 1893, the railway company was no longer insured by the insurance company, and consequently all claims based upon the supposed continuance of the insurance after said date must be disallowed.

8 Pom. Eq. Jur. § 1407; *Hubbell v. Von Schrenking*, 49 N. Y. 826; *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Iroin v. Beakley*, 67 Pa. 24; *Crabtree v. Levings*, 58 Ill. 526; *Morton v. Lamb*, 7 T. R. 125;

The salary of the president of the company after its dissolution will be no more than his services are worth for the work he does after that time regardless of the amount as fixed by the directors. *Com. v. Eagle F. Ins. Co.* 14 Allen, 848.

Equitable priorities.

Where checks have been drawn and filled up for the purpose of paying a dividend, and partly delivered before the fire which renders the company insolvent, the dividends have been severed from the funds of the company and must be paid in preference to other claims. *LeRoy v. Globe Ins. Co.* 2 Edw. Ch. 657.

In case a bill to wind up the association is filed before the time for paying the assessment has expired payments which have been made must be refunded after deducting the maker's proportionate share of the losses. *Fogg v. Supreme Lodge, U. O. of G. L.* 159 Mass. 9.

One who has applied for a policy and paid the premium to the agent may, in case the company becomes insolvent before the money is paid over or the agent assumes liability to the company for it, reclaim it from the hands of the agent. *Smith v. Binder*, 75 Ill. 492.

The officers of a branch of the association who have collected dues in advance and paid them over to the association cannot compel their return to them in case of the insolvency of the association. *Garrett v. Guarantee Trust & S. D. Co.* 29 W. N. C. 53.

Liens.

The lien of an attachment will not be defeated by a decree dissolving the corporation and appointing a receiver. *Life Asso. of America v. Fassett*, 102 Ill. 215.

Where an attachment of local assets is made on the same day that a receiver is appointed in the parent state, it is necessary, in order to defeat the attachment, to show that the receiver was appointed first. *Cohen v. Supreme Sitting, O. of I. H.* 105 Mich. 283.

Liens acquired before the dissolution of the company cannot be displaced by appointment of a receiver. *Taylor v. Columbian Ins. Co.* 14 Allen, 353; *Folger v. Columbian Ins. Co.* 99 Mass. 276. 96 Am. Dec. 747; *Southern Bank v. Ohio Ins. Co.* 22 Ind. 181.

If a lien has been obtained on the assets it will not be displaced by the appointment of a receiver, but if no lien has been acquired equality is equity. *Buswell v. Supreme Sitting, O. of I. H.* 161 Mass. 224, 28 L. R. A. 846.

Judgments obtained before appointment of the receiver are entitled to preference over general creditors. *Doane v. Millville Mut. Maine & F. Ins. Co.* 43 N. J. Eq. 522.

Under the Maine statutes all claims, whether in judgment or not, are to be paid ratably, and the dissolution of the company will terminate attachment proceedings. *Bowker v. Hill*, 60 Me. 178.

A judgment creditor who has no lien on the property of the insurance company, and who has not issued execution when the winding up proceedings are begun against the company, has no right to have his judgment paid out of the funds in court in priority to the claims of other creditors. *Belfe v. St. Louis Mut. L. Ins. Co.* 18 Mo. App. 184.

Jones v. United States, 96 U. S. 27, 24 L. ed. 645.

Section 138, art. 81, of the Code provides that the president or other proper officer of corporations shall annually, on or before the 1st day of March, make out and deliver to the county commissioners of the county or appeal tax court where the corporation is situated, an account of the number of shares of stock in such corporation held by persons not residents of this state, and that the same shall

ority to the claims of other creditors. *Belfe v. St. Louis Mut. L. Ins. Co.* 18 Mo. App. 184.

In the absence of anything to show that an attachment creditor had attached property enough to satisfy his claim, the receiver should not be directed to pay the amount in full out of assets in his hands. *Glines v. Supreme Sitting, O. of I. H.* 50 N. Y. S. R. 743.

Unless a judgment creditor has acquired a statutory lien prior to the appointment of a receiver he is not entitled to a priority over other creditors. *Mosher v. Supreme Sitting, O. of I. H.* 88 Hun, 394.

No attachment can become effective after the appointment of a temporary receiver. *Mosher v. Supreme Sitting, O. of I. H.* 88 Hun, 394.

After the company has been enjoined from doing further business no lien can be acquired by an attachment, although the receiver has not yet been appointed. *Merrill v. Commonwealth Mut. F. Ins. Co.* 166 Mass. 238.

A judgment against the company after the appointment of the receiver is not a lien on real estate standing in its name. *Atty. Gen. v. Atlantic Mut. Ins. Co.* 100 N. Y. 279.

No judgment can be acquired after the presentation of the petition for dissolution of the company, which will be a lien on its assets. *Re Berry*, 26 Barb. 55.

The holder of an accident insurance policy who has put his claim in judgment more than thirty days before equitable proceedings of insolvency are instituted against the company does not acquire for his claim any preference over the legal claims of the other creditors of the company. The court says they are unable to perceive that the claimant became entitled to any lien upon the funds. There was no attachment or seizure of the funds. His judgment was nothing more than a subsisting claim against the company, and not more just and equitable so far as is seen in any facts which the case discloses. His claim was in one form while other claims existed in different forms. He had taken more advanced steps than other claimants towards collecting his debt, but these steps fell short of establishing any special title to the fund or lien thereon. This is an equitable proceeding and equity is equality. *Smith v. Maine Mut. Accl. Assn.* 86 Me. 229.

IV. Special funds.

a. In general.

The premiums and interest on capital stock constitute the primary fund for payment of losses, and the capital stock can only be resorted to when that fund is exhausted. *De Peyster v. American F. Ins. Co.* 6 Paige, 486.

If the articles of the association have created two funds and designated those who are to have the benefit of them the courts will follow this designation. *Farmers' Loan & T. Co. v. Aberle*, 18 Misc. 257.

Under the New York laws where a deposit is required to be made with the insurance department for the benefit of registered policies and annuities such claims must be paid, so far as possible, out of such funds, and can look to the general assets of the company only for the balance unpaid after ex-

be valued at its actual cash value to and in the name of such stockholders respectively; but the tax assessed on such stock for county or municipal purposes shall be levied and collected from said corporation, and may be charged to the account of such nonresident stockholders in the said corporation, and shall be a lien on the stocks therein held by such stockholders, respectively, until paid.

These provisions having created the duty and obligation on the part of the corporation to pay such taxes, when the shares of stock are

assessed to the individual owners, that duty and obligation might be enforced by a proper action at law.

American Coal Co. v. Allegany County Comrs. 59 Md. 185.

But the liability for such taxes upon the part of the corporation ceases, both at law and in equity, when it becomes insolvent and passes into the hands of receivers.

Relfe v. Columbia L. Ins. Co. 11 Mo. App. 874.

A tax on the interest paid by a corporation

haunting such fund. *Atty. Gen. v. North American L. Ins. Co.* 85 N. Y. 485.

The holders of running registered policies are not entitled to payment out of the fund deposited with the insurance department in preference to death claimants under registered policies. *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172.

Policies which are not in fact registered cannot share in the fund set apart for the payment of registered policies. *Atty. Gen. v. North American L. Ins. Co.* 82 N. Y. 172.

If two funds are created, one a death fund and the other a reserve fund, and the purpose of the two is different, the holders of death claims cannot resort to the reserve fund in case the death fund proves to be insufficient to pay their claims in full. *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354; *People v. Life Union*, 145 N. Y. 806.

Where the plan of the association provided for a death fund and a reserve fund, death claims were held to be entitled to the death fund absolutely, and to share *pro rata* with other members and creditors in the reserve fund. This was placed upon the ground that the reserve fund was not disposed of by the charter, but must be disposed of on equitable principles. *Re Equitable Reserve Fund Life Assn.* 131 Hun, 239.

Where the constitution of the society provides for transferring from the reserve fund to the death fund not less than the proceeds of one death assessment, it must be construed as authorizing a transfer only for the payment of death claims arising under reserve certificates where it further provides that no person holding a life certificate shall be entitled to or in any manner derive any benefit from the reserve fund. *People, Atty. Gen. v. Life & Reserve Assn.* 150 N. Y. 94, *Reversing* 32 Hun, 522.

Where the reserve fund is created for the benefit of members it is divisible among living members, and death claimants have no interest in it. *People v. Life Union*, 83 Hun, 693.

The fund deposited with the insurance department for the benefit of policy holders is subject to their claims alone, and not to those of general creditors. *Falkenbach v. Patterson*, 43 Ohio St. 350.

In *BOSTON & A. R. Co. v. MERCANTILE TRUST & D. Co.* it is held that if the company makes a deposit with the state treasurer as a guaranty for the payment of the policies issued by it, the fund will be applicable solely to the claims of policy holders, and the policy holders after exhausting this fund will be entitled to participate with the general creditors in the distribution of the general fund of the company.

So where a special fund has been set aside for the benefit of policy holders the salaries of employees are not charges against it, but merely against the general fund of the association.

In *Kentucky Mut. Secur. Fund Co. v. Turner*, 98 Ky. 481, it was held that the terms of the contract provided that in case the mortuary fund was not sufficient to pay policies in full the security fund should be prorated among the living members, and the representatives of such as were dead in proportion of the amount of their respective certificates.

If the by-laws of an assessment life insurance

company provide for a reserve fund the amount of which, above a certain sum, shall be applied to the payment of death claims under certain conditions the funds cannot, in case of insolvency, be applied to death claims generally. *Farmers' Loan & T. Co. v. Aberle*, 19 App. Div. 79.

The guaranty fund of a mutual life insurance company organized under the California act of 1886 is liable only for the payment of debts due from the company to third persons dealing with it, and not for the payment of stockholders for moneys paid or contributed by them for the extinguishment of the obligations of the company for which, as stockholders, they were liable. *Re California Mut. L. Ins. Co.* 81 Cal. 364.

Certificate holders in an endowment order of a fraternal society are to take from the assets in the hands of the receiver dividends from the particular fund on account of which their payments were made in proportion to the amount paid into such fund by each; and money paid as an initiation fee will not be entitled to a dividend if it did not go into the fund. *Fogg v. Supreme Lodge, U. O. of G. L.* 159 Mass. 9.

Where a safety fund is collected by a beneficiary association which is limited to insure in a certain event to the benefit of the members generally for the payment of future dues and assessments, and is not to be used to make good the indemnity, but in case the association should fail to pay the indemnity is to be divided among the holders of certificates then in force, deducting the expenses of management, in the case of the insolvency of the company the safety fund is to be divided among certificate holders not in default including representatives of deceased holders, and claimants for death losses as such merely are not entitled to share in the fund. *Burdon v. Massachusetts Safety Fund Assn.* 147 Mass. 360, 1 L. R. A. 146.

Where the plan of the association contemplates both mutual and all-cash insurance, and provides for assessments and premium notes to pay losses, all on both kinds of policies may be provided for by an assessment on premium notes, but claims for unearned premium on all-cash policies must be paid from cash on hand and not from an assessment of the premium notes. And the two funds will be marshaled so that the cash will be left for payment of unearned premiums, while the fire losses will be paid out of assessments. *Clark v. Manufacturers' Mut. F. Ins. Co.* 130 Ind. 332.

An assessment levied to meet a death claim before the dissolution of the corporation will not be impressed with a trust in favor of the holder of that claim if no portion of the assessment ever reaches the hands of the receiver and there is nothing in the contract appropriating the proceeds of an assessment to the payment of any particular claim. *People, Atty. Gen., v. Life & Reserve Assn.* 150 N. Y. 94.

Under the Missouri statutes in case of a mutual company, death claims must be paid *pro rata* from the assets of the company, although an assessment for the particular loss had been made and collected but not paid to the beneficiary prior to the insolvency. *Ellerbe v. Farmers & M. Mut. Aid Assn.*

on its indebtedness, though collected from the corporation, is still a tax on the creditor, the corporation being only made use of as a convenient means of collecting the tax.

Haight v. Pittsburg, Ft. W. & C. R. Co. 78 U. S. 6 Wall. 15, 18 L. ed. 818; *Northern C. R. Co. v. Jackson*, 74 U. S. 7 Wall. 262, 19 L. ed. 88; *United States v. Baltimore & O. R. Co.* 84 U. S. 17 Wall. 322, 21 L. ed. 597.

An adjuster is not entitled to a preference

105 Mo. 13; *Ellerbe v. United Masonic Ben. Asso.* 114 Mo. 501.

But it has been held that where a death occurred and an assessment was levied to pay the claim, but payment was postponed because of a dispute in regard to it, the assessment must be applied to the claim. *Re Equitable Reserve Fund Life Asso.* 61 Hun. 299.

If an assessment is required to pay debts, and after they are all paid a surplus exists, it is to be returned to the persons upon whom the assessment was laid. *Com. v. Massachusetts Mut. F. Ins. Co.* 119 Mass. 45.

b. Reinsurance.

The holder of the policy has no preferential claim on the amount of the reinsurance which the receiver obtained because of the loss. *Herckenrath v. American Mut. Ins. Co.* 8 Barb. Ch. 68.

The holder of the policy has no right to funds from reinsurance by the insurer of the risk. *Carlington v. Commercial F. & M. Ins. Co.* 1 Bosw. 152; *Goodrich's Appeal*, 109 Pa. 523.

But it has been held that a reinsurer, who has bought up before the commencement of insolvency proceedings the claims under the original policies, may set them off against the claim of the assignee of the original insurer to recover the amount due on the policies of reinsurance. The ruling was placed upon the ground that there were mutual debts or mutual credits within the meaning of the statute of set-off. *Hovey v. Home Ins. Co. (Ohio)* 10 Nat. Bankr. Reg. 224, 3 Ins. L. J. 815.

Where the insurer reinsures his risks in a foreign company, and deposits a bond with the state treasurer to protect the reinsurance in case the latter company assigns for benefit of creditors, the assignee will take the bond subject to the claims of the policy holders for whose benefit it was given. *Hughes v. Hunner*, 91 Wis. 118.

In a case where a company reinsured its risks and attempted to transfer its mortuary fund to the reinsurer, the court held that after paying death losses accrued before the filing of the bill and the expenses of the suit, the fund should be divided and a portion turned over to the reinsurer equal to the proportionate share which the policy holders who accepted reinsurance bore to the whole amount, and the remainder divided among those policy holders who refuse to accept reinsurance in proportion to the assessments which had been paid by them. *Insurance Commissioner v. Provident Aid Soc.* 89 Mo. 413.

c. Stockholder's Liability.

Where a mutual company issued three kinds of policies—all-cash, perpetual, and premium note—the court held that an assessment on the notes might be levied to pay fire losses; expenses of the receivership; money borrowed to pay losses during the life of the policies; to raise a fund to return deposit money received on perpetual insurance and used in the payment of losses during the life of the policies. *Solly v. Potts*, 6 Mont. Co. L. Rep. 209.

The holders of policies are creditors of an insolvent insurance company within the meaning of statutes making stockholders liable for the debts of the concern. *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401.

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for his unpaid salary, because he does not come under the classes preferred. He is not a "clerk," and certainly not a "servant" or "employee," which indicate relations of more inferior degree.

Lewis v. Fisher, 80 Md. 142, 26 L. R. A. 2.

McSherry, Ch. J., delivered the opinion of the court:

There are twenty appeals in the record now

A shareholder who has loaned money to the concern is not, in the absence of contract or statutory limitations, prevented from looking to the personal liability of the subscribers to recover the amount of his loan in case the capital stock is not sufficient for that purpose. *Re Professional Life Assur. Co.* L. R. 3 Eq. 663.

V. Contract rights.

In determining the proper distribution of the assets reference must be had to the provisions of the certificates and the constitution and by-laws of the association. *People, Atty. Gen., v. Life & Reserve Asso.* 150 N. Y. 94.

Where the contract of the participating and non-participating policy holders each negated personal liability of the stockholders, and the latter class were made subject to prior claims, it was held that both classes were entitled to be paid out of the general fund of the society *pari passu* with general creditors, and that they could not compel the general creditors to leave the fund for them and seek the personal liability of the stockholders for reimbursement. And the court expressly decides that the participating policies do not make the holders partners in the concern so as to prevent their sharing in the assets as creditors. *Re English & Irish Church & University Assur. Soc.* 1 Hem. & M. 85, 11 Week. Rep. 681, 8 L. T. N. S. 724.

If a call upon stockholders in addition to the amount of their subscriptions is necessary to pay general creditors, the holders of policies will not be permitted to marshal the funds so that any portion of it can be applied to their claims if their contracts expressly provide that they cannot look to the individual liability of stockholders. *Re State Fire Ins. Co.* 34 L. J. Ch. N. 8. 493.

A contract by an insurance company that a certain portion of their premiums should be invested and appropriated for payment of their claims in priority to general liabilities of the company is enforceable in case of the company's insolvency. *Re British Imperial Ins. Corp.* 47 L. J. Ch. N. S. 313.

Where the contract of policy holders is that they will not look to the contributories beyond the amount of their subscriptions they must share that fund with the general creditors, and cannot compel the latter to look to the personal liability of the subscribers over the amount of their subscriptions so as to leave the capital of the company untouched for their benefit. *Re Professional Life Assur. Co.* L. R. 3 Eq. 663.

The insured in a marine policy on a ship for a year is not entitled to have his premium note given up on paying *pro rata* for the time expired in the event of the insurers becoming bankrupt. *Hone v. Boyd*, 1 Sandf. 481. The court places this ruling upon the ground that the contract had not been terminated, and that mere notice by the insured would not have that effect.

Although if the policies have been canceled there is no liability for unpaid premiums. *Merchants' Mut. Ins. Co. v. Underwood*, 1 Sandf. 474.

VI. Surplus assets.

When a mutual company is dissolved its assets remaining after paying all liabilities against the company vest in the state. *Titcomb v. Kennebunk Mut. F. Ins. Co.* 79 Me. 315.

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before us. The cases were elaborately and ably argued during the last October term of this court, and the preparation of the opinion was then assigned to the late Chief Judge Robinson. His lamented death occurring shortly afterwards without his having done more than hurriedly sketch an incomplete outline of some of the many questions involved, delayed a decision till now. We have had the benefit of Judge Robinson's notes, and will avail of them in this opinion.

The American Casualty Insurance & Security Company of Baltimore City was incorporated under the laws of Maryland in January 1890, and begun operation with a paid-up capital stock of \$1,000,000. Its business embraced many and divers lines of insurance and indemnity. It was authorized to write and did write policies of insurance against accidents, against losses by railroads and street railways arising from injuries to property and persons, whether passengers or employees, or strangers; and it engaged in various other kinds of indemnities. In a little less than four years its whole paid-up capital, with the large sums which it had received in premiums,—except, however, the funds in court for distribution,—has been swept away by losses, and there are now outstanding liabilities due by it in a very large aggregate amount and to many thousand creditors. Becoming hopelessly insolvent, a bill was filed against it by some of its creditors, and an order was passed thereon on November 23, 1893, appointing receivers to take charge of its assets. The receivers now have in hand certain funds of the insolvent company, and the questions before us relate to the method of distributing the same. A portion of these funds is invested in certain securities which had been deposited by the company with the treasurer of Maryland, and the residue consists of moneys derived from other sources; and the question which is presented at the threshold is whether the proceeds of these securities, when sold, and the accrued and accruing interest thereon, constitute a special or trust fund applicable to a particular purpose,—to the payment of a particular class of creditors,—or are general assets, available for the settlement of all claims due by the insolvent company. All of the questions involved were passed upon by the court below in its order of August 8, 1895, from which order the pending appeals were taken.

After determining by this order what was the special and what the general fund, and after directing how the commissions, costs, and auditor's fees were to be paid, the circuit court ordered that the taxes claimed to be due to the mayor and city council of Baltimore were not properly chargeable upon the assets in the hands of the receivers, and, further, that there were three classes of creditors. The order then proceeded to define each of these classes, and prescribed rules for ascertaining the different values of the several policies held by them. Following, with a single exception, the paragraphs of the order appealed from, we come first to the question relating to the division of the funds into a special and a general fund. At the time of the appointment of the receivers there was standing in the name of the Honorable Spencer C. Jones, treasurer of Maryland,

Baltimore city stock of the par value of \$200,000, which had been deposited with him by the company as a guaranty for the payment of the policies issued by it. On December 2, 1893, the receivers filed their petition in the circuit court, setting forth the facts in reference to the deposit of these securities, and praying the court to require Mr. Jones to transfer and deliver them to the petitioners, to the end that the same might be administered under the order and direction of the court. To this petition an answer was filed by Mr. Jones, asserting that these securities were held by him as a trust fund for the benefit of the policy holders of the company, and that they could not be applied to any other or different purpose. Presenting this view, he submitted to such decree as the court might deem proper to pass in the premises. Upon the petition and answer a decree or order was passed whereby Mr. Jones, the treasurer of Maryland, was directed to assign and deliver this Baltimore city stock to the receivers, to be held by them for the benefit of the policy holders, subject to the further orders of the court. Whether this fund is a special or trust fund, or, on the other hand, belongs to the general assets of the company, depends entirely upon the facts and circumstances under which it was deposited with Mr. Jones. If these are such as to create a trust in behalf of the policy holders, then the fund must be applied as the terms of the trust direct. In determining whether or not a trust has been created courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settlor had in view in making the declaration. No technical terms or expressions are needed. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property. 27 Am. & Eng. Enc. Law, p. 26, and the citations in notes 1, 2, 3. In this case the trust is alleged to have been created by an accident insurance and security company doing business in all parts of the country, and having its home office in this state. In many states of the Union insurance companies of every kind doing business in such states are required to deposit with some one of the state's officers a certain named sum of money or approved securities of a designated value, as a guaranty for the payment of losses sustained by the policy holders. And in this state every life insurance company is required to deposit with the treasurer of the state public securities of the value of \$100,000 as a guaranty for the payment of the policies issued by the company. The American Casualty Company, it is insisted, however, is not a life insurance company, within the meaning of the Code of Public General Laws, and was not, therefore, obliged to make a deposit of any kind with the treasurer, and, further, that the treasurer, as such, had no lawful authority to accept such deposit. We need not stop to consider whether the deposit in this case was made by the company under the impression that it was a statutory requirement, or whether it was made voluntarily, with a view to strengthen its credit, and to give confidence to its policy holders of its ability to meet its obligations. The fact is, the

company did make the deposit with Mr. Jones, and did take from him at the time the following certificate:

I, Spencer C. Jones, do hereby certify that I am treasurer of the state of Maryland, and that the American Casualty Insurance & Security Company of Baltimore City, a corporation chartered by said state and located in the city of Baltimore, has deposited in this office securities of the denominations and descriptions particularly set forth and described in the schedule signed by me and hereto annexed, amounting in par value to the sum of two hundred thousand dollars; and I further certify that said securities are now held by me, as such treasurer aforesaid, in my official capacity, on deposit as a guaranty for the payment of the policies of insurance issued by said company. In witness whereof I have hereunto set my hand at the city of Annapolis this twenty-eighth day of July, A. D. 1892.

Spencer C. Jones, Treasurer of Maryland.

The schedule annexed to this certificate is entitled, "Schedule setting forth the several denominations and a particular description of the stocks and other securities . . . held by me in trust for the policy holders of the American Casualty Insurance & Security Company of Baltimore City, as stated in the foregoing certificate." Here, then, is an express declaration by the trustee that this city stock was deposited with him by the company, and that it was held by him in trust as a guaranty for the payment of its policy holders; and this certificate was delivered by Mr. Jones to the company, and was in its possession at the time the receivers were appointed. An intention to create a trust of this kind may be inferred from conduct and circumstances without any express declaration. *Allen v. Withrow*, 110 U. S. 119, 28 L. ed. 90. In the case at bar we have the most explicit proof of the creation of the trust, for there is the unequivocal declaration of the trustee that he held the funds in trust; and there is a clear designation of the *cestuis que trustent* who are entitled under it. This is sufficient. *Smith v. Darby*, 29 Md. 228,—a case directly in point. The evidence of the trust, then, is conclusive, not only as to its creation, but also as to the objects and purpose for which, and the persons for whose benefit, it was established. And in reply to the objection that Mr. Jones has no right to accept the deposit as treasurer of the state it is sufficient to say that it is quite immaterial whether he held it in his official or in his individual capacity. If a trust existed, it will not be defeated by the inability of the trustee to act. A court of equity will never suffer a trust to fail for the want of a trustee. Nor can the action of Mr. Jones, in surrendering the fund under an order of a court of equity to the receivers, be held to have revoked the trust, or to have in any manner affected the rights of the *cestuis que trustent* thereunder. If he did not care to take upon himself the responsibility of distributing the fund among the parties entitled to it, he has the undoubted right either to invoke the aid of a court in its distribution, or upon the petition of the receivers to surrender it to the court, whose officers the re-

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ceivers were. As to § 205, art. 16, of the Code, which requires trustees to whom any property has been conveyed or limited for the benefit of creditors, or to be sold for any purpose, to give bond, to be filed with the clerk of the court, it is only necessary to say that it has no application to a trust of this character. That section relates only to the assignment or conveyance of property for the purpose of sale, and it provides that no title shall pass to any trustee until such bond shall be filed and approved, and that no sale made by any such trustee without such bond shall be valid. For the reasons we have given, we agree with the court, below that the funds arising from the sale of the city stock and the interest accrued and accruing on that stock until sold must be treated as impressed with a trust, and must be applied solely to the payment of the claims of the policy holders, subject, however, to such prior or paramount liens upon it as will be hereinafter alluded to.

We have just said that we agree with the court below in that part of the order appealed from which defines the special and the general funds, but we cannot concur in that portion which provides that the general fund shall be set apart for the payment of all creditors "other than the claims of the policy holders." The policy holders, after they have exhausted the special fund, are entitled to participate, along with all other creditors, in the general fund. Passing by, for the moment, the intervening provisions of the order relative to the costs and commissions, and which will be disposed of later on, we come now to the claim filed by the mayor and city council of Baltimore for taxes. This appeal presents two questions: First, whether the tax levied by the municipality for the year 1893 upon the shares of stock of the company held by residents and nonresidents is a debt due and payable by the company or only collectible from the shareholders; and, secondly, if the tax be a debt due and payable by the company, is it a prior lien over the claims of all other creditors? These taxes cannot, of course, be considered a debt due by the company unless they are made so by statute, because the shares of stock are the property of the shareholder, and, under the Code, must be valued to him. But the Code further provides that the shares of stock of corporations owned by residents or nonresidents of the state shall be valued at their actual cash value, "but the tax assessed on such stock shall be levied and collected from said corporation, and may be charged to the account of such nonresident stockholders," and shall be a lien on the shares held by them respectively. Code, art. 81, § 138, as to nonresidents, and § 141, as to residents. The statute thus makes explicit provision for a certain and prompt method of collecting the taxes due upon shares of stock, whether held by residents or nonresidents, by imposing upon the corporation the obligation and the duty to pay the tax itself. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. *First Nat. Bank v. Kentucky*, 76 U. S. 9 Wall. 353, 19 L. ed. 701. And when this court came to deal with the same question (*American Coal Co. v. Allegheny County Comrs.*, 59 Md. 197) we held that, "the

statute having created the duty and obligation to pay when the shares of stock are assessed to the individual owners, that duty and obligation on the part of the corporation may be enforced by a proper action at law." If these taxes are a debt due by the corporation, they are a debt due by it, and to be paid by it, regardless of any dividends or profits payable by the corporation to the shareholder, and out of which it might be reimbursed. *New Orleans v. Houston*, 119 U. S. 265, 80 L. ed. 411. Though this is conceded to be so while the corporation is a going concern, the contention is that when the company becomes insolvent, and its property has passed into hands of receivers, such taxes cannot be held to be a debt of the corporation for the payment of which its assets are liable. In reply to this it may be observed that the tax is, by the express terms of the statute, charged to and made payable by the corporation. If this be so, and if the tax was due at the time of the insolvency, then obviously the insolvency could in no manner affect the right of the city to demand payment out of the company's assets. By article 4, § 827, Code Pub. Local Laws, the city of Baltimore is empowered to levy taxes annually upon the assessable property of the city, and to provide by ordinance for the collection of the same. The city has provided by ordinance that taxes levied shall be paid on or before the 1st day of October in the year for which the levy was made, and that the collector may enforce the payment of the same after giving thirty days' notice. These taxes were consequently due when the company's assets passed into the hands of the receivers, and, being then due, the act of 1892 (chap. 518) directs they shall be paid and satisfied by the officer or person selling under judicial process the property, real or personal, upon which such taxes are payable. As these taxes were due and payable when the company became insolvent, they are, in our opinion, a prior lien upon the assets in the hands of the receivers, and must be paid out of the general fund, and if that should be insufficient, the balance must be paid out of the special fund.

This brings us to that part of the order of August 8, which classifies the various creditors, numbering in the vicinity of 4,000. The order divides these creditors into three groups: First, Clerks, servants, and employees to the extent of their salaries or wages due and unpaid for not exceeding three months prior to the appointment of the receivers. These creditors are allowed their claims for salaries and wages due and unpaid for not exceeding three months prior to November 23, 1893, as preferred claims, under art. 27, § 15, of the Code; and such allowance is free from objection, but is, in no contingency, payable out of the special fund. Second, Policy holders of the company. And, thirdly, all other creditors.

First. Who are included within the terms, "clerks, servants, and employees?" By the section of the Code to which reference has just above been made it is provided that "whenever any person or body corporate shall make an assignment, . . . or shall be adjudicated insolvent, . . . or shall have his, her, or its property or estate taken possession of by a re-

ceiver, . . . in the distribution of the property or estate of such person or body corporate all moneys due and owing from such person or body corporate for wages or salaries to clerks, servants, or employees contracted not more than three months anterior" to such assignment, insolvency, or receivership, "shall first be paid in full," etc. Under no circumstances can these claims be paid out of the special or trust fund. That trust, as we have said, was created for a particular purpose, and it was created as far back as 1892, long before any debt now due for wages or salaries, and entitled to priority under the statute, was contracted. The trust fund devoted to a special purpose cannot, therefore, be considered such property and estate belonging to the company at the time it became insolvent as would be liable for the satisfaction of these claims. In the case of *Lewis v. Fisher*, 80 Md. 134, 26 L. R. A. 2, we held that an attorney at law was not a clerk, servant, or employee, and we have now to determine whether an insurance adjuster is within these terms. What is the precise nature of the duties of an adjuster, the record does not disclose. But an adjuster was not, as we understand it, a person in the continuous employment of the company; that is, one who devoted his whole time and service uninterruptedly to the company. In his petition Mr. Phelps says he was employed as an adjuster in the state of Alabama at a salary of \$1,000 and expenses. It was his duty and the duty of other adjusters, when an accident occurred, to ascertain all the facts and circumstances in connection with such accident,—how it happened, whether it was through the fault of the insured corporation, the nature and extent of the injury, and to make report thereof to the company. All this involved the exercise of judgment and discretion, and required some familiarity with the principles of law relating to the legal liability of the insured. Now, it is clear, we think, that the word "employee," as used in the statute, was intended to have a limited meaning, and that it cannot be applied in its broadest sense or as including everyone in the service or employment of a corporation or individual. The object of the statute was to provide for the payment of the wages and salaries due a certain class of persons to whom such wages or salaries were deemed always necessary for their support and maintenance. The statute first provides for the payment of the wages and salaries of clerks,—persons rendering mere clerical services,—then of servants or employees. The statute did not mean by "employees" persons rendering services of a higher degree than clerks. The duties of an adjuster being, as far as we are able to discover, of the character we have described, these officers, while in a general sense employees, cannot, by any fair rule of construction, be considered employees in the limited and restricted meaning of that term as used in the statute. To hold otherwise would result in the inclusion of a large class of persons in the service of a company or individual, as preferred creditors, though they are obviously not within the scope, purpose, and object of the Code, under which provision is made for a preference. But it was

insisted that the conclusions reached by this court in *Lewis v. Fisher*, 80 Md. 139, 26 L. R. A. 2, are in conflict with the decision in *Moore v. Heaney*, 14 Md. 558. Such is not, however, the fact. Two entirely different statutes, relating to different subjects, were construed in the two cases. In *Moore's Case* the act of 1854 (chap. 23), relating to the exemption of the wages or hire of "a laborer or other employee" from attachment, was interpreted; while in *Lewis's Case* the identical statute now involved—the act of 1888 (chap. 883, art. 47, § 15, Code)—was before us. In *Moore's Case* this court gave a wide and liberal meaning to the word "employee," so as to bring as large a class of persons as possible within the provision which created an exemption in favor of laborers and other employees from the stringent terms of the attachment law, and from the equally harsh effects of an attachment levied by way of execution on wages. The act of 1854, creating an exemption in favor of a class of persons least able to protect themselves, and largely dependent on their wages for support, was given a liberal, and not a technically strict, construction, that might, perhaps, have been placed upon it. But the act of 1888 (art. 47, § 15, Code) was designed to create a preference in behalf of certain creditors in the distribution of an insolvent's assets, and to that extent it disturbs and destroys the equality among all creditors, which equality it was the obvious, if not declared, policy of the insolvent system to promote and preserve. Hence it was that, without questioning the decision in *Moore's Case*, which defined the words "other employee," as used in a statute relating to one subject, we gave in *Lewis's Case* to the term "employee" as used in another and a totally different statute, and as restricted by the context and by the words with which it was associated, a less comprehensive signification. The same word, used in different statutes relating to different subjects, does not necessarily have the same meaning. As observed by Pollock, C. B.; in *Reg. v. Skeen*, Bell, C. C. 97, "There is no word in the English language which does not admit of various interpretations."

We come now to the rules laid down in the order of August 8 for ascertaining the values of the various policies, and it will be necessary, for the sake of clearness, to make some general reference to the nature and character of these contracts of insurance or indemnity. No useful purpose could be served, but this opinion would be protracted far beyond all reasonable limits, if the provisions and stipulations contained in the various policies were set forth at large. We may say, however, that with suitable modifications and changes to adapt them to the particular character of loss designed to be covered in each case, and to adjust them to the sort of business in which the insured was engaged, all the policies purport to be either individual accident insurance policies, employees' indemnity bonds, or contracts under which, for a designated and agreed consideration, the company stipulated to indemnify the assured against liability for damages (not exceeding a specified amount) which might arise out of injuries to property or out of an injury to or the death of certain persons

standing in various relations to the assured, these injuries, both to persons and to property, and these deaths, happening upon described premises, and being such as the assured might, in consequence of being responsible for their occurrence, be legally bound to answer for in damages. The object of the insurance, then, except in the case of a mere individual accident policy, was to provide means with which the assured might be reimbursed for any loss he had sustained if he were the holder of an employees' indemnity bond, or for any damages which he might lawfully be required to pay, and did in fact pay, by reason of such injuries or deaths as the policies covered, if he were the holder of the other classes of indemnity. The amount actually paid by the assured to the person injured, or to the representatives of the person killed, or to the owners of the property damaged or destroyed, settled and measured, within the limits specified in the policy, the extent of the insurer's liability. And while the mere liability of the assured to pay unascertained damages for any of the causes set forth in the contract of indemnity did not determine the precise amount which the insurer was bound to pay to reimburse the assured, it nevertheless fixed the insurer's liability to the assured under the contract. The happening of the event which subjected the insured to a claim for damages established the period when the correlative obligation of the insurer became complete and ceased to be contingent, except as to the amount to be paid. The liability of the insurer was thereby fixed, though the extent of that liability might, and in most cases must, necessarily, have been unascertained until a subsequent period.

Now, the insolvency of the company canceled outstanding policies of insurance for the future. *Doone v. Millville Mut. Marine & F. Ins. Co.* 43 N. J. Eq. 522. It is apparent that all casualties for which the various insured corporations and individuals holding the insolvent company's policies might be responsible must have happened either before or after the date of the insolvency. If the accidents which form the basis of the claims now made for indemnity happened after the insolvency was declared, then, inasmuch as the insolvency canceled the policies, there can be no claim under the policies; but as the company, by its insolvency, committed a breach of its contracts, the policy holders thereupon became entitled to damages for that breach, and these damages are the values of the destroyed policies. *Mason v. Cronk*, 125 N. Y. 503; *People v. Security L. Ins. & A. Co.* 78 N. Y. 125, 34 Am. Rep. 523. The policies being thus destroyed, of course all liability under them, from the date of the insolvency, for accidents occurring subsequently to the insolvency, ceased. Consequently, losses which happened after the insolvency, under policies in existence at the date of the insolvency, are not provable against the funds in the receivers' hands. While this is so, the values of the destroyed policies are provable, and, according to well-settled rules, these values consist solely of the unearned or returned premium. And this the circuit court decided. With respect to the other category,—the occurrence of the casualty before the date of the insolvency,—there are two contin-

gencies presented: First, where the accident or injury insured against occurred, and the damages were ascertained and actually paid by the assured, before the appointment of the receivers; and, secondly, where the accident or injury insured against happened before the appointment of the receivers, but the amount recoverable from the assured remained unascertained and unpaid till after that date. As to the first of these contingencies, and in so far as the policy covers no other loss, there is and can be no dispute, and the court below properly held with respect to such policies that their value was a sum of money equal to the sum of the loss and the return of the unearned premium. But as to the second of the above contingencies we think the court was in error. With respect to the policies falling within this second contingency the order of August 8 declared: "But no cause of action nor action nor suit pending against the claimant, nor judgment nor decree against the claimant, unsatisfied before November 23, 1893, by the claimant, is a loss sustained by the claimant, nor can any claim be made for any judgment or decree rendered against the claimant and satisfied by him prior to November 23, 1893, except for the amount actually paid in settlement thereof." As already observed, these policies, in so far as they related to a period subsequent to the appointment of the receivers, and covered no antecedent loss or injury, were, by operation of law, annulled when the company became insolvent; but for the consequences of accidents or other casualties which occurred anterior to the insolvency, and which subjected the assured to a liability or a loss the amount of which remained undetermined or unsatisfied until after the receivers were appointed, the policies were unaffected, and the obligations arising under them were unimpaired by the company's insolvency. It is not solely because the insured has actually paid damages that the liability of the insurer to him is fixed, but it is because an accident or casualty or occurrence has happened for which he is responsible, and against the loss arising from which he has been indemnified, that the obligation of the insurer to reimburse him arises, though the precise amount to be paid by the insurer may depend for its ascertainment upon events happening after the insolvency. In other words the contingent liability of the insurer to reimburse the insured becomes a fixed liability the moment an event happens which fastens a responsibility on the insured, if that event be within the terms of the policy; but the amount of the liability continues to be contingent till the precise extent of the demand against the insured is established and paid. This contingency as to amount in no manner derogates from the fact that a liability for some amount has arisen and become fixed. In all instances, therefore, where the loss or injury happened before the insolvency, though the amount thereof was not ascertained and was not paid by the insured until after the insolvency, the holder of the policy will be entitled to prove for a sum equal to the loss or damages paid by him, plus the return premium, if any. What has been said above is sufficient to indicate that we also dissent from the third rule laid down by the cir-

cuit court for ascertaining the value of the class of policies in that rule referred to. When the liability became fixed prior to November 23, 1893, the insolvency on that date did not extinguish the assured's claim upon the assets, and did not put an end to the assured's right to indemnity. To the return premium in the cases described in this rule must be added what would have been payable under the policy after November 23 had no insolvency supervened. If by the fourth rule laid down in the order of August 8 it is meant that no loss arising from occurrences which happened after November 23 gives rise to a claim against the assets, we see no error in the rule; but if it means that no such claims exist if the accident or casualty occurred before November 23 and the amount was not ascertained until after that date, then, for the reasons we have heretofore given, we regard this fourth rule as erroneous.

There must of necessity be many outstanding and unascertained claims pending against holders of the company's policies, which claims may require some time for adjustment; but it is of great importance that the company's assets should be distributed at as early a date as practicable, and hence the settlement of its affairs ought not to be postponed to await the determination of every contingency on which its policy engagements are suspended. *Carr v. Hamilton*, 129 U. S. 256, 32 L. ed 670. To obviate all unreasonable delay, and yet to afford an opportunity to each policy holder who may be entitled to prove against the company's assets, it will be the duty of the circuit court to prescribe by an order that all claims be filed on or before the second Monday of June next, or otherwise be barred from participation in the distribution. This may result in cutting out some claims, but that will be unavoidable unless the distribution be postponed for a considerable space of time; and such a course would occasion unnecessary loss to those whose claims are in a condition to be proved. If by that date there should be outstanding claims not reduced to a certain basis, it will be the misfortune of the assured; but there is no way of obviating that misfortune. May, Ins. § 594a. By a prior clause of the order of August 8 it was provided "that each owner and holder of, or person having any lawful claim upon, any of said classes of insurance policies, or any similar policy of the defendant corporation, issued prior to November 23, 1893, for a period to extend beyond said date, who duly paid the premium thereon for the entire period or any portion of it extending after November 23, 1893, as agreed between the policy holders and the said company, is entitled to claim upon the value thereof on November 23, 1893, and to receive dividends upon such value out of the net special fund." If the design of this provision was to exclude all policies which did not cover a period of time extending beyond November 23, 1893, the provision is obviously erroneous. Such an exclusion would cut out a claim matured and perfected during the life of the policy whose limit of duration terminated the day before the appointment of the receivers, and under which nothing remained to be done by the insurance company but to reimburse the insured. In respect to that part of the order which charges the special

fund with the payment of costs and expenses that the general fund may be insufficient to meet, it is only necessary to say this special fund, being a trust fund devoted to a particular and specified purpose, cannot be diverted therefrom, or applied to any other or different object; and, except in so far as it is liable for the payment of the taxes which are paramount to all other claims, it must be distributed to the policy holders for whom it was set apart, and can be charged with no portion of the costs and commissions incurred in administering a totally distinct fund.

But two questions more remain to be considered. One is of considerable interest. In the argument at the bar it was insisted with great earnestness and marked ability that all policies issued by the casualty and indemnity company to carriers of passengers, indemnifying the carriers against their liability for injuries to persons, are void because contrary to public policy. The contention is that, as the law exacts from the carrier of passengers the exercise of the utmost care and diligence which human foresight can use to avoid an injury, any contract which relieves the carrier of his duty to the public in this regard, or lessens his liability for all or any of the wilful, criminal, and negligent acts of his employees or his managers and himself, is detrimental to the interests of the public as understood by the courts at this time, and is therefore repugnant to public policy. No exact definition of public policy has ever been given or can be found. Speaking generally, the principle which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law or public policy in relation to the administration of the law. 19 Am. & Eng. Enc. Law, p. 565. In *Richardson v. Mellish*, 2 Bing. 229, Mr. Justice Burrough pointedly observed: "I, for one, protest . . . against arguing too strongly upon public policy;—it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail." It is one thing at one time, another thing at another time, and its very vagueness shows that it does not admit of exact or precise definition, and that it is not easily explained. "If that statement requires authority," said Kekewich, J., in *Davies v. Davies*, L. R. 36 Ch. Div. 364, when discussing public policy as affecting contracts in restraint of trade, "turn to *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, and consult the arguments of counsel and the opinions of judges covering the whole subject. . . . One thing I take to be clear, and it is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice Tindal decided *Horner v. Graves*, 7 Bing. 735, in 1831, as it was when Chief Justice Parker decided *Mitchel v. Reynolds*, 1 P. Wms. 181, in 1711; that it must have changed, and did change, between 1831 and 1869, when Vice Chancellor James decided *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 845; and if there had not been further change before Lord Justice Fry decided *Rou-*

illon v. Roussillon, L. R. 14 Ch. Div. 351, in 1880, it must have occurred ere now." The wisdom and correctness of these observations are strikingly illustrated in the development and change and expansion of the law from the crude, rigorous, and harsh exactions of past centuries to the liberal, enlightened, and advanced policy of to-day in relation to the liability of a carrier of goods, his right to restrict that liability by contract, and to insure against loss and injury the property intrusted to him, and of which he himself is, under the law, an insurer. By the common law the carrier was treated as an insurer, and was bound to keep and carry safely all goods consigned to his care, and he was liable for all losses, and in all events, except for losses caused by the act of God and the King's enemies. Chitty, Carr. 349; *Baltimore & O. R. Co. v. Green*, 25 Md. 89. This rule of responsibility did not have its origin in contract, but was founded on grounds of public policy. "For though," said Lord Holt in *Cogge v. Bernard*, 2 Ld. Raym. 909, "the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." Afterwards, when the better administration of the law afforded greater protection to the carrier against the depredations of thieves, and had lessened the opportunities for fraud and collusion, the strict rule of the common law was measurably relaxed, and the carrier was permitted to limit his responsibility by special contract where the limitations were just and reasonable. But even this departure was of gradual development, for in *Barney v. Prentiss*, 4 Harr. & J. 317, 7 Am. Dec. 870, the court declined to express an opinion on the carrier's right to restrict his liability; but in *Brahme v. Dinamore*, 25 Md. 828, the right was distinctly recognized, and is undoubtedly now the law. *New York O. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 684; *McCoy v. Erie & W. Transp. Co.* 43 Md. 498. The conclusions reached in the carefully considered and exceedingly able opinion delivered in *Lockwood's Case*, 84 U. S. 17 Wall. 357, 21 L. ed. 684, were: First, that a common carrier cannot lawfully stipulate for exemption from responsibility where such exemption is not just and reasonable in the eye of the law; secondly, that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. While the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very

same losses. Consequently he may by insurance indemnify himself against loss of or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servants' negligence. This was decided in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance, the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance, with someone else for reimbursement for such loss. The doctrine announced in the *Phoenix Ins. Co.'s Case*, 117 U. S. 312, 29 L. ed. 873, was affirmed in *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, and is the settled law of the land. A reasonable restriction by contract of his common law liability and an insurance by the carrier of goods against loss are recognized by the law, and are not in contravention of its policy to-day, whatever that policy might have been heretofore. It is obvious that a carrier of passengers cannot by contract restrict, diminish, or limit that obligation to the public or that duty to the passenger which requires the exercise of the highest degree of care and diligence on his part. A contract which stipulates for or agrees to such relaxation, and therefore contemplates immunity from the carrier's own negligence, would be utterly void; precisely as would a contract purporting to relieve a carrier of goods from liability for losses occasioned by his own or his servant's negligence. But the policies before us are not contracts of that character. Neither in express terms nor by implication do they profess or purport to abridge in any way the carrier's common-law liability for injuries to passengers, employees, or strangers. These policies leave that liability precisely where, and as complete as, it was before they were written. They contain no provision impugning or questioning in the slightest degree the full measure of that responsibility. It is perfectly manifest, therefore, that they are not in terms contracts restricting or attempting to restrict the carrier's conceded liability; and, if they contravene public policy at all, it must and can only be incidentally and indirectly. This is all that can be imputed to them. But they are, it is alleged, repugnant to public policy because by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence their inevitable tendency or effect is to induce less vigilance or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the extent that a fire insurance policy affords an individual protection against loss, to exactly the same extent may it be said the assured will become indifferent in guarding against casualties from fire. And in so far as a carrier may have a policy covering goods and insuring them for his own benefit against losses arising from his or his servant's negligence, just so far will he be either tempted to be negligent, or become indifferent as to vigilance. But in

neither instance can it be said that, because a temptation to be negligent may possibly result from the possession of an insurance policy, the contract of insurance necessarily begets negligence, or conflicts with public policy. Nor can we assume as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity—which at best is but limited and partial—necessarily disregard the duty to exercise the highest degree of care. And unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods, is to afford him a fund out of which he may be reimbursed, and that too, perhaps, but partially; for in all these policies the liability of the insurer is always limited, and confined to a specifically designated sum. The compensation to an individual, whether passenger, employee, or stranger, is, after all, a money compensation, and, though the life or limb of a person may be, and most certainly is, of greater intrinsic value than goods and chattels, still the law knows of no other means of making compensation or approximate compensation in either instance than by the assessment of damages in dollars and cents. If in the development and progress of the law the ancient rules have been relaxed in the case of a carrier of goods so as to enable him to insure against his own negligence when the result of the insurance is to furnish him the means to make compensation to the owner or shipper of goods, we see no valid reason for holding that the law, in its advance to conform to the "habits," capacities, and opportunities of the public, has not reached the stage of allowing a carrier of passengers, not to contract for a restriction of his original liability, but to purchase from a third party an indemnity fund with which to make more certain his ability to respond in damages for personal injuries caused by his carelessness and neglect. As public policy is a varying quantity, changing with the habits of the people, there is nothing in it, as it exists at this day, to warrant us in saying these policies infringe it. But how can an insurance or indemnity of this kind be contrary to that vague, indefinite, and "variable quantity" called "public policy," when no restriction is placed on the carrier's liability or duty to the public or to the individual, and no attempt is made in the contract of indemnity to interfere with the relations between the carrier and the public, or the carrier and the individual, as those relations existed under the law prior to the writing of the policy? We have said the only suggestion in answer to this inquiry is that a tendency to relax the carrier's vigilance necessarily results from the fact that under the policy a fund is provided out of which he may be reimbursed the sums he may be obliged to pay as penalties occasioned by his own negli-

gence. But this not only does not meet the objection that no such relaxation of care and diligence is stipulated for in the contract of insurance, or in any contract between the carrier and the passenger or other individual, but it lays out of view a consideration of which the most casual observer cannot fail to take note, and it is this: The carrier will, from motives of self-interest, if from none other, endeavor to reduce the sum total of his insurance to a minimum figure, and thereby diminish the amount of the annual premium payable therefor, while the aggregate of insurance which he may be able to procure, as well as the rate charged him for it, will always depend in a large measure, if not entirely, upon the prudence, care, and skill with which his affairs are managed and conducted. Such a carrier has, consequently, exactly the same motive or incentive to protect the public and the individual from injury that he would have if he should become his own insurer, or were a carrier of goods, and therefore the insurer of them. Stretching the doctrine of public policy to the extent of striking down these policies would, in the language of Mr. Justice Burrough, "lead you from the sound law." And as, according to the same learned justice, this doctrine "is never argued at all but where all other points fail," it would be of doubtful expediency to invoke it where the only apparent consequence of obtaining such insurance would be, not to diminish the carrier's own responsibility, but rather to increase his means of meeting that responsibility. The fallacy of the objection urged against the validity of these policies lies in the failure to distinguish between a contract which, on the one hand, stipulates with the passenger for immunity on the part of the carrier from the consequences of the latter's breach of duty, and a contract whereby, on the other hand, the carrier, while in no way diminishing that liability, merely agrees with a third person to procure from the latter a fund out of which to pay, perhaps the whole, but at least a portion, of the damages which he may be chargeable with on account of his failure to observe and discharge his duty. As remarked by Mr. Justice Story in *Ocean Ins. Co. v. Polleys*, 38 U. S. 18 Pet. 164, 10 L. ed. 108: "We all know that there are cases where a contract may be valid notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote." Now, it is perfectly obvious the casualty company never intended, by writing policies for carriers of persons, to aid or promote carelessness or negligence on the part of the assured. Its manifest interest to avoid the payment of heavy amounts to reimburse the assured for the damages which might be recovered in consequence of such negligence was alone sufficient to exclude the inference that by writing these policies its purpose was to aid or promote negligent, and therefore illegal, conduct on the part of the carrier; and, though its liability might depend on just such negligence, its contract was not made to promote it; nor did the underwriter, directly or indirectly, stipulate for any breach of duty by the carrier towards the public or the individual. The thing done by the insured might subject him to an action for damages

because wrongfully done, but the distinct and independent contract to partially reimburse him those same damages was in no respect designed to aid, assist, or advance any such illegal act. In the case last above cited from 18 Pet. a policy of insurance written upon a schooner for the term of one year was the cause of action. The schooner was totally lost by the perils of the sea while the policy was in force. The insurance company insisted that the schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that therefore a policy on a vessel pursuing such a voyage was not valid, or legal and binding. The supreme court said: "The objection, then, as insisted on by the counsel for the insurance company, involved two distinct propositions. The first was that the schooner was sailing on the voyage under circumstances which rendered her liable to forfeiture. The second was that the policy on her was therefore void. Now, the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist, or advance any such illegal purpose." We see no reason to hold that these policies are void because against public policy.

There is but one other question to be considered, and that relates to the claim of the West End Street Railway, one of the appellants. A policy was taken out by this company for a year expiring August 1, 1892. It contained a provision allowing the insured to renew, at its option, the same policy for three years from the above date. The insured gave notice of its intention to claim, and it did claim, an extension or renewal of the policy under the option, but the insurer refused to renew. The West End Company claims that the policy is still in force. To this we do not assent. If the insured intended to rely on the contract, it was its duty to have paid the premium, or at least to have tendered the premium and demanded a renewal. *Dungan v. Mutual Ben. L. Ins. Co.* 46 Md. 493. It did neither, and the policy thereupon ceased to be effective.

We think no interest should be allowed on the claim for taxes, or on any of the other claims filed against the insolvent company. While not precisely analogous, the case of *Hutchinson v. Liverpool & L. & G. Ins. Co.* 158 Mass. 143, 10 L. R. A. 558, supports this conclusion. It is not easy, if indeed it be possible, to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. Perhaps some of the numerous claims might, in strictness, be entitled to an allowance of interest under ordinary circumstances, but it does not appear that the amounts asserted to be due have been wrongfully withheld by the casualty company. The failure to pay, as far as we can see, has been the result of the company's insolvency. A penalty or damages in the way of interest ought not, therefore, to be added to the sums actually due.

It results from what we have said that the order of August 8, 1895, will be affirmed in part and reversed in part, and the causes, except those that will be dismissed, must be remanded to the end that another order may be passed conforming to this opinion.

Order affirmed in part, and reversed in part, and causes remanded to the end that another order may be passed in conformity to this opinion; one half the costs in all the cases to be paid out of the general fund, the other half to be paid out of the special fund.

Henry H. KERR, Receiver of the City National Bank of Quannah, Texas, *Appl.*,

John D. URIE.

(.....Md.....)

1. A transfer of stock in a national bank of another state, made in Maryland to a married woman, who is competent by the law of that state to be a stockholder, is valid, irrespective of the law of the state in which the bank is situated.

2. One who holds stock as the self-appointed attorney or trustee of an infant, without anything on the books of the corporation to show that the holder is not the actual and beneficial owner, is liable as a stockholder.

(June 22, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Kent County in favor of defendant in an action brought to enforce defendant's statutory liability as a stockholder of an insolvent national bank. *Affirmed.*

The facts are stated in the opinion.

Mr. James A. Pearce, for appellant:

The state courts had jurisdiction.

Clostin v. Houseman, 98 U. S. 180, 23 L. ed. 833; *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455.

The remedy is at law, and not in equity, in this case.

Kennedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476.

The order of the controller as to the assessment is conclusive, and a certified copy thereof is the only evidence required.

Kennedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 386.

The defendant in this case is liable to the assessment made, and the enforcement of his personal liability is the only recourse of the plaintiff in this case.

Married women have been held liable because of the law of the place authorizing them to become so.

Bundy v. Cocks, 123 U. S. 185, 32 L. ed. 397; *Foster v. Chase*, 75 Fed. Rep. 797.

In all of the cases in which the liability of a married woman has been sustained, not one can be found in which she was not the beneficial owner of the stock.

Mrs. Urie, being by the express terms of the assignment to her, and of the certificate thereafter issued to her, a trustee for another, would have brought herself directly within the exemption from personal liability secured by § 5152 to trustees, had she been sued to recover this assessment.

A married woman may be a trustee.

Perry, Tr. § 50; *Bouldin v. Reynolds*, 58 Md. 495.

A married woman cannot bind herself personally in dealing with the trust estate. She may, as agent, bind one who is competent to authorize and has authorized her to act for him, but would not be liable to third parties with whom she dealt in her own name.

14 Am. & Eng. Enc. Law, p. 681; *Attery v. Griffin*, L. R. 6 Eq. 606.

Capital stock, and especially unpaid subscriptions to the capital stock, constitute a trust fund for the benefit of the creditors of the corporation.

Cook, Stock & Stockholders, § 109; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 781.

The liability to assessment to the full par value of the stock is as much a part of the "unpaid subscription" as is the original par value of the stock, till it is fully paid, and is in fact a part of the original subscription, the liability being an inherent part of such subscription.

Davis v. First Baptist Soc. 44 Conn. 582, 2 Browne, Nat. Bank Cas. 110; *Rider v. Morrison*, 54 Md. 429.

The assignment is not effective in law to terminate defendant's personal liability.

Johnson v. Laflin, 5 Dill. 65; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Adams v. Johnson* ("Bowden v. Johnson"), 107 U. S. 251, 27 L. ed. 386; *Castleman v. Holmes*, 4 J. J. Marsh. 1; *Roman v. Fry*, 5 J. J. Marsh. 634; *Re Reciprocity Bank*, 23 N. Y. 18; *Copper's Case*, L. R. 3 Ch. 458; *Curtis's Case*, L. R. 6 Eq. 455; *Weston's Case*, L. R. 5 Ch. 614; *Nickalls v. Merry*, L. R. 7 H. L. 580; *Rid's Case*, 24 Beav. 818; *Foster v. Chase*, 75 Fed. Rep. 797.

Messrs. Charles F. Harley and John D. Urie, for appellee:

Transfers of stock in national bank associations are not governed by different rules from those which are ordinarily applied to the transfers or shares in other corporate bodies.

Johnston v. Laflin, 103 U. S. 800, 26 L. ed. 532.

The use of the word "trustee" in this connection is entirely erroneous.

Anderson, Law Dict. p. 1037; *Davis v. First Baptist Soc.* 44 Conn. 582.

The stock stands, not in the name of an infant, but in the name of an adult, a married woman, and she is liable under the national bank act, to assessment.

Keyser v. Hiltz, 133 U. S. 183, 33 L. ed. 531; *Anderson v. Line*, 14 Fed. Rep. 405; *Robinson v. Turrentine*, 59 Fed. Rep. 554; *Witters v. Soules*, 85 Fed. Rep. 640; *Sinmons v. Dent*, 16 Mo. App. 288.

The agreement to transfer was made in June,

NOTE.—As to the effect of the apparent ownership of stock on the books of a corporation to render one liable as a stockholder, see note to *Andrews* 88 L. R. A.

v. National Foundry & P. Works (C. C. App. 7th C.) 36 L. R. A. 139, reviewing the authorities on this subject as applied to a pledge of stock.

1898, while the said bank was a going, dividend-paying concern, and the agreement was carried into effect in July following, before the parties thereto had any knowledge of the passing of the dividend by said bank, and nearly a year and a half before the said bank was wrecked by the cashier embezzling its funds.

Sinclair v. Dwight, 9 App. Div. 297, 8 Thomp. Corp. §§ 8255 *et seq.*; 1 Thomp. Corp. §§ 210 *et seq.*; Cook, Stock & Stockholders, 8d. ed. §§ 254 *et seq.*

This transfer, having been made for a valuable consideration, is legally presumed to be bona fide.

Glenn v. Grover, 3 Md. 212; also *Bump, Fraud. Conv.* 4th ed. p. 217; *Matthai v. Flether*, 57 Md. 484; *Lynn v. Baltimore & O. R. Co.* 60 Md. 407, 45 Am. Rep. 741.

Even if we consider Lillian Urie, as attorney or agent of M. L. Urie, her infant child, she had a perfect legal right to act as such agent, even in dealings with her husband, the defendant, with all the liabilities and responsibilities of other agents.

Story, Agency, § 7; *Mechem, Agency*, § 61; 1 Am. & Eng. Enc. Law, 2d ed. p. 947.

Lillian Urie has all the rights and all the liabilities of a *feme sole* in the premises; and the liability of an agent purchasing or holding for an infant is incontrovertible.

Story, Agency, 9th ed. § 264; 1 Am. & Eng. Enc. Law, 2d ed. p. 1122; *Cook, Stock & Stockholders*, 8d ed. § 67.

In either view of the case, whether as an individual holder of the stock as appears by the stock book of the bank, or as agent as appears by the certificate issued to her, Lillian Urie is liable and alone liable for the assessment on this stock.

The fact that the bank accepted the transfer, canceled the certificate formerly held by the defendant, and entered the name of Lillian Urie as the personal holder of this stock on the books of the bank, and the demand of the receiver, who represents the bank, on her for the assessment, thus recognizing her personal responsibility therefor, together with the long lapse of time since the transfer of the stock, estops the receiver from any action against the defendant.

Parson's Case, L. R. 8 Eq. 656; *Alexander v. Walter*, 8 Gill, 239, 50 Am. Dec. 688; *Bump, Fraud. Conv.* 4th ed. p. 472; *Bigelow, Estoppel*, 685; *Cababe, Estoppel*, pp. 12, 48, 105.

Fowler, J., delivered the opinion of the court:

The question presented by this appeal is whether a married woman residing in this state is capable of holding stock in a national bank located and doing business in the state of Texas, and, if so, whether she is liable as such stockholder, under the personal liability provisions of § 5152 of the Revised Statutes of the United States. Whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case, than from any other cause, for it can hardly be supposed that at this day, when by the law of most all the states, a married woman may contract as a *feme sole* in respect to her separate estate, she is without power to subscribe for or become the transferee of the stock of a national bank.

88 L. R. A.

The learned author of *Cook on Stock, Stockholders, and Corporation Law* (§ 250) expresses the opinion that, without doubt, a married woman may become the transferee of such stock. Certainly a *feme sole* may be such a stockholder, and would undoubtedly be subject to all the personal liabilities imposed by § 5152. And, if this be so, what would be the effect of her marriage upon her right to hold bank stock? Would she be any the less a stockholder after than before her marriage? There is certainly nothing in the acts of Congress which can be held to exclude married women from the privilege of owning this class of valuable personal property.

The question before us is thus presented: It appears from the agreed statement of facts that in April, 1891, the defendant, John D. Urie, purchased for the benefit of his infant daughter (a child four years old) ten shares of the capital stock of the City National Bank of Quannah, and that his wife requested the certificate therefor should be placed in her name, which was accordingly done. The bank having called upon Mrs. Urie to pay into its surplus \$250, she was unable to do so, and the defendant (her husband) agreed to, and did, furnish the money the bank had called for, provided the stock in question should be transferred to him, to be held for the benefit of their infant child, as Mrs. Urie had held it in the first instance. The original certificate which had been issued to her was accordingly surrendered, and another was issued to the defendant, in February, 1892, which he subsequently transferred to her at her request and in consideration of \$123.10 paid to him by her. It is admitted that this transfer is bona fide and for value. The assignment by the defendant was to his wife as attorney, and the certificate was so drawn, but it appears by the agreed statement of facts that the stock was issued to and held by Mrs. Urie personally, as shown by the stub of the stock book. The bank having become insolvent, a receiver was duly appointed, who has instituted suits against the stockholders of said bank to enforce the personal liability provided by § 5152. But instead of suing Mrs. Urie, who, according to the books of the bank, is the holder of the stock, suit has been brought against her husband, upon the theory that his transfer of the stock to her is void, not, however, by reason of any fraud or irregularity in the transfer, but upon the sole ground that Mrs. Urie, being a married woman, is incapable of being a stockholder. Such a proposition at first blush would seem to be altogether untenable, nor do we think this first impression has been overcome by any argument we have heard. It is too late at this date to regulate the property rights of married women by the ancient common law of England. That has been abrogated in this country almost universally, and, as Mr. Cook says, married women may doubtless in all the states become transferees of bank stock, and the learned counsel for the appellant is forced to admit that, if the law as thus laid down is to prevail, his proposition must fail.

If the question before us had arisen out of a contract conceded to be a Maryland contract, we think there could not have been any doubt as to the legality of Mrs. Urie's holding, for under our statute all the property, real and per-

sonal, belonging to a woman at the time of her marriage, and all property which she may acquire by purchase, gift, grant, devise, bequest, descent, or in course of distribution, she shall hold for her separate use, etc. There can be no doubt, therefore, that where a married woman is in possession of bank stock before she is married, or which after marriage came to her, as provided by the statute, she would hold it as her separate property, as provided by the Code. The fact that her power of disposition may be limited makes her none the less a stockholder. But it is said the contract is not a Maryland contract, but is a contract made in Texas, and that therefore the rights of the parties must be determined by the law of the latter state. And this contention is based upon the proposition that a subscription made in one state to capital stock of a corporation which exists in and carries on its business in another state is a contract to be performed in the latter state, and is governed by the laws of that state. While this general proposition may be conceded, yet it must be remembered that the contract we are considering is not the contract of subscription, but the contract by which the defendant transferred to his wife the stock already subscribed for by her. It would seem to follow, if the contention of the appellant be correct, namely, that Mrs. Urie has no legal capacity to subscribe for or hold the stock, that the original contract of subscription which was made by her and in her own name, although the money was furnished by her husband, was null and void; and therefore no liability ever arose under § 5152, and hence the defendant never incurred any liability thereunder, unless the mere fact that he furnished the money to pay for the stock would make him so liable; and this cannot be, because the liability under § 5152 attaches only to persons who are stockholders either in their own right or in some representative capacity, not exempted by the express terms of that section. But, be this as it may, we have already said the question now before us is the validity of transfer of the stock by the defendant to his wife. By means of this contract of transfer which was made in this state by two citizens of this state, and therefore to be governed by the laws of this state, the defendant, in good faith and for value, assigned, and, we think, had a right (no creditor of his objecting) to thus assign it. The contract was complete when the transfer was made, and his ownership of the stock, which is conceded, carried with it, according to the weight of authority of the later decisions, the right to make the transfer, because stock is characterized by the same features as other forms of personal property. Nor was it essential to the transferee's equitable title that she should have a new certificate issued to her. It was said by Davis, J., in the leading case of *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 81, "that the nonproduction and surrender of the certificate at the time of the transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation." And in *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 239, 6 Am. Rep. 402, it is said that when shares are assigned, al-

though not made on the books of the corporation, title passes to the assignee.

In later cases—*Baltimore Relort & F. Brick Co. v. Mali*, 65 Md. 96, 97, 57 Am. Rep. 304; *Swift v. Smith*, 65 Md. 435, 57 Am. Rep. 336; and *Noble v. Turner*, 69 Md. 524.—it was held that such a title is an equitable title, giving to the transferee the right to enforce actual entry of the transfer upon the books of the corporation, and thus to convert the equitable into a legal title. We conclude, therefore, that by virtue of the transfer in Maryland, and without regard to the laws of Texas, Mrs. Urie became the equitable and real holder of the stock in question; and, if this be so, no question as to her powers of disposition, or as to whether she is or is not capable under the laws of Texas to make contracts, can arise in this case, for the liability of a stockholder arises not under any law of Texas, which it is contended has not been proved in this case, but under the act of Congress. And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank. *Witters v. Soules*, 35 Fed. Rep. 641; U. S. Rev. Stat. § 5152. The right to be a stockholder is given to her by the law of the state where she resides, and her rights and liabilities, as such, are provided by the acts of Congress. But if we could, without proof, say what is the law of Texas, it would be found, upon this question, the same substantially as ours. "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, . . . shall be the separate property of the wife." Tex. Rev. Stat. art. 2367.

The case of *Keyser v. Hitz*, 133 U. S. 151, 83 L. ed. 533, was relied on by the defendant to show that his wife, and not he, was the real holder of the stock in question, and that, therefore, she was the proper defendant in this suit. Assuming that she had a right to hold the stock under our state law, this case is, we think, conclusive authority upon the controlling question before us. In delivering the opinion of the court, Harlan, J., said: "The only persons holding shares of national bank stock, whom the statute exempts from this personal responsibility, are executors, administrators, guardians, or trustees. U. S. Rev. Stat. § 5152. It is not for the courts, by mere construction, to recognize an exemption which Congress has not given. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common law rights of the husband, in respect to its alienation, cannot control the interpretation of the statute. Such considerations are more properly for the legislative department." In *Re Reciprocity Bank*, 23 N. Y. 15, Comstock, J., expressed the same view, and said that the law in regard to the imposition of personal liability of stockholders ought to be so construed as to maintain it in its integrity, and that to hold married women exempt from its provisions would go far to defeat its policy.

The appellant, however, contended that, admitting that Mrs. Urie was authorized to hold the stock beneficially, she did not so hold it, but in fact held it as attorney, agent, trustee,

or in some representative capacity. But it is clear from the evidence that she either holds as self-appointed attorney or trustee for an infant of tender years, for an undisclosed principal, as appears by the certificate, or personally and beneficially, as appears by the stub of the stock book of the bank. In neither event do we think she can evade the personal liability of a stockholder. If persons were allowed to subscribe for stock in a national bank or in any other corporation where a personal liability attaches, either as attorney for an unnamed principal, as self-appointed trustee for some unnamed *cetui que trust*, or as attorney for an unnamed infant of tender years, and, when called upon to pay the debts of the bank to the extent of the stock so subscribed, could escape by simply declaring that they represented in some capacity those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations, which are found in great numbers in every state, would be deprived of the only certain means provided by law for the payment of their claims. But in addition to this, it is well settled upon authority that one assuming to act as Mrs. Urie has acted becomes personally bound. The infant not being liable, liability attaches to the person who makes the subscription; and, if that person has transferred the stock to one capable of taking and holding it, the liability passes to the latter. Cook, Stock, Stockholders, & Corp. Law, § 67.

The only safe rule on this subject is that, when stock is held in a representative capacity, it should be noted on the stock book of the bank; and, if a person appears there as absolute owner of the stock, he will not generally be permitted to deny it. If he claims to be trustee, and does not disclose it, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great expense and delay if persons who appeared on the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock in a representative capacity. *Davis v. Weed*, 44 Conn. 569, 2 Browne, Nat. Bank Cas. 115; *Davis v. First Baptist Soc.*, 44 Conn. 582, 2 Browne, Nat. Bank Cas. 110. But this court has disposed of this question in the same way in *Magruder v. Colston*, 44 Md. 356, 22 Am. Rep. 47. Thus, "if creditors must look beyond the legal title, as exhibited by the books of the bank, they can never know against whom to proceed." Mrs. Urie, as we have seen, was, according to the books of the appellant bank, the absolute owner of the stock. Having concluded that Mrs. Urie is the holder of the stock in question, it follows that the plaintiff's prayers were properly refused. The rulings of the court upon the defendant's prayers and upon the demurrer to his plea are not before us.

Judgment affirmed.

IOWA SUPREME COURT.

Henry WALLACE

v.

PIERCE-WALLACE PUBLISHING COMPANY *et al.*, *Appts.*

(.....Iowa.....)

1. A court of equity cannot dissolve or wind up the affairs and sequester the property of a corporation without express statutory authority.
2. Dissensions between two persons who are equal owners of the stock of a corporation, and are also its officers, will not justify the appointment of a receiver so long as no actual wrong is committed by either of them.
3. A receiver of that part of the property of a corporation which consists of shares of stock in another corporation cannot be appointed on account of a disagreement respecting the management and control of the latter corporation, between two persons who are the officers of the former corporation and own all its stock in equal shares.
4. A solvent corporation cannot be put into the hands of a receiver on account of a debt not reduced to judgment or

NOTE.—As to the appointment of receivers of corporations, when no other relief is asked, see *note to Supreme Sitting, O. of L. H. v. Baker (Ind.)* 20 L. R. A. 210.

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secured by any lien on property of the corporation.

(February 11, 1897.)

A PPEAL by defendants from an order of the District Court for Polk County appointing a receiver over property of the Pierce-Wallace Publishing Company. *Reversed.*

Statement by Deemer, J.:

Suit in equity for the appointment of a receiver of a corporation known as the Pierce-Wallace Publishing Company, for the winding up of its affairs, and for general equitable relief. The lower court ordered the appointment of a receiver for 118 shares of the capital stock of a corporation known as the Homestead Company, owned by the Pierce-Wallace Publishing Company, and directed him to attend the meetings of the stockholders in the Homestead Company, and vote the stock for the Pierce-Wallace Company, and to care for and to preserve the said stock under the orders and direction of the court in the premises. Defendants appeal.

Messrs. Guernsey & Bailey, for appellants:

A court of equity has no inherent jurisdiction to appoint a receiver for a private corporation.

High, Receivers, ¶ 288; Beach, Receivers,

§ 403; 20 Am. & Eng. Enc. Law, p. 57; *Bangs v. McIntosh*, 23 Barb. 598; *Atty. Gen. v. Bank of Niagara*, Hopk. Ch. 354; *Smith v. Los Angeles Super. Ct.* 97 Cal. 348; *Howe v. Duel*, 43 Barb. 505; *Belmont v. Erie R. Co.* 52 Barb. 637; *Pond v. Framington & L. R. Co.* 130 Mass. 194; *State, Merriam, v. Ross*, 122 Mo. 435, 23 L. R. A. 534; *Jones v. Bank of Leadville*, 10 Colo. 464; *Heap v. Heap Mfg. Co.* 97 Mich. 147; *Murray v. American Surety Co.* 44 U. S. App. 43, 70 Fed. Rep. 841; *Fischer v. San Francisco Super. Ct.* 110 Cal. 129; *La Societe Francaise v. 15th Judicial Dist. Ct.* 53 Cal. 495.

Our statutes with reference to the appointment of receivers, applicable alike to corporations and natural persons, are Iowa Code, § 2903, McClain's Code of 1888, § 4113.

In order to warrant the appointment of a receiver there must exist—

1. A civil action or proceeding pending.
2. There must be some specific property in controversy, or, to use the language of the statute, "property which is the subject of the controversy."
3. The application must be made by a party to such suit.
4. In his application he must show that he has a probable right to, or interest in, the property in controversy, and "that such property or its rents or profits are in danger of being lost or materially injured or impaired" pending the disposition of the main controversy.
5. The receiver may be appointed "to take charge of and control such property" under the court's direction "during the pendency of the action."

The plaintiff has no title to the property in controversy; he has not a right to its possession; he has not a lien upon it; he has not a lien upon the proceeds of it; he cannot sell it; as a stockholder in the Pierce-Wallace Publishing Company he owns his stock in that company.

White v. Griggs, 54 Iowa, 650; *Clark v. Raymond*, 84 Iowa, 251; *High, Receivers*, ¶¶ 11, 12; *May v. Ross*, Freem. Ch. (Miss.) 703; *Steels v. Aspy*, 128 Ind. 367.

If an injury were threatened this stock, and the evidence absolutely fails to show it, Wallace, as a stockholder in the Pierce-Wallace Publishing Company, could not maintain a suit until he had first applied to the corporation and requested it to do it, and the corporation under circumstances tantamount to fraud and bad faith had refused. A mere refusal would not be enough. The element of fraud or bad faith or such circumstances as would throw doubt upon the good faith of the decision of the corporate authorities not to act must be involved.

Cook, Stock & Stockholders, 3d ed. §§ 644, 646; *Dodge v. Woolsey*, 59 U. S. 18 How. 331, 15 L. ed. 401; *Haves v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *New Birmingham Iron & L. Co. v. Blevens*, 12 Tex. Civ. App. 410.

In the absence of proof and averment of danger of impairment of the value of this stock pending this suit, no receiver could be appointed under any circumstances.

Loomis v. McKenzie, 31 Iowa, 425; *Sleeper v. Itein*, 59 Iowa, 879; *Silverman v. Kuhn*, 53 Iowa, 436; *Paine v. McElroy*, 73 Iowa, 81.

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A receiver can only be appointed as an incident to a pending action.

Ex parte Whitfield, 2 Atk. 815; *Gluck & Becker, Receivers of Corporations*, § 10; *High, Receivers*, 3d ed. §§ 1, 13; *French v. Gifford*, 30 Iowa, 148; *Maish v. Bird*, 59 Iowa, 307; *Clark v. Raymond*, 84 Iowa, 251; *State v. Ross*, 2 Ohio N. P. 363; *Jones v. Bank of Leadville*, 10 Colo. 464; *People v. Weigley*, 155 Ill. 491; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 58 Fed. Rep. 644, 24 L. R. A. 776.

The record discloses no cause of action over which the court had jurisdiction.

The question presented is whether a court of equity has jurisdiction on the petition of a private individual to dissolve a corporation.

A court of equity has no such jurisdiction.

Morawetz, Priv. Corp. §§ 242, 283; *High, Receivers*, §§ 288, 289; *French v. Gifford*, 30 Iowa, 153; *Hinckley v. Pfister*, 83 Wis. 64; *Hardon v. Newton*, 14 Blatch. 376; *Re Mart*, 23 Abb. N. C. 227; *Mages v. Genesee Academy*, 17 N. Y. S. R. 221; *Wheeler v. Pullman Iron & S. Co.* 143 Ill. 197, 17 L. R. A. 818; *Neill v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *La Societe Francaise v. 15th Judicial Dist. Ct.* 53 Cal. 495; *Mason v. Supreme Court of Equitable League of America*, 77 Md. 438; *Folger v. Columbian Ins. Co.* 99 Mass. 267; *Heap v. Heap Mfg. Co.* 97 Mich. 147; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 58 Fed. Rep. 644, 24 L. R. A. 776; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 452; *Bayless v. Orne*, Freem. Ch. (Miss.) 172; *Waterbury v. Merchants' Union Exp. Co.* 50 Barb. 167; *Robertson v. Bullions*, 11 N. Y. 252; *State v. Merchants' Ins. & T. Co.* 8 Humph. 252; *Baker v. Backus*, 32 Ill. 101; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 502; *Fountain Ferry Turnp. Road Co. v. Jewell*, 8 B. Mon. 142; *Atty. Gen. v. Earl Clarendon*, 17 Ves. Jr. 491; *Slee v. Bloom*, 5 Johns. Ch. 379; *Van Pelt v. United States Metallic Spring B. & S. Steel Co.* 18 Abb. Pr. N. S. 331; *Atty. Gen. v. Bank of Michigan*, Harr. Ch. (Mich.) 815; *Fischer v. San Francisco City & County Super. Ct.* 110 Cal. 129.

A decree of dissolution does not necessarily involve a receivership.

Havemayer v. San Francisco City & County Super. Ct. 84 Cal. 378, 10 L. R. A. 637.

Does a disagreement between stockholders, in the absence of any charge of fraud, warrant a dissolution of a corporation under our statutes? The articles of incorporation constitute a contract.

Heald v. Owen, 79 Iowa, 23; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 58 Fed. Rep. 644, 24 L. R. A. 776.

The fact that there are deadlocks, and that the parties must seek relief from mutual concessions, forces concessions and makes interference unnecessary.

Loomis v. McKenzie, 31 Iowa, 425; *McGeorge v. Big Stone Gap Improv. Co.* 57 Fed. Rep. 282; *Glenn v. Liggett*, 47 Fed. Rep. 474; *Jones v. Bank of Leadville*, 10 Colo. 464; *Gluck & Becker, Receivers of Corporations*, § 27; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665; *American Loan & T. Co. v. Toledo, O. & S. R.*

Co. 29 Fed. Rep. 416; *Vanduser v. Vanduser*, 70 Iowa, 614; *Maben v. Maben*, 72 Iowa, 653.

The court by its order practically undertakes the management of the Homestead Company, which it cannot do in this action.

Hook v. Iosworth, 24 U. S. App. 341, 64 Fed. Rep. 443.

Meers, Dudley & Coffin and Bishop, Bowen, & Fleming, for appellee:

As a stockholder in the defendant corporation, the plaintiff possesses the right to a voice in its management, and to have a share in its profits and ultimate assets.

Cook Stock & Stockholders, § 11.

If his share, or right to share, in the corporate management of property, is materially interfered with, and the corporation itself refuses, or is unable, to redress the wrong, the ear of a court of equity ought to be open to him.

French v. Gifford, 30 Iowa, 148.

The following authorities distinctly recognize the right of a stockholder to sue by reason of his interest as such, and to have a receiver.

Hill v. Glasgow R. Co. 41 Fed. Rep. 610; *Zabriskie v. Cleveland, C. & C. R. Co.* 64 U. S. 23 How. 881, 16 L. ed. 488; *Edison v. Edison United Phonograph Co.* 52 N. J. Eq. 620; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587.

The corporation, as such, cannot act, and neither director would respond to a call for aid from the other. With this condition of affairs existing, it is clear that either may sue, and have such relief as the facts may warrant.

Wayne Pike Co. v. Hammons, 129 Ind. 368; *Supreme Sitting, O. of I. H. v. Baker*, 134 Ind. 293, 20 L. R. A. 210; Cook, Stock & Stockholders, § 741, and note.

The prayer of plaintiff is also that it may have general equitable relief. Hereunder it may have any relief consistent with the pleadings and proofs, even though not specially asked for.

Pond v. Waterloo Agri. Works, 50 Iowa, 596.

The court may appoint a receiver to avoid loss and preserve the property until it can ascertain what are the rights of the parties. As a matter of course the receiver may take possession of all the property. It has been held that this does not have the effect to work a dissolution.

Life Asso. of America v. Rundle ("Relfe v. Rundle"), 103 U. S. 222, 26 L. ed. 337; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Hasselman v. Japanese Development Co.* 2 Ind. App. 180.

To deprive a corporation of all its assets does not have the legal effect to dissolve it, or even to impair its franchise.

State, Atty. Gen., v. Merchant, 37 Ohio St. 251; *Thomp. Corp.* §§ 6662, 6683.

The case presented is that of a corporation having a board of directors who, because of bitter personal enmity which has been fed and fostered until reconciliation has become impossible, might as well be with the world between them, and with the existence of each to the other unknown, as far as anything like co-operation between them is concerned.

3: L. R. A.

Equity will afford adequate relief in such a case.

Edison v. Edison United Phonograph Co. 52 N. J. Eq. 620; *Archer v. American Waterworks Co.* 50 N. J. Eq. 83; *Lawrence v. Greenwich F. Ins. Co.* 1 Paige, 587; *Meier v. Kansas P. R. Co.* 5 Dill. 476.

The courts will interfere whenever the managing agents of a corporation cannot, or will not, properly carry on its business.

Morawetz, Priv. Corp. § 273; *Pond v. Vermont Valley R. Co.* 12 Blatchf. 280; *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Lehigh Coal & Nav. Co. v. Central R. Co.* 35 N. J. Eq. 349; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 467, Affirmed, *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 273.

Each stockholder, having an interest in the corporate concern as an entirety, is entitled to have his rights protected accordingly.

Cook, Stock & Stockholders, § 684; *Featherstone v. Cooke*, L. R. 16 Eq. 303.

If the disagreement between the managing agents could not be reconciled without one or the other abandoning conscience and his sense of honor and right, if no stockholders' meeting could be held at which the difficulty could be settled or remedied, the court will proceed to wind up the affairs of the corporation.

Morawetz, Priv. Corp. § 232; *Re Suburban Hotel Co.* L. R. 2 Ch. 737; *Faulde v. Yates*, 57 Ill. 416, 11 Am. Rep. 24.

Deemer, J., delivered the opinion of the court:

The Pierce-Wallace Publishing Company is a corporation organized under the laws of this state, having its principal place of business in the city of Des Moines. The stock is owned in equal shares by plaintiff and the defendant J. M. Pierce, and these parties are the sole directors and officers of the corporation; Pierce being the president and business manager, and Wallace the secretary and treasurer and editor. The corporation owns 118 shares of the capital stock of another corporation known as the Homestead Company, and also owns and conducts two newspapers,—one known as the Wisconsin Farmer, conducted and carried on at Madison, Wisconsin, and another known as the Live Stock Indicator, published at Kansas City, in the state of Missouri. The 118 shares of stock owned by the Pierce-Wallace Company in the Homestead Company are a majority of the stock in the latter company. The other stock is owned by S. F. Stewart, Frank Dunning, A. G. Lucas, and Pierce and Wallace in their individual capacity. In his original petition the appellee asked for a dissolution of the corporation and a distribution of its assets, but this he afterwards amended by striking out the prayer for dissolution, and the relief asked when the case was tried was the appointment of a receiver, and such equitable relief as the facts would warrant. His claim in this court is (using the language of his counsel): (1) That Pierce and Wallace were the sole and equal owners of the stock in the Pierce-Wallace Publishing Company. (2) That between these two men differences of a personal nature had arisen, and from an accumulation of causes had become so intensified that nothing in the way of conference or

communication between them was possible. (3) That in consequence no meeting of the board of directors or stockholders could be had, and no authoritative direction could be given in the affairs of the corporation. (4) That Pierce had taken possession of and assumed control over the affairs and property of the corporation, and by one means and another was excluding Wallace therefrom. (5) That in many respects the management by Pierce was not only contrary to the views of Wallace, but, having taken sole possession, and maintaining it by such means as might be required, he was manipulating matters in his own interest, and utterly disregarding the rights and wishes of Wallace. And he contends that the order appointing the receiver should be sustained.

We are at a loss to know whether or not appellee is asking for the dissolution of the Pierce-Wallace corporation. He struck out this part of the prayer from his original petition, and does not expressly insist upon this relief, although his contention seems to be that at the final hearing he should have such a decree as would practically amount to a dissolution of the corporation. It may be that the reason why he does not ask that the corporation be dissolved is to be found in the fact that his counsel are of the opinion that such relief cannot be had under the facts as they are disclosed by this record. But, whether this be the fact or not, it is certainly true that, in the absence of express statutory authority, jurisdiction of courts of equity does not exist over the corporate bodies to such an extent as to justify them in dissolving corporations, or of winding up their affairs and sequestering their property. This seems to be so well settled that there is scarcely a dissenting voice in authority. See High, Receivers, 3d ed. §§ 233, 239; Beach, Receivers, § 403; 20 Am. & Eng. Enc. Law, p. 57; Morawetz, Priv. Corp. §§ 282, 283; *French v. Gifford*, 30 Iowa, 153; Thomp. Corp. §§ 4538, 4539, 6703. Our statutes do not, in terms, authorize the appointment of a receiver for the purpose of winding up a going corporation. The only provision we have is general in character, and does not relate to any specific class of cases. It is as follows: "On the petition of either party to a civil action or proceeding wherein he shows he has a probable right to or interest in any property which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or materially injured or impaired . . . the court, . . . if satisfied that the interests of one or both parties will be thereby promoted and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him." Code, § 2908. We have heretofore held that this section does not authorize the dissolution of a corporation by a court of equity, nor the placing of its property in the hands of a receiver, which practically accomplishes the same purpose. *French v. Gifford*, 30 Iowa, 153. We have also held, however, that one who brings himself within the provisions of § 2908 may have a receiver appointed as well of the effects of a corporation as of an individual or copartner.

ship. Dickerson v. Cass County Bank, 95 Iowa, 392. And we also said in *French v. Gifford*, that there are cases in which a receiver will be appointed for the property of a corporation, as, for instance, where the officers have been guilty of a misappropriation of the funds or a breach of trust in the discharge of official duties.

Turning now to the record to discover the facts upon which appellee relies for the appointment of a receiver, we find that his complaints are: (1) That Pierce had arrogated to himself the active management of the corporation, and excluded appellee therefrom, and withheld and refused to give appellee any satisfactory information as to the condition of the business, and had deprived him of the funds of the corporation and of the management of its financial affairs as treasurer of that concern. (2) That irreconcilable differences exist between appellee and Pierce, which render it impracticable and impossible for them to transact business with each other, or to consult together upon any business proposition. (3) That the corporation is indebted to each of the stockholders in the sum of \$5,500, and by reason of the feeling existing between these parties no provision has or can be made for the liquidation of this indebtedness. (4) That no adequate provision can be made for the maintenance, operation, and continuance of the newspapers published by the corporation in Wisconsin and Missouri. (5) That the business of the corporation cannot be carried on as intended and provided for in its articles of incorporation, and that the objects of the corporation and intentment of its stockholders are completely frustrated. These are the substance of the allegations of the petition. The evidence adduced in support of them shows that the state of feeling between these men is very bitter, and that they scarcely ever meet without some fuel being added to the flame. But it seems that their trouble grew out of, and largely, if not wholly, relates to, the management and control of the Homestead Company. Various and sundry disagreements arose between Pierce and Wallace as to the conduct and policy of this paper; and Wallace, who was until recently its editor, was finally deposed by action of its board of control. This and numerous other suits followed and a train of unfortunate litigation is impending.

In considering the case we must carefully distinguish between the various corporations which are more or less involved in the proceedings. The suit is against Pierce and the Pierce-Wallace Publishing Company; not against the Homestead Company, nor its stockholders or officers. Of it, therefore, we have no jurisdiction. And we should approve of no order which will have the effect of controlling its management or directing its affairs, unless it of necessity results from giving effect to a proper order made in a proceeding against the Pierce-Wallace Company. The only difference between the parties relating to the Pierce-Wallace Company grew out of the publication in the Wisconsin paper of some essays delivered at a session of the Farmers' Institute in that state, in advance of their official publication under the auspices of the dean of the University of Wisconsin. This difference arose in May, 1894, more than one year

prior to the bringing of this suit, and seems to have been satisfactorily adjusted; at least the parties continued in business for many months after this dispute, and it was so inconsequential in character that no court would be justified in appointing a receiver on account of it. Wallace says that Pierce deposited all the funds of both the Homestead Company and the Pierce-Wallace Company in his own name, and assumed all the duties of treasurer of both corporations, although he (Wallace) was the duly elected treasurer. The record discloses that Pierce did deposit the funds of both corporations in his own name, and for a time drew his checks against the deposits; that this was done at the suggestion of Wallace, or at least with his acquiescence, until more serious difficulties arose between the parties as to the conduct and management of the Homestead Company, at which time Wallace insisted upon recognition of his rights as treasurer. His demands were acceded to in so far as the depositing of the funds was concerned, with some little delay, which is at least partially explained; and at the time of the commencement of this suit the funds of the Pierce-Wallace Company were deposited in the name of that company. After Wallace's deposition as editor of the Homestead he brought a suit to compel Pierce to turn over to him as treasurer the funds of the Pierce-Wallace Company. After the suit was commenced, Pierce agreed to turn over these funds, and, for aught that appears in the record, this agreement has been complied with.

These are all the matters of difference between these parties as to the Pierce-Wallace Company, and it is manifest from the order made by the lower court that he did not regard them as sufficient to justify the appointment of a receiver of all property of this corporation, for he directed the receiver to take charge of nothing but the 118 shares of stock of the Homestead Company. And, if there were any doubts about the matter, they would be dispelled by appellee's own testimony, wherein he says: "We have never had any disagreement with reference to the matters of the Pierce-Wallace Publishing Company except the one I have referred to. We continued to run the affairs of this company from February, when this controversy arose, until February in the next year. During this year there was never a controversy with reference to any matter pertaining to the Pierce-Wallace Company's affairs, except at the very start in this Wisconsin business, for the reason that during that year, after this started, I knew little or nothing about the affairs of the company. I don't know whether we would have had a controversy if I had known anything about it. I stated that as the reason why we did not have a controversy. I do not know any more about them now than I did then." It is perfectly apparent that appellee has no right to a dissolution of the Pierce-Wallace Company, and that a receiver should not be appointed for all its property, nor any part of it, unless there be something in the controversy with reference to the Homestead Company matters which is a justification for the order authorizing the receiver to take charge of the stock of that company owned by the Pierce-Wallace corporation.

With reference to the Homestead Company,

we find there are decided differences between the members of that company, which are apparently irreconcilable; but they relate to matters *intra vires*, and, except as hereafter noted, do not have reference to the Pierce-Wallace Company. These disputes quite largely, if not wholly, related to the editorial management of the newspaper published by the Homestead Company; Wallace insisting that he should control the utterances of that department, while Pierce and the other stockholders and directors were asserting the right of supervision, and, to a certain extent at least, control, of the editorial columns. The breach caused by this difference widened until it led to the deposition of plaintiff, by regular vote of the directors of the corporation, from the editorial management of the paper. Now, without going into the merits of this unfortunate controversy, and without indicating our views as to who is at fault, we simply say that, if it be conceded that the managers and directors of the Homestead Company were at fault, it would give the plaintiff no right to the appointment of the receiver. The Homestead Company is not a party to this suit. It is an independent corporation, composed of different stockholders from those who own the stock in the Pierce-Wallace Company, and is managed by other officers. Again, no actionable fraud is charged against the officers of the Homestead Company. Plaintiff was deposed by a regular majority vote, and as a minority stockholder or officer he has no cause for complaint. It is a general rule that a minority cannot dictate the policy of the corporation, and no interference with its management in their behalf can be justified unless it be absolutely necessary to the attainment of justice. *Peatman v. Central Light, H. & P. Power Co. (Iowa) 69 N. W. 541.* But we have already said too much as to the power to appoint a receiver for the Homestead Company, for such relief is not asked, and the receiver was not granted in a suit against it. The appointment was made with directions to the receiver to take charge of a part of the property of the Pierce-Wallace Company, to wit, the stock owned by it in the Homestead Company; and the part of this opinion referring to this last-named corporation is designed to make plain the difference which exists in these two bodies, and to show, if we can, that a dispute as to the management or policy of the Homestead Company will not of itself authorize the appointment of a receiver for the other corporation. We take it from the record that the lower court concluded that there were such differences between Pierce and Wallace as to the management of the Homestead Company that they could not act together in matters relating to the Pierce-Wallace Company, and could not properly represent the latter corporation in the meetings of the Homestead Company; and it seems that the receiver was appointed in order that it might be represented at the meetings of the stockholders of the Homestead corporation. It further appears that the court below did not think there were such differences as would hinder the Pierce-Wallace corporation in the exercise of its functions, except in relation to the Homestead stock, for he denied the receivership as to all the property save this stock; and we may say, in justification of the court's

refusal, that we think it was right in so doing. Plaintiff has not been denied any right in this corporation. He is still at liberty to handle the funds, and to perform his duties as a stockholder, director, and officer. What have we, then, as to the management of the stock in the Homestead Company?

It appears that after Wallace's deposition as editor of the Homestead paper he demanded a meeting of the board of directors. Pierce called the meeting, but Wallace was out of town. It is said that Pierce did not know of his absence, but this is immaterial, for the reason that a second meeting was called shortly afterwards, when Wallace was in the city, and this he refused to attend. As soon as the meeting was called, Pierce drew up a resolution which gave to each of the parties a proxy to vote one half of the Homestead Company stock at the meeting of that corporation. This resolution was submitted to Wallace in advance of the meeting, as indicating Pierce's views; and it seems that Pierce was anxious that all matters with reference to the action of this corporation should be agreed upon, to avoid any possibility of difficulty. Now, it seems to be held by some of the English courts that a receiver will be appointed where there is such a dispute among the members of a governing body as prevents the affairs being carried on properly. See *Penfatherstone v. Cooke*, L. R. 16 Eq. 298; 2 Cook, Stock, Stockholders, & Corp. Law, § 684; Morawetz, Priv. Corp. §§ 234, 285. Mr. Cook says, however [note 2, p. 981], the court will not interfere unless the corporation is in a condition in which there is no proper governing body, or there are such dissensions in the governing body as that it is impossible to carry on the business with advantage to the parties interested. "In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." There are other authorities holding to a contrary doctrine. *American Loan & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. Rep. 416; *Little Warrior Coal Co. v. Hooper*, 105 Ala. 665; *Einstein v. Rosenfeld*, 88 N. J. Eq. 309. And it is manifest that courts are loath to appoint a receiver for the mere purpose of carrying on the business of a corporation which is being conducted by its proper officers, although not to the profit or satisfaction of its stockholders, for the reason, as said by Judge Thompson in his work on Corporations, at § 6834, "that the sovereign does not furnish public agencies for the carrying on of private enterprises." But, whatever may be the true rule with reference to this matter, it appears that the Pierce-Wallace Company is being managed by the officers selected for that purpose, just as it was before plaintiff was deposed, except that he has voluntarily refused to attend its meetings, or to participate in the management of its business. There has been no such disagreement between the officers of this corporation with reference to its affairs as to render it impossible for it to carry on the business for which it was organized. The record shows but one meeting of the directors after plaintiff's deposition as editor of the Homestead, and this he refused to attend, not, as we understand it, because of any disagreement between the directors or stockholders as to the management of this cor-

poration, but because of the effect it might have upon the affairs of the Homestead Company. Evidence is abundant to the effect that all essential differences grew out of difficulties which arose with reference to the management of the Homestead, and that these litigants are not at variance with reference to the management of the Pierce-Wallace Company. Plaintiff, as we believe, failed to attend the meetings of this latter corporation simply because he did not wish to have the stock held by it in the Homestead Company represented at the meetings of this last named concern, and would not agree to the appointment of proxies, as suggested by Pierce, solely because of the effect it might have upon the Homestead difficulty.

Whether there will, in the future, be such dissensions and differences between these parties as will authorize the appointment of a receiver,—conceding that one may be appointed for these causes,—is almost wholly a matter of conjecture. It does not follow that because of trouble in the management of the Homestead the business of the defendant corporation cannot be carried on. If differences should arise in the future, it will then be time to consider the rights of the parties. We have already mentioned the fact that claim is made that the corporation is indebted to plaintiff and defendant Pierce. The evidence established this claim. But it does not appear that this indebtedness has been reduced to judgment, or that any lien exists against the property of the corporation. And it is clearly shown that the corporation is perfectly solvent and able to meet its obligations. Plaintiff has no right as a creditor to the appointment of a receiver. This is a familiar doctrine, and requires no citation of authorities to support it.

Reference has been made to the case of *Dickerson v. Cass County Bank*. In that case it was found that there was such an action pending as justified the appointment of a receiver. It appeared, however, that the corporation was insolvent; that the officers were continuing the business at a loss, and were allowing the assets to be scattered, so that they could not be realized upon without great sacrifice; and that plaintiff, as a stockholder, was subject to a double liability under our statute. No one of these facts is present in this case. The only claim which has any merit is that there are dissensions among the stockholders and directors which render it impossible for the corporation to carry on its business.

The relief asked is, in effect, the dissolution of the corporation, or, if this be not the prayer, it is that the management of the corporation be taken out of the hands of the officers who have been conducting its business, and placed in the hands of an officer of the court for some indefinite period. It has already been seen that this is rarely, if ever, done; and, if such practice should be approved in this court, it is well to inquire. How long should the receivership be continued? There are but two stockholders in this corporation, plaintiff, Wallace and defendant Pierce. Now, a court of equity has no power to make them agree; and, if their differences are such as that it is impossible for them to carry on their business, it is not likely that the appointment of a receiver will bring about a reconciliation. It is practically con-

ceded that a court of equity has no power, in the absence of a statute, to dissolve a going corporation. What, then, must result? Either that a court must carry on this business for the interest of the stockholders until the corporation is dissolved by lapse of time, or that one of the parties should sell his stock, or such portion thereof as will give a majority to one or the other of these litigants. We have already seen from the cases cited that it is with great reluctance that any court authorizes the appointment of a receiver because of dissensions in the governing bodies, and when it does "it will only interfere for a limited length of time, and to as small an extent as possible." It is not necessary to decide whether the rule announced in *Featherstone v. Cooke* is applicable in a state where the statute enumerates the causes for which a receiver may be appointed, for, if we accept it as correct doctrine, we do not think it applies to the facts of this case. It may be unfortunate that there is no remedy other than a sale of his stock by one or the other of the stockholders, but, if this be the case, it is a situation in which the parties voluntarily placed themselves; and, so long as no actual legal wrong is committed by either, they must be content with their condition. Our conclusions find support in the following, among other authorities: *Hinkley v. Blethen*, 78 Me. 221; *Pond v. Vermont Valley R. Co.* 12 Blatchf. 280; *State, Merriam, v. Ross*, 129 Mo. 435, 22 L. R. A. 634; *Loomis v. McKenzie*, 31 Iowa, 425; *People v. Weigley*, 155 Ill. 491; *Strong v. McCagg*, 55 Wis. 624; *Hinckley v. Pfister*, 88 Wis. 64; *French Bank Case*, 53 Cal. 495; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 7 C. C. A. 412, 58 Fed. Rep. 644, 24 L. R. A. 776; *Spelling, Priv. Corp.* § 851; *Jones v. Bank of Leadville*, 10 Colo. 464.

The District Court was in error in appointing the receiver, and its order is reversed.

D. C. CARPENTER

Clarence C. KNAPP *et al.*,
and
W. H. Knapp, Intervener.

(.....Iowa.....)

- 1. A stipulation requiring the consent of the beneficiary** "in case of assignment" of a benefit certificate does not apply to a change of the beneficiary.
- 2. A person to whom an endowment certificate is payable** in case of the death of the assured within the limit of the endowment period has no assignable interest during that period and while the assured is living, when the latter has the right to change his beneficiary.
- 3. The power to change the beneficiary is vested in a member of a mutual benefit society** in the absence of any restrictions in the certificate, by-laws, articles of incorporation, or statute.

NOTE.—As to power to change beneficiaries, see also *Huett v. Supreme Lodge, K. of H.* (Cal.) 33 L. R. A. 174; and *Jory v. Supreme Council, A. L. of H.* (Cal.) 26 L. R. A. 753.

38 L. R. A.

(April 10, 1897.)

CROSS APPEALS by plaintiff and intervener from a judgment of the District Court for Black Hawk County in favor of plaintiff in an action brought to recover money in the hands of the Equitable Mutual Life & Endowment Association in satisfaction of a debt due by Clarence C. Knapp, which money was claimed by W. H. Knapp; the plaintiff appealing from certain rulings not going to the merits, and the intervener appealing from the judgment which awarded the amount to the plaintiff. *Affirmed.*

Statement by Kinne, Ch. J.:

Plaintiff on February 17, 1895, commenced his action against the defendants, aided by attachment, in which he sought to recover some \$24,000. The attachment was levied by garnishing the Equitable Mutual Life & Endowment Association of Waterloo, Iowa, as a supposed debtor of the defendant Clarence C. Knapp. Defendants filed an answer in denial. Thereafter W. H. Knapp intervened in said action, claiming to be the owner of the funds in the hands of the garnishee. Plaintiff, in an answer to the intervener's petition, controverted his claim. The cause was tried to the court, and a judgment and decree entered for plaintiff for the amount claimed, and adjudging plaintiff to be entitled to the fund in controversy. Intervener appeals. The plaintiff also appeals from rulings which do not go to the merits of the controversy. As we conclude that upon the merits the case should be affirmed, we do not deem it necessary to further refer to plaintiff's appeal.

The facts appearing from the pleadings and evidence are that on the 23d day of July, 1885, one J. T. Knapp became a member of the Equitable Mutual Life & Endowment Association, a corporation conducting a mutual life insurance business. He received a certificate of membership, in which the defendant Clarence C. Knapp was named as beneficiary. Said certificate contained the following provisions:

"Death Claims. Upon receipt at the home office of satisfactory proofs, on proper blanks furnished by the association, of the death of said member, prior to ten full years from the date hereof, viz., the 23d day of July, 1895, at 12 M. of said day, the Equitable Mutual Life & Endowment Association will pay to Clarence C. Knapp, or, in case of ——— death before that of said assured, then to executors, administrators, or assigns of said member, . . . the net proceeds of one assessment upon all members at date of said death, not exceeding two thousand five hundred dollars.

"Endowment Claim. Upon the surrender of this certificate by the aforesaid member or legal holder, after having been kept in force for a period of ten full years, the Equitable Mutual Life & Endowment Association will pay to said member or legal holder his full share of the endowment fund of said association, not exceeding one thousand dollars."

Said certificate also provided that, "in case of assignment of the within certificate, the beneficiary must consent thereto, and said assignment must be approved by the secretary of the association; otherwise the assignment shall be void."

The assured and the beneficiary were, when said certificate issued, partners engaged in the business of banking at Cedar Falls, Iowa, under the firm name of J. T. Knapp & Co. In September or October, 1893, the assured wrote the beneficiary that he would make no more payments on said certificate, and that, if he (the beneficiary) wanted to keep it up, he would have to look after it. Afterwards, and on October 30, 1893, said beneficiary assigned said certificate to the intervener, Will H. Knapp, but said assignment was not then approved by the secretary of the association. There was no consideration for this assignment, other than Will H. Knapp's agreement to pay all assessments and dues then due, or which might thereafter accrue against J. T. Knapp, as the party insured in said certificate. Will H. Knapp was a son of Clarence C. Knapp, and a nephew of the assured. Will H. Knapp thereafter, and until the death of the assured, paid such assessments as were due upon the membership of the assured. November 14, 1893, J. T. Knapp died. December 12, 1893, Clarence C. Knapp executed another assignment of said certificate to Will H. Knapp, which purported to be made to complete the assignment theretofore executed. This last paper was approved by the secretary of the association. Thereafter the intervener had prepared and sent to the association proofs of the death of J. T. Knapp, and the association collected an assessment from its members to pay the amount due upon said certificate, being over \$2,300, which, by agreement of the parties, was paid into the hands of the clerk of the district court to abide the order of said court.

Mr. E. E. Hauser, for plaintiff:

An endowment certificate or endowment policy differs materially from the ordinary life insurance policy.

Cooke, Life Ins. § 107, p. 198.

It is not the certificate of Clarence C. Knapp. It is J. T. Knapp's certificate as long as he lives; and it is his to do with as he pleases as long as he lives; during his life it is under his control.

Mutual L. Ins. Co. v. Armstrong, 117 U. S. 391-600, 29 L. ed. 997-999; 2 May, Insurance, 3d. ed. § 890, p. 859; *Tennis v. Northwestern Mut. L. Ins. Co.* 26 Minn. 271; *Lamberton v. Bogart*, 46 Minn. 409; *Evers v. Life Asso. of America*, 59 Mo. 429.

The endowment policy or certificate in suit is not good as an executed gift to Clarence C. Knapp. It is so conditioned that it is revocable by J. T. Knapp at any time during his life.

Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500.

The policy in suit is during the life of J. T. Knapp completely within his control and assignable by him, so as to pass the whole insurance to his assignee.

No right or title vests under a contract containing a condition precedent, until that condition happens. *A fortiori* it is true of a mere gift.

C. C. Knapp takes under this as a gift, if at all, and not by descent, devise, or purchase; and his rights are to be determined by the laws governing gifts. A gift must be completely

executed, and it must go into immediate and absolute effect.

Irish v. Nutting, 47 Barb. 370; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, 8 Am. & Eng. Enc. Law, title, *Gifts*, p. 1313.

If the gift is left incomplete, there exists a *locus penitentia*, and what has been done may be revoked.

Tulcott v. Field, 34 Neb. 611; *May, Ins.* § 458.

If the beneficiary assign, the assignee must have an insurable interest in the life of the assured, or the assignment will be held void. The assignment of a policy to a party not having an insurable interest is just as objectionable as the taking out of a policy in his name. To the extent to which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy.

Warnock v. Davis, 104 U. S. 779, 26 L. ed. 926; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 13 Am. Rep. 813; *Sterens v. Warren*, 101 Mass. 564; *Cammark v. Lewis*, 82 U. S. 15 Wall. 643, 21 L. ed. 244; *Cooper v. Shaffer* (Pa.) 9 Cent. Rep. 601; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479; *Lamont v. Hotel Men's Mut. Ben. Asso.* 30 Fed. Rep. 817; *Ruth v. Katterman*, 112 Pa. 251; *Price v. Supreme Lodge K. of H.* 68 Tex. 361; *Missouri Valley L. Ins. Co. v. McCrum*, 86 Kan. 146, 59 Am. Rep. 537.

There must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the insured.

Corson's Appeal, 113 Pa. 438, 57 Am. Rep. 479. Also see *Langdon v. Union Mut. L. Ins. Co.* 14 Fed. Rep. 272; *Mutual Ben. Asso. v. Hoyt*, 46 Mich. 473; *Watson v. Centennial Mut. L. Asso.* 21 Fed. Rep. 698.

Where one procures insurance on the life of another in whom he has no insurable interest, the policy is void.

Lamont v. Grand Lodge I. L. of H. 81 Fed. Rep. 180; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 1 L. R. A. 238; *Stambaugh v. Blake*, 22 W. N. C. 407; *Burton v. Connecticut Mut. L. Ins. Co.* 119 Ind. 207; *May, Ins.* § 102; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189; *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329.

If W. H. Knapp had no advantage or benefit to accrue to him from the continuance of the life of J. T. Knapp, then he had no insurable interest in it, and the assignment to him was void.

1 May, Ins. 3d ed. §§ 102, 112; *Heuser v. Mutual L. Ins. Co.* 47 Mo. App. 836.

The assured holding an endowment certificate is recognized as having a right to assign the endowment.

Niblack, Ben. Soc. & Accd. Ins. § 212; *Brown v. Grand Lodge, A. O. U. W.* 80 Iowa, 287; *Hirsch v. Clark*, 81 Iowa, 200, 9 L. R. A. 841; *Schmidt v. Iowa K. of P. Ins. Asso.* 82 Iowa, 804; *Richmond v. Johnson*, 28 Minn. 447.

A voluntary conveyance by a father to a son,

when the father is insolvent, is fraudulent as to creditors.

Triplet v. Graham, 58 Iowa, 185; *Watson v. Riskamire*, 45 Iowa, 281; *Boulton v. Hahn*, 58 Iowa, 518; *Brainard v. Van Kuran*, 22 Iowa, 261; *Pratt v. Green*, 25 Iowa, 89; *State Bank v. Harrow*, 26 Iowa, 426; *Irish v. Bradford*, 64 Iowa, 303; *Potter v. Phillips*, 44 Iowa, 353.

Messrs. Boles & Boles, for intervenor:

If C. C. Knapp had a vested property interest in this certificate of membership issued on the life of J. T. Knapp, prior to the enactment of § 1767, *McClain's Digest*, which he might then have assigned, the statute cannot be permitted to deprive him of such vested right or of the power to assign it.

Brown v. Grand Lodge, A. O. U. W. 80 Iowa, 287; *Lindsey v. Western Mut. Aid Soc.* 84 Iowa, 740; *Tilton v. Swift*, 40 Iowa, 79; *Newman v. Samuels*, 17 Iowa, 530; *Sutherland, Sta. Constr.* § 406; *Benton v. Brotherhood of R. Brakemen*, 146 Ill. 570.

The beneficiary in an ordinary life policy acquires the entire property interest in the contract the moment the policy is executed and delivered.

Bacon, Ben. Soc. & Life Ins. § 292; 18 Am. & Eng. Enc. Law, p. 655; *Harley v. Heist*, 86 Ind. 190, 44 Am. Rep. 285; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 870; *Bliss, Life Ins.* 2d ed. § 818; *May, Insurance*, 3d. ed. § 899 L.

The vested interest of a beneficiary in an ordinary life policy may be assigned by such beneficiary during the lifetime of the party whose life is insured.

18 Am. & Eng. Enc. Law, p. 646 *et seq.*; *Bacon, Ben. Soc. & Life Ins.* § 297. *Fowler v. Butterly*, 78 N. Y. 68, 84 Am. Rep. 507.

There is practically no distinction, save one, in the rights of a person whose life is insured upon the ordinary life plan and the rights of a person whose life is insured by a mutual benefit society. In neither case has the person whose life is insured any property interest in the insurance unless he or his estate is named as the beneficiary. The only difference between the rights of persons whose lives are insured upon one plan or the other is this: that the member of a mutual benefit society ordinarily has the right to change the beneficiary named in his certificate at any time that he may so elect, without the consent of such beneficiary, whereas the person whose life is insured by the ordinary life policy has no such power.

Brown v. Grand Lodge, A. O. U. W. 80 Iowa, 287; *Hellenberg v. District No. 1 I. O. of B. B.* 94 N. Y. 580.

As to the rights of beneficiaries named in the two kinds of contracts, the courts unite in holding that the ground of distinction between the rights of a beneficiary under an ordinary life policy and the rights of a beneficiary under the ordinary certificate of membership of a mutual benefit society is this: that in the former case the interest of the beneficiary cannot be defeated without his consent, and in the latter the interest of such beneficiary is subject to be defeated at the will of the person whose life is insured and without the consent of such beneficiary. For this reason it is said that the interest of a beneficiary under an ordinary life

policy is vested and assignable from the moment of the policy's issue.

Brown v. Grand Lodge, A. O. U. W. 80 Iowa, 290; *Smith v. National Ben. Soc.* 128 N. Y. 85, 9 L. R. A. 616; *May, Ins.* 3d ed. § 899 L., 399 M.; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285.

The interest of a beneficiary in a life policy upon either plan is vested and assignable from the moment of the policy's issue, or is not so vested, depending upon the question whether the interest of the beneficiary may be defeated without his consent, by the act of the insured member.

Whether the interest of a beneficiary may be defeated without his consent depends upon the terms of the contract under which such beneficiary derives his interest.

Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285; *Niblack, Mut. Ben. Soc. & Acci. Ins.* 2d ed. p. 406; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 598.

If the terms of this contract expressly prohibit a change of beneficiary without his consent, the question involved in this case is entirely freed from difficulty, and it is undeniable that under such circumstances the interest of the beneficiary was a vested and assignable interest.

There is no provision in the certificate of membership or the articles of incorporation or by-laws of the association permitting the member to change the beneficiary named in the certificate without the consent of such beneficiary.

The words "assignment of the within certificate" mean a change or transfer of the beneficial interest in the certificate.

Hirschl v. Clark, 81 Iowa, 200, 9 L. R. A. 841.

By the express provisions of this contract, all assignments are prohibited unless the beneficiary shall consent thereto.

The parties intended that the consent of C. C. Knapp must be obtained to a change of that part of the contract which involved his own interests.

It is unnecessary at common law that the assignee of a life insurance policy should have an insurable interest in the life of the insured.

Cooke, Life Ins. p. 121; *St. John v. American Mut. L. Ins. Co.* 18 N. Y. 89, 64 Am. Dec. 529; *Falton v. National Fund L. Assur. Co.* 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Mutual L. Ins. Co. v. Allen*, 188 Mass. 24, 53 Am. Rep. 245; *Eckel v. Renner*, 41 Ohio St. 282; *Martin v. Stubbings*, 126 Ill. 387; *Fitzpatrick v. Hartford L. & A. Ins. Co.* 56 Conn. 116; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68; *Rüttler v. Smith*, 70 Md. 261, 2 L. R. A. 844; *Souder v. Home Friendly Soc.* 72 Md. 511; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, and other cases. See also *Johnson v. Van Epps*, 110 Ill. 551; *Lamont v. Grand Lodge I. L. of H.* 81 Fed. Rep. 177.

Where assignments of life policies are held void upon the ground of a want of insurable interest in the assignee at the time of the assignment, such holding is based absolutely and solely upon considerations of public policy.

which obtain in the jurisdictions holding such doctrines.

At the moment of this assignment, the statute of this state authorized mutual benefit societies to issue certificates of membership naming any relative of the member as the beneficiary thereof.

Simcoke v. Grand Lodge, A. O. U. W. 84 Iowa, 383, 15 L. R. A. 114.

If the secretary of the association did not in fact approve such assignment it was not thereby rendered void, for the reason that the provision of the contract requiring the approval of the assignment by the secretary of the association was a provision intended for the benefit of such association and which the association might waive, and no one, other than the association, can complain of such nonapproval by its secretary.

Niblack, Ben. Soc. & Acci. Ins. 2d ed. p. 830; *May, Ins.* 8d ed. § 459 F; *Simcoke v. Grand Lodge A. O. U. W.* 84 Iowa, 383, 15 L. R. A. 114; *Tinsworth v. Tinsworth*, 40 Kan. 571; *Spawen v. Chew*, 60 Tex. 533; *Manning v. Ancient Order of United Workmen*, 86 Ky. 186.

This is a contract purporting to be made between two parties for the benefit of a third.

In *Gilbert v. Sanderson*, 56 Iowa, 849, 41 Am. Rep. 108, this court held that where a contract was made between two persons for the benefit of a third the original parties to the contract might rescind the same "unless in the meantime the person for whose benefit it was made in some manner has indicated he accepts the contract, or it can be implied he does so. By so doing he acquires the rights and assumes the burdens incident thereto."

While certain courts have held that the right of the member to change the beneficiary in a mutual benefit certificate without the consent of the beneficiary exists, unless by the provisions of the contract such change is prohibited, yet such holding is directly in conflict with the principles of law which have long been applied to ordinary life policies.

Niblack, Ben. Soc. & Acci. Ins. 2d ed. § 212; *Bacon, Ben. Soc.* § 304; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *May, Ins.* 8d ed. § 899M.

In the various decisions of this court the right of the member of a mutual benefit association to change the beneficiary named in his certificate has always been predicated upon the express reservations of the contract giving to the member such right, or upon the statute now in force in this state, which authorizes the change of beneficiaries.

Brown v. Grand Lodge, A. O. U. W. 30 Iowa, 290; *McClure v. Johnson*, 56 Iowa, 620; *Niblack, Ben. Soc. & Acci. Ins.* 2d ed. p. 407; *Schmidt v. Iowa K. of P. Ins. Assn.* 82 Iowa, 304; *Brown v. Grand Council N. W. L. of H.* 81 Iowa, 400; *Hirsch v. Clark*, 81 Iowa, 200, 9 L. R. A. 841.

The possession of a certificate by C. C. Knapp was not necessary in order to give him a right of action thereon, nor was such possession necessary in order to enable him to assign such right of action if he had it, or any interest which he acquired by virtue of the terms of the contract.

Cooke, Life Ins. § 107; *Fowler v. Butterly*, 38 L. R. A.

78 N. Y. 68, 34 Am. Rep. 507; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157.

Kinne, Ch. J., delivered the opinion of the court:

Counsel have exhaustively and ably argued many interesting questions arising upon this record. In our view, however, the controlling question in the case is as to the right of Clarence C. Knapp to assign the certificate to the intervener. If he had no such right, then it is clear that intervener is not entitled to the fund in controversy. We proceed, therefore, to a consideration of that question. At the outset it should be said that the object of the association, as stated in its articles of incorporation, is "benevolent and mutual assistance among its members and their families, or designated beneficiaries, by the collection of dues and assessments, and disbursement at the death of its members, or at stated periods, less cost of maintaining association." (The italics above are ours.) The certificate of membership provides that upon proper proof of the death of a member being made, and in case he dies within ten years from the date of the issuing of the certificate, the association will pay to "Clarence C. Knapp, or, in case of ——— death before that of said assured, then to executors, administrators, or assigns of said member, . . ." It also provides that upon the surrender of the certificate by the "aforesaid member or legal holder, after having been kept in force for a period of ten full years, the . . . association will pay to said member or legal holder his full share of the endowment fund of said association, not exceeding \$1,000." It also provides that "in case of assignment of the within certificate the beneficiary must consent thereto, and said assignment must be approved by the secretary of the association; otherwise the assignment shall be void." There is no express provision in the certificate, articles of incorporation, or by-laws authorizing a change in the beneficiary, unless some of the provisions heretofore set out can be construed to give such authority. It is the general rule that a beneficiary under an ordinary life policy takes a vested interest therein at the moment the policy is executed and delivered, which cannot be impaired or defeated by any act of the assured, or of the assured and the company, to which said beneficiary does not assent. 13 Am. & Eng. Enc. Law, p. 655; *Bacon, Ben. Soc.* § 292; *Bliss, Ins.* § 818; *May, Ins.* § 899; *L. Biddle, Ins.* § 285; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Damron v. Penn Mut. L. Ins. Co.* 99 Ind. 478; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 598; *Thomas v. Grand Lodge, A. O. U. W.* 12 Wash. 500. It follows that such policies may be assigned, unless such act be contrary to the statute, the articles of incorporation, or by-laws of the company, or to the provisions of the policy itself. 13 Am. & Eng. Enc. Law, p. 646; *Biddle, Ins.* § 288; *Bacon, Ben. Soc.* § 297; *Plummer v. People's Nat. Bank*, 65 Iowa, 405; *McClure v. Johnson*, 56 Iowa, 620.

Appellant contends that the assured, in the case at bar, is given no authority, by the certificate, by-laws, or articles of incorporation,

to change the beneficiary; hence, the beneficiary named in the certificate had a vested interest in it the moment it was issued. In other words, he says that no right has been reserved to the assured, in the contract or laws of the association, to change the beneficiary; therefore none exists; and the rights of Clarence C. Knapp would be the same, as to the assignment of the policy, as in case of an ordinary life policy. Appellant's conclusions do not necessarily follow, even if the fact be as he claims. It is true that the rights of the assured are to be determined from the contract, and the contract embraces the certificate, by-laws, articles of incorporation, statute law, if any, and such rights as necessarily inhere in membership in such an association. Now, if the contract be silent as to the rights of the assured to change his beneficiary, what right has he in that respect? It is also true that, in most of the cases in which it has been held that the assured had a right to change the beneficiary, it will be found that the contract expressly reserved such right to the assured; and that is true as to every such case decided by this court. The question, therefore, as now presented, is an open one in this state. In *Niblack, Ben. Soc.* § 212, it is said that it has been held with substantial unanimity, wherever the question has arisen, that in mutual benefit societies the member may change his beneficiary without other limitations or restrictions than such as are imposed by law, the articles of incorporation, the by-laws, or the certificate. In other words, the general doctrine is said to be that the assured has a right to change the beneficiary unless the contract or statute provides to the contrary. In *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 192, it is said: "The general rule applicable to beneficiary or charitable associations is, that the beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member, until the death of the member occurs. During his lifetime the member may therefore exercise the power of appointment without other limits or restrictions except such as are imposed by the organic law, or by rules and regulations of the society, duly adopted in compliance therewith." In *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 598, the court said: "The weight of authority . . . is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts." Many cases are referred to in support of the above holdings. *Thomas v. Grand Lodge A. O. of U. W.* 12 Wash. 500, was a case of a mutual benefit certificate, and it was held that the insured had the right at any time during his lifetime to change the beneficiary. On the trial a question arose as to whether a certain by-law, which gave the members the right to change the beneficiary named in the certificate, was in evidence, so that it might be considered. The court held, in effect, that it was immaterial whether it was in evidence or not, and said: "It will be presumed that he had full right to control the benefit until the contrary is made to appear. The authorities upon this proposition are not entirely

uniform, but, as above suggested, a great majority of the cases have so held." Referring to the statement, sometimes found in the cases, that it is difficult to assign any reason for the distinction between such certificates and the ordinary life policies, as to the right of the assured to change the beneficiary, the same court says: "This may be true, but one good reason suggests itself, and that is, that these certificates are not in themselves an absolute contract which could, under the constitution and by-laws of the order, be entered into with any person. Under such constitution and by-laws these beneficiary certificates can only be issued to members. Hence, it seems reasonable that anything which would affect the right to membership would affect the right to the beneficiary certificate, and that since the membership can at any time be changed by the member without the consent of the beneficiary, he can also change the certificate. Upon reason and authority the beneficiary certificate should be presumed to be within the control of the member." See also *Lloeff v. Supreme Lodge K. of H.* 118 Cal. 91, 83 L. R. A. 174. Such associations are distinguishable from ordinary life insurance companies in many respects. By membership in such associations the assured obtains certain rights which inhere in the organization. So the class or classes of beneficiaries in them is limited, and such provisions, while in entire harmony with the object and purpose of such associations, are incompatible with the theory of regular life insurance, wherein the beneficiary, on the issuance of the policy, obtains a vested right therein. We conclude, therefore, in the absence of any provisions in the certificate, by-laws, articles of incorporation, or statute, either providing expressly for a change of beneficiaries or prohibiting such change, that by reason of the character and purposes of such associations it should be held that the power to change the beneficiary is vested in the member assured during his lifetime. *Fischer v. American L. of H.* 163 Pa. 279; *Voigt v. Korsten*, 164 Ill. 814.

2. From what has already been said, the conclusion follows that Clarence C. Knapp could have had no assignable interest in the certificate issued upon the life of J. T. Knapp, because he had no vested interest therein, as the power to change the beneficiary vested in the assured during his lifetime. That conclusion is sustained when we come to consider more carefully the character of the contract before us. It is what is called an "endowment certificate." By its terms the assured, in case he is alive at the expiration of the endowment period, becomes entitled to his full share of the endowment fund of the association, upon surrendering the certificate. If the assured dies prior to the expiration of the endowment period, and Clarence C. Knapp survives him, upon furnishing proofs of death of said assured, said Clarence C. Knapp is entitled to the benefits of the policy. If the assured dies during the endowment period, and Clarence C. Knapp is not then alive, then the sum due is to be paid to the executors, administrators, or assigns of the assured. Such a certificate, it seems to us, must of necessity be under the control of the assured until his death. How can it be claimed

that Clarence C. Knapp had a vested interest in the certificate prior to the death of the assured, and within the limit of the endowment period? At the expiration of the endowment period, the ten years, if J. T. Knapp was living he had the absolute right to deliver up the certificate and receive the endowment provided for therein. Such an act on his part would have satisfied the obligation of the association. So long as the assured was alive, and the endowment period had not expired, it could not be said that the assured might not outlive such period, and thus become the sole beneficiary under the certificate. Therefore it seems to us that during the entire endowment period, while the assured lived, he must be held to have the absolute right of control of the certificate, as against Clarence C. Knapp, and the latter could, within said time have no vested right therein; hence his assignee, the intervener, took nothing by the assignment from Clarence C. Knapp. Under such a policy it is said the rights of the beneficiary named, who is to be paid the proceeds of the certificate in case of the death of the assured before the expiration of the endowment period, do not attach until the decease of the assured within such period. 2 May, Ins. § 390, P, and cases cited. And see also, as bearing somewhat upon this question, *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Tennas v. Northwestern Mut. L. Ins. Co.* 26 Minn. 271; *Evers v. Life Assn. of America*, 59 Mo. 429.

3. If the contract authorized the assured to change the beneficiary, then there can be no doubt that Clarence C. Knapp could acquire no vested interest therein during the lifetime of the assured, and hence could not make an assignment which would carry any interest therein to the intervener, unless by virtue of other provisions which may be claimed to modify the contract in that respect. The authorities are uniform in holding that when the right to change a beneficiary is reserved in the contract, and in the absence of other controlling provisions, the beneficiary named in the certificate acquires no vested interest until the death of the assured, and prior to that time the assured may change the beneficiary at will. *Bacon*, Ben. Soc. § 289; *Niblack*, Ben. Soc. § 312; *Brown v. Grand Lodge A. O. U. W.* 80 Iowa, 287; *Hirsch v. Clark*, 81 Iowa, 200, 9 L. R. A. 841; *Schmidt v. Iowa K. of P. Ins. Assn.* 82 Iowa, 804, 11 L. R. A. 205; *Richmond v. Johnson*, 28 Minn. 447; *Byrne v. Casey*, 70 Tex. 247; *Sabin v. Phinney*, 134 N. Y. 423; *Supreme Council of Catholic Mut. Ben. Assn. v. Priest*, 46 Mich. 429; *Hellenberg v. District No. 1 I. O. of B. E.* 94 N. Y. 580; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189; *Hotel-Men's Mut. Ben. Assn. v. Brown*, 33 Fed. Rep. 11; *May, Ins. § 399L*; *Smith v. National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593.

4. Is there anything in this contract which modifies the general rule above stated? Appellant contends that the provision on the back of the policy, that "in case of assignment of the within certificate the beneficiary must consent thereto, and said assignment must be approved by the secretary of the association; otherwise the assignment shall be void,"—

88 L. R. A.

limited the right of the assured to change the beneficiary, and hence Clarence C. Knapp took a vested interest in said certificate. It is conceded that the assignment above mentioned refers to an assignment made by the assured, not to one made by the beneficiary; and that is, no doubt, a correct construction of the contract. Attention is called to the case of *Hirsch v. Clark*, 81 Iowa, 200, 9 L. R. A. 841, wherein it was said that a change of beneficiary was the same thing, in effect, as an assignment. Hence it is claimed that the word "assignment," used above, embraced also a change in beneficiaries made by the assured, and therefore he could not thus change without the consent of the beneficiary. We do not so regard it. Bearing in mind the fact that under the other provisions of the contract, and in view of the nature of the association, the assured had a right to change the beneficiary, we should not be justified in so construing the language under consideration as to deprive him of such right, unless such was plainly the intent, and unless there is no other way in which force and effect can be given to all of the provisions of the contract. If the word "assignment" be given its ordinary meaning (that is, of a formal transfer of the certificate from the assured to another person), the language used is given force and effect without limiting the right of the assured to change the beneficiary. We think it is clear from the words used that it was not intended to limit the power possessed by the assured to change the beneficiary at will during his lifetime. The language is, "in case of assignment of the within certificate," etc. These were apt words to protect the company from having the certificate assigned to a third person without their knowledge. They intended that no assignment should be made of the "within certificate" unless the beneficiary named therein consented, and not then until it was approved by the secretary of the association. The provision was chiefly intended for the protection of the association. It would not be necessary in case the assured should change the beneficiary named in the certificate, because such formal change could only be made by notifying the association in some manner, and ordinarily it would be evidenced by a new certificate. There was therefore no limitation upon the right of the assured to change his beneficiary. Hence we need not determine what the effect might be of an assignment made without the consent of the beneficiary, and not approved by the association.

5. By § 7 of chap. 65, Acts 21st Gen. Assm., which relates to mutual benefit associations, it is provided: "No corporation or association organized or operating under this act shall issue any certificate of membership or policy to any person . . . unless the beneficiary under said certificate shall be the husband, wife, relative, legal representative, heir, or legatee of such insured member, nor shall any such certificate be assigned, except an endowment certificate, and any certificate issued or assigned made in violation of this section shall be void. Any member of any corporation, association, or society operating under this act shall have the right at any time, with the consent of such corporation, association, or society to make a change in his beneficiary without re-

quiring the consent of such beneficiary." Counsel discuss the question of the applicability of this act to the case before us. The certificate in this case was issued prior to the passage of the act in question. If, as we hold, Clarence C. Knapp had, irrespective of this statute, no vested right in the certificate of insurance issued upon the life of his brother during said brother's lifetime, then the attempted assignment of said certificate during the brother's lifetime cast no rights upon the intervener. We need not, therefore, give this statute further consideration. We do not understand from the argument of counsel that any claim is based upon the assignment made after the death of the assured. We hold that there was no inhibition in the certificate, articles of incorporation, by-laws, or statutes which apply to this case, against the assured changing the beneficiary during his lifetime; that, in the absence thereof, he had a right to change the beneficiary; that, in view of the purposes of the order, it was intended to confer such right

upon the assured; that, under an endowment certificate like that at bar, the rights of the beneficiary named in the certificate do not attach until the decease of the assured, if he die within the endowment period. It follows that Clarence C. Knapp never had a vested interest in the certificate of his brother which he could assign during the brother's lifetime, and therefore the intervener took nothing by the assignment relied upon. The title to the fund in court was therefore in Clarence C. Knapp, and subject to plaintiff's attachment.

We are agreed that the appeal of intervener is properly before us for consideration, and as upon the merits the case is determined in plaintiff's favor, we do not discuss the questions raised by his appeal. As the matters already considered are conclusive as to the rights of the parties, we are not justified in extending this opinion by the discussion of many other questions argued by counsel.

On both appeals the judgment and decrees below are affirmed.

LOUISIANA SUPREME COURT.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY, *Appt.*,

v.

McEWEN & MURRAY, Limited, *et al.*

(49 La. Ann. 1184.)

- *1. When loss to the plaintiff has been occasioned by accident and uncontrollable events (Rev. Civ. Code, art. 2754), the defendants, being without fault, are absolved from liability.
- *2. "In order to render a person chargeable in damages for an act of commission or omission on his part, it must have been the proximate cause of the damage."
- *3. A mere failure to guard against a certain result is not actionable negligence, unless, under all the circumstances, it might have been reasonably foreseen by a man of ordinary intelligence and prudence.

(April 20, 1897.)

APPPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans, Division C, in favor of defendant in an action brought to recover damages for injuries to property of plaintiff by reason of the alleged negligence of defendant. *Affirmed.*

Statement by **Nicholls, Ch. J.:**

Plaintiffs claim that McEwen & Murray, Limited, and the Gulf Lumber Company, Limited, are indebted to them in the sum of \$4,781; that prior to September, 1893, they had properly erected along the south shore of Lake

Pontchartrain, between the intersection of People's avenue and the said lake and the Pointe aux Herbes, an embankment of earth, and had duly constructed thereon their railroad under and by virtue of legislative and municipal grants and franchises; that, in order to protect said embankment against the waters of Lake Pontchartrain in times of storm, they had constructed, at great expense, in front of said embankment, and between it and the said lake, a revetment amply sufficient for the purpose for which it was intended; that several months prior to the 1st of October, 1893, the Gulf Lumber Company, Limited, while towing in Lake Pontchartrain a raft of large saw logs, the property of McEwen & Murray, Limited, and destined for their mill, carelessly and negligently permitted the same to escape from their control, and to drift out upon the waters of Lake Pontchartrain; that said Gulf Lumber Company, Limited, was towing said logs under a contract, for full consideration, with McEwen & Murray, Limited, their obligation under that contract being to tow and deliver said logs in a careful and proper manner; that for several months thereafter said Gulf Lumber Company permitted, negligently and wantonly, and without proper cause or excuse therefor, said logs to float about loose and uncontrolled in said lake, when they could have easily and readily secured the same; that in the last days of September, or in the early part of October, 1893, there occurred a violent storm, which dashed the waters of Lake Pontchartrain with great force and fury against petitioners' revetment; that said revetment, however, was so well and strongly constructed that it withstood the force of said water, and protected petitioners' said

*Headnotes by **NICHOLLS, Ch. J.**

NOTE.—This case is very unusual in its facts and seems to have no direct precedent.

As to the driving of logs, see *Wisconsin River* 38 L. R. A.

Log Driving Assn. v. D. F. Comstock Lumber Co. (Wis.) 1 L. R. A. 717, and *note*; and *Harold v. Jones* (Ala.) 3 L. R. A. 406, and *note*.

roadway and embankment, and would have continued during and after the storm until the present day to so withstand said water and protect said roadbed and embankment, had it not been that the aforesaid logs, which even then were negligently and without proper cause permitted to drift about in said lake, were violently dashed, by the waters and waves raised by said storm, against said revetment, which was demolished in several places by the pounding of said logs, which broke through said revetment, and permitted the entrance of the waves, which washed away a great part of petitioners' revetment; that petitioners, after they had duly notified defendants that they would repair said revetment at their cost and expense, thus putting them in default, proceeded to repair, and did repair, the damage aforesaid, so caused entirely by the negligence and wrongful acts aforesaid of defendants, at a cost of \$4,734, which they had paid, as would appear by an itemized bill annexed to the petition. They prayed for judgment against both defendants *in solido* for that amount. McEwen & Murray, Limited, defendants, answered, pleading, first, the general issue. Further answering, they admitted that the Gulf Lumber Company had been, and was still, under a contract to tow logs for the said mill owned and operated by McEwen & Murray, Limited, as shown in the answer filed in the case by said lumber company, and that the McEwen & Murray corporation were the owners of the saw logs which were scattered from the tow then under the control of the aforesaid lumber company on or about the 10th of April, 1893, as alleged by plaintiffs, and admitted by said lumber company in their answer; but they averred that the corporation of McEwen & Murray had neither possession nor control of said logs, as the same were then *in transitu* towards that company's sawmill, and in the possession and under the control of a common carrier, the aforesaid lumber company. They denied that the McEwen & Murray company were guilty of negligence or carelessness, either in the handling of said logs, or failing to recover the same, and emphatically denied that the company could be held liable for any damages alleged to have been caused by any of the said saw logs to plaintiffs' property or breakwater. The lumber company, after pleading the general issue, admitted that, since the beginning of the year 1893, they had been under a contract with McEwen & Murray, Limited, which owned and operated a sawmill on the New Canal, in the city of New Orleans, to haul and to tow saw logs from sundry tributary streams emptying into Lake Maurepas, on said lake, through Pass Manchac, on Lake Pontchartrain, into the New Canal, to the sawmill of McEwen & Murray, Limited; that, for the purpose of said towage, the logs are chained together in small quantities, forming what is known in the trade as "cribs," which "cribs" are strong, and chained together, and securely fastened to a strong steam towboat operated by respondents; that with the aforesaid means, and following the above method, said company has successfully towed large numbers of saw logs to the aforesaid sawmill; that the same mode of supplying other sawmills in New Orleans has

been successfully carried on by other lines of towboats plying on Lake Pontchartrain, and entering into the New Canal, as aforesaid; that, Lake Pontchartrain being navigable water in the United States, the business of hauling and towing saw logs in the manner above indicated is a lawful trade or occupation, and the towing of logs in said manner is as safe as any other mode of navigation, no logs being ever separated from any tow, and carried beyond the control of the towboat or its crew in large quantities, except in cases of sudden and unforeseen gales of wind and tempests; that on or about the 10th of April, 1893, while the towboat of the respondent company (on board of which the president of the company was in person) was hauling a tow composed of some 207 logs, the towboat and cribs of logs were met by a sudden and severe storm, at a distance of about 1½ miles west of the entrance of the New Canal into Lake Pontchartrain; that, under directions of the president of the company, the boat was anchored at about 11 A. M. of that day, and, through the efforts of her crew, the logs were held together until 1 o'clock of the ensuing night, when, under the increased fury of the storm, the cribs were broken asunder, and the logs of the tow were scattered over the lake, beyond the reach and control of the boat and of her crew, only six logs remaining in the tow, the same being hauled in on the next day; that, on diligent search, respondents discovered that the scattered logs were driven in many different directions, some 95 of which were recovered through parties employed by the company; others being found on shore at Mandeville, in Louisiana; some at Pass Manchac; others at Little Woods, on Lake Pontchartrain; some at the bridge of the plaintiff company; others at the mouth of Bayou St. John; and some 22 were traced to the vicinity of plaintiffs' revetment or breakwater, on the lake shore, where many other logs of different brands were also found; that on three different occasions very serious efforts were made by the respondent company, through competent parties employed for that purpose, and by means of some of its own boats, with all necessary appliances, to pull off and recover the logs which had been driven near plaintiffs' breakwater by a disastrous and terrific storm which struck Lake Pontchartrain and surrounding country on the 1st of October, 1893, but without success, although several hundred dollars were expended by the company in their effort to remove said logs. Respondents denied that they were guilty of any negligence either in losing their aforesaid tow of saw logs, or in making necessary efforts to recover them, and that they were in any manner liable to plaintiffs for damages in the premises. They averred that, under the circumstances, the logs were lawfully lying on the lake shore, and that the breakwater of plaintiffs', having been built on navigable water of the United States, at a point where no harbor lines had been established, was then, and continued to be, an illegal impediment to navigation, and a public nuisance. The district court rendered judgment in favor of the defendants, and against the plaintiffs, rejecting their demand, and they appealed.

Mr. Harry H. Hall, for appellants:

One whose property is borne upon the lands of another by inevitable accident, without his fault or negligence, may elect to abandon the property, in which case he is not liable to the owner of the lands for any injury occasioned by it; or he may elect to receive it, in which latter case he must make good to such owner the damage thus occasioned.

And the same rule applies to vessels or rafts abandoned at sea.

Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569; *Spencer, Marine Collisions*, §§ 136, 137; *The W. J. Keyser*, 13 U. S. App. 489, 56 Fed. Rep. 781; *The Concho*, 58 Fed. Rep. 811; 2 *Shearm. & Redf. Neg.* ¶ 788; *Thomp. Neg.* p. 1068.

Injury resulting from an accident produced by a superior cause, unmixt with the negligence of defendant, imposes no liability.

Davis v. Saunders, 2 Chitty, 639; 1 English Ruling Cases, p. 208.

By "accident," is meant inevitable occurrence not to be foreseen or prevented by prudence, care, and attention, and not contributed to or occasioned in any manner by the act or omission of the defendant or his agents.

Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221; *Dyert v. Bradley*, 8 Wend. 478; *Wakeman v. Robinson*, 1 Bing. 213; *The Eliza S. Patter*, 31 Fed. Rep. 687; *The Uhla*, 19 L. T. N. S. 89.

Where negligence contributes to an accident, it is held to be the *casus*, and a supervening accident does not relieve.

The Romney Marsh v. Trinity House, L. R. 5 Exch. 208; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Thomp. Neg.* 1069.

To claim immunity from responsibility caused accidentally by one's property he must abandon it.

Ohio Civ. Code, 181, 2800; Civ. Code, 2321 (2801); 1 *Domat, Civil Law*, Cushing's ed. p. 629, § 1615; *White v. Crisp*, 10 Exch. 311, 23 L. J. Exch. N. S. 317; *Bartlett v. Baker*, 34 L. J. Exch. N. S. 8; *Hyams v. Webster*, L. R. 2 Q. B. 284; *Addison, Torts*, 209; *Sheldon v. Sherman*, 42 N. Y. 484, 71 Am. Rep. 569.

Messrs. Denegre, Blair, & Denegre, for appellees:

Plaintiff has no case either at law or in equity. The damage suffered is *damnum abaque injuria*, the proximate cause of the injury *viz major*, the now historical hurricane of October 1, 1893.

No ordinarily prudent man would have apprehended danger from such a cause; and even prudent men cannot be held as negligent for failing to make effective provisions against it.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the situation.

Baltimore & P. R. Co. v. Jones, 95 U. S. 441, 24 L. ed. 507; *Cooley, Torts*, p. 630; *Shearm. & Redf. Neg.* § 6; *Moak's Underhill, Torts*, p. 272; 16 Am. & Eng. Enc. Law, *verbo Negligence*, p. 898.

38 L. R. A.

Even if negligence could be attributed to the defendants, the record establishes that the damage inflicted was not the sequence or natural cause; but that the injury was done by an intervening, unexpected, and unnatural event, the cyclone of October, 1893; and that this cyclone was the immediate and proximate cause of the damage, and without which no harm would have been done.

Weeks, *Damnum Aboque Injuria*, § 115, p. 230.

Nicholls, Ch. J., delivered the opinion of the court:

In March, 1898, a contract was entered into between McEwen & Murray, Limited, a corporation owning and operating a sawmill on the New Canal, in the city of New Orleans, and the Gulf Lumber Company, by which the latter bound itself to haul and tow the former's saw logs from different points on streams emptying into Lake Maurepas, on said lake, through Pass Manchac, on Lake Pontchartrain, into the New Canal, to the sawmill of the owners. For the purpose of towing, the practice has been to bind 10 or 12 logs together by chains into what are known as "cribs," and to construct a raft with them, by chaining a number of these cribs together. The raft is then fastened securely to the steamboat by which they are to be conveyed. In April, 1893, when one of these rafts was being conveyed by a towboat of the Gulf Company to the city of New Orleans, the boat, when at a point on Lake Pontchartrain, about 1½ miles from the mouth of the New Canal, encountered, in the night-time, a violent storm. Its severity was such as to cause the raft to break loose from the boat, and get beyond the reach of her crew. Before morning it had disappeared from view. The raft finally broke to pieces, some of the cribs retaining their forms, but most of them separating, and the logs of which they were composed scattering in different directions along and across the lake. At what precise time and place the raft broke into pieces does not clearly appear. Many of these logs, and also a number of the cribs, were subsequently found in different localities, miles apart, either grounded upon the shore or upon the sand bars in the lake, which run parallel to the shore at some distance out from it, or lying on the shallow waters between those bars and the shore. The Gulf Lumber Company did not attempt until some time after the storm to ascertain what became of the raft and its different parts. They finally, however, at different dates, between April and the 1st of October, sent out steamboats, properly manned, and with proper appliances, to recover the logs and cribs, if possible. Outside services were also called into requisition. Although many of the logs were recovered by these operations, a portion of them remained still in the lake and upon its shores on the last-mentioned date. A part of these were, doubtless, in front of the revetment which the plaintiff company had built for the protection of their roadbed, and which was constructed at no great distance from the lake shore. On the 1st of October an exceptionally violent storm occurred, which caused the waters of the lake to rise, and to beat in an extraordinary manner upon the

shore in front of the plaintiffs' revetment. The direction of the wind and waves was such as to drive logs which were in the lake in the vicinity of the plaintiffs' revetment upon it, and to batter it down in a number of places, not only injuring the revetment, and necessitating its repair, but also injuring the road embankment by the washing of the waves upon it, through the open spaces of the broken revetment. After the damage had been done, a correspondence took place between the plaintiff company and the defendants in reference to a number of logs which the former asserted, "drifting in Lake Pontchartrain, had floated against their revetment work and their embankment, between Little Woods and the city, where they were a menace to the revetment in case of another storm." The plaintiffs wrote that they had been informed that the logs belonged to McEwen & Murray, Limited; that, if such was the fact, they asked McEwen & Murray to remove them at their earliest possible convenience. The plaintiff company also wrote to the defendants, claiming that the injury already done to the revetment and embankment had been caused through the negligence of McEwen & Murray, and that of the Gulf Lumber Company, by logs belonging to the former, notifying them that they proposed to repair the damage done, and to hold both defendants responsible for the cost of repair. The repairs were afterwards made, and it is admitted that the amount claimed is correct, if it be legally due. The Gulf Lumber Company, replying to the letters written by the plaintiffs in relation to the logs then on the lake shore, stated that all the logs branded "M" belonged to McEwen & Murray, but were in the writers' care until they got them at the mill; that the logs which were scattered from Milneburg to the railroad got away from them during a high sea, and that so far they had been unable to get them; that they were then getting a small boat in readiness with which to get them off; and that they expected to get them off in the next ten or fifteen days. They denied that the logs had gotten away from them by negligence, and asserted that their getting away had entailed loss on them. In February of 1894, McEwen & Murray wrote the plaintiffs, in reply to a letter written on the 30th of January, 1894, that the Gulf Lumber Company had been unable to get the logs on the North-eastern tracks, on account of boats being broken, and also low water; that they would go over there in a short time, and get them off; that the matter would receive their close attention. On the 1st of February, 1894, the Gulf Lumber Company wrote the plaintiffs that they had gone down, and made an effort to get the logs, but the water was so shallow they could not reach them, but that, as soon as they got high water, they would be after them, for they wanted them badly. On the 3d of February, the plaintiffs wrote the Gulf Company that, unless they indicated a reasonable time within which they would undertake to remove the logs which threatened the revetment, the railroad company would be forced to relieve their works of the threatened danger, at the expense of the Gulf Company; that, situated as the logs were, they would again very seriously damage the revetment in case of a

storm; that, while it was true it would be less expensive to remove the logs during high water than at the then stage of water, the risk of damage to the plaintiffs' works should be taken into consideration. They therefore called on the company to inform them positively whether they would remove the logs within a time which they would indicate and fix.

On the 9th the Gulf Company announced that it would be impossible for them to remove the logs at that time, or to name a date when they would do so; that all that they could say was that they were very anxious to have the logs, and that, as soon as the water would permit a boat not drawing over 4 feet of water to get within 800 feet of them, they would do so. On the 12th the plaintiffs notified the Gulf Lumber Company that, unless the logs lying in front of the revetment which protected their tracks were removed by the 1st of March, they would, in order to protect their works against the damage which would inevitably follow from the logs being thrown against the works by a storm or high water, cut up and remove them, at that company's risk and expense, and that they would hold them responsible for any damage that might occur in the meantime. On the 15th of the month, the attorney of the Gulf Company wrote plaintiffs that his clients had, since a portion of their logs had been blown by the terrific storm which swept over this portion of the state in September (October) in the proximity of the railroad company's revetment, made three serious efforts, with all the means at their command, to reach and remove the logs, but that, owing to the stage of the water at that point, their attempts had been unsuccessful. They suggested to the plaintiffs that, as they had better access to the logs than his clients had, they might be cut up into useful materials. They therefore proposed to the plaintiffs to sell them the logs at a price much below their real value as saw logs. Plaintiffs declined to make the purchase, but stated that, if the logs could be cut up into such lengths as would be useful and available to the Gulf Company, they would receive any suggestions which that company would make to that effect. On the 23d of February plaintiffs' attorney wrote to defendants' counsel a letter substantially to the same effect, stating additionally that, unless the logs were removed by the 1st of March, the railroad company would be compelled to have them cut up and removed. This letter was followed by a reply from defendants' counsel, in which, after referring to the declaration made that the plaintiffs would, after the 1st of March, cut up and remove the logs, he said, on behalf of his clients, that they earnestly protested against the cutting up of their logs by the railroad company, or any person acting under their orders or authority; that, before doing so, their attention was directed to the provisions of act No. 104 of 1892; and that their clients intended to prosecute all offenders under the terms of that statute.

We find nothing in the record which justifies a charge of negligence in the Gulf Lumber Company in losing their logs on the night of the 10th of April. We think "its loss was occasioned by accidental and uncontrollable

events," without their fault, and that, under the terms of article 2754, Rev. Civ. Code, they were absolved from liability at that time and for that fact. Plaintiffs contend that it was the duty of the defendants to have immediately followed up the raft, and secured it. Had any loss or damage resulted to third parties at that time by reason of the rafts being adrift, when, by proper and timely efforts, they could have been recovered, we would have been called on to say whether, under the circumstances shown to have then existed, the company were under legal obligation to take the course which plaintiffs maintain it was their imperative duty to have followed, or whether they were entitled to invoke the same rule which is laid down in reference to the owners of vessels sunk through unavoidable accident in navigable waters. We find it announced that, "where a vessel is sunk through an unavoidable accident in navigable water the owner is not obliged to remove the wreck, nor is he liable for injuries it may cause to others, nor indictable for maintaining a nuisance, although navigation is obstructed." 29 Am. & Eng. Enc. Law, *verbo Wreck*, p. 995; 2 Shearm. & Redf. Neg. § 738.

There is no one before us claiming to have received injury or to have been damaged at that time by a failure of the Gulf Company to take immediate steps to ascertain what had become of the detached raft, and there is nothing which would authorize us to say that, if such steps had been taken, the raft could have been then found, or found under such conditions as would have brought about a result different from that which actually occurred. Plaintiffs contend, however, that, even if defendants were not originally liable for the damages which would follow from the situation and condition of the different parts of the raft at a later date, they have made themselves so liable by reason of the fact that, instead of abandoning the cribs and logs, they have insisted upon their continued ownership of the same. They invoke on their behalf the principal doctrine announced in the concluding sentence of the extract from the American & English Encyclopedia of Law which we have quoted, and which is to the effect that "if, however [the owner], instead of abandoning the wreck, . . . retains possession, he is liable for any injuries arising from his failure to take proper precautions for the public safety." See 2 Shearm. & Redf. Neg. § 738.

Plaintiffs refer us to §§ 1614-1616, 1 Domat, Civil Law, Cushing's ed., where, under the chapter in which the author deals "of the consequences of the engagements which are formed by accidents," he says: "The proprietor of a ground on which is thrown the rubbish of a building that is fallen down, or that which a flood hath carried away from another's ground, is obliged to suffer him who has had the loss to take away what remains, and to allow him such free access to his ground as is necessary for that end. But upon the conditions that are explained in the following articles." § 1614. "In the cases of the foregoing article, he who desires to have back the materials of his building that is fallen down, or that which a flood hath carried away from his land and thrown upon another

man's ground, is obliged, on his part, not only to indemnify the proprietor of said ground as to what damage shall happen to be done by his taking away the things which have been thrown upon it, but he is, moreover, bound to repair all the damage which has been already done to the ground by the things since they were cast upon it. But if he choose rather not to take away anything, he will owe nothing; for if he abandons to the proprietor of that ground all that has been cast upon it, he is not bound to make good a damage that has happened by the bare effect of that accident; and it is enough that he loses what the accident has carried away from him." § 1615. "If he whose materials or other things have been thrown by these accidents on the estate of another person be desirous to take them away, he will be obliged, besides the making reparation for the damage sustained by the owner of the ground, to take away as well the unprofitable stuff that can be of no manner of use, as that which is useful and which he is desirous to take away, and to clear entirely the surface of the ground on which the things have been thrown." § 1616.

We will refer to this particular matter later. For the present, we go back to an examination of the conduct of these defendants in the interval between their first discovering traces of the missing raft, up to the date of the storm of October 1, 1893. It was unquestionably not the intention of the defendants to surrender their ownership of the logs which had scattered which they could locate and identify. They made very sincere and earnest efforts to recover and save them, not on account of any danger to be apprehended to special individuals or to the public generally by reason of their situation, but because of the value which they were deemed by the owner to have relatively to the expense necessary to redeem them. We take it for granted that, had they been of the opinion that this value would not have justified any attempt at all at their recovery, none would have been made, but they would have been abandoned; also, that they never intended that an attempt would be made to retake logs found which were on examination, ascertained to be in such a special condition as not to warrant the expenditure of money needed to accomplish it. We think it can be fairly assumed that, while not abandoning for the time being any of their property, the owners proposed to ultimately abandon such portions of it as could be secured only by an unreasonable outlay of money. While we think it might have been possible, at very great expense, and by taking advantage of special stages of water and wind, to have removed all the logs by boat, we do not think the situation was such that owners, simply as owners, could have been reasonably expected to take any more active steps than they did towards regaining the logs. They might, perhaps, have been brought in to the shore, and there cut into pieces, as was suggested at one time; but defendants were engaged in the business of operating a sawmill, and not of selling wood, and the logs would have had but little value to them when cut up. In dealing with the acts of the defendants in this matter, we have therefore to ascertain whether, independently

of any question of value and expenditure, they were under a legal obligation, for the safety of either special individuals or of the public generally, to do more than they did in the premises. Defendants were not at fault for the escape of the raft. They had no agency whatever in respect to the particular places where the cribs and logs were lodged by the winds and waves, nor in determining the particular conditions in which they were there lodged. If for the conditions existing at the time of the October storm they were liable at all, it was not for acts of commission, but of omission. The conditions *per se* were not such as to lead anyone to look forward to probable danger or damage in the near future. Even the possibility of danger was remote. The conduct of the plaintiffs prior to the storm indicates no apprehension by them of damage likely to arise from logs on their immediate front. Had they entertained such apprehension, they would have called upon the defendants earlier than they did, or themselves taken the initiative, and removed the logs, taking the risk of recovering the expense therefor from the defendants. They certainly would not have allowed the comparatively small expenditure which they would have had to make to stand in the way of a threatened serious danger. The correspondence which followed the storm might be pertinent on a claim for future damage, but it has little effect in disposing of matters in the past.

In considering the question of the liability of the defendants to the plaintiffs for not actually and actively removing the logs from the lake front prior to the storm, the plaintiffs must bear in mind that they took upon themselves certain risks in placing their roadbed and revetment where they did. Their position, where placed, was of course legal; but none the less they were exposed, from necessity, to the possibility of just such a condition of affairs as happened. The lake has constantly upon it driftwood and logs reaching it from streams which run into Lake Maurepas through Pass Manchac. The precise point at which these logs and this driftwood may be when a storm arises is a matter of pure accident, as is the precise point where they may be during the storm and at its close. The particular logs which may batter down plaintiffs' revetment during a storm need by no manner of means be those which are on its front at its commencement. Those may be carried out either to do a work of destruction elsewhere, or none at all. The result would be a matter of chance, dependent upon the violence of the wind and its particular direction. The presence of logs on the front may, under extraordinary combination of circumstances, add to the danger of the situation; but we think we can say from the evidence in the record that this danger would be only exceptional. Plaintiffs' revetment has been in front of their embankment since 1886, without serious, if any, injury to it. Nothing but a storm of the extraordinary character of that of the 1st of October, with its special accompanying conditions, would bring about such a result as the plaintiffs complain of. The district judge, in his judgment, referring to it, said: "The storm of October was not an ordinary storm,

such as an ordinarily prudent man would expect and be bound to provide against. Upon the contrary, it was a most extraordinary storm, the equal of which in fury and destructiveness has never but once been known or heard of in this country,—an event of such infrequent and remarkable character that even prudent men cannot be held as negligent for failing to make effective provision against it. If, instead of leaving logs grounded in front of the revetment, there had been heavy flat boats or other vessels moored there, and secured as ordinarily prudent men would secure such craft, the result, in all probability, would have been the same. Ordinary fastenings would have been of no avail as against the phenomenal gale of October 1, and the boats would have been converted into implements of destruction, just as the logs were." "Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made is insufficient as against an event such as may happen once in a lifetime, or perhaps twice in a century, does not, in my opinion, make out a case of negligence upon which an action in damages will lie."

We do not think that, as a matter of law, defendants were guilty of negligence *per se* in not removing the logs from the lake shore prior to the 1st of October. To hold them negligent, if at all, the attendant facts and circumstances of the case would have to be shown, so as, from all the facts, it could be seen that defendants were in fault. Plaintiffs do not claim that if defendants had absolutely abandoned the logs, not being in fault in losing them at the beginning, they could have any recourse against them for damages. They charge that the storm of October found a certain condition upon its immediate front, for which condition defendants were responsible, by reason of their claim of the ownership of the logs, and of their being held as such owners to a legal obligation to safeguard it and the public against all dangers to result from their situation. The raft did not remain in its entirety. The logs of which it was composed were scattered for miles along the shore. The defendants can scarcely be said to have retained possession of them, or to have held possession of any logs other than the particular ones which they might be attempting to remove, and then only so long as they were working to that end upon them. It was impossible that they should retain any greater possession or longer possession of the same than this. It was impossible for them to guard them in the lake. We do not think that by directing their attention to such logs as admitted of being removed, and removing them, defendants bound themselves for the removal of such as could be removed only by extraordinary methods and at unreasonable expense, either absolutely or within any special time. We think they were authorized to abandon, as we have no doubt they always intended to abandon, such as could be removed only under such circumstances. Defendants never claimed the logs which were thrown inside of plaintiffs' revetment upon their embankment, or upon any of their land. Those which were cast upon their land are there yet, unclaimed;

so that the passage from Domat finds no application in the facts of the case. We think that defendants' efforts in the direction of removing the logs (if it was their duty to do so) were as great as could be expected, and made as promptly as could be expected. 2 Shearm. & Redf. Neg. § 788. They are chargeable with no act of omission or of negligence for which they can be made legally answerable in damages to the plaintiffs. In *Hanson v. Mansfield R. & Transp. Co.* 38 La. Ann. 117, 58 Am. Rep. 162, this court declared that "negligence," in its common acceptation, was held to be "the doing of something that a reasonable and prudent person would ordinarily not have done under the circumstances of the situation, or the omission to do something which a person of like character would have done under the circumstances of the case." The Supreme Court of the United States, in *Baltimore & P. R. Co. v. Jones*, 95 U. S. 441, 24 L. ed. 507, gave to the term substantially the same definition, adding that "the duty is dictated and measured by the exigencies of the occasion." In order to render a person chargeable in damages for an act of omission or commission on his part, the act complained of

must have been the proximate cause of the damage. In *Huber v. La Crosse City R. Co.* 92 Wis. 686, 81 L. R. A. 583, the supreme court of Wisconsin, affirming what had been previously declared by it in *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365, said: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147. A mere failure to ward against a result which could not have been reasonably expected is not actionable negligence." A condition is ordinarily a remote cause, and it was so in this instance. See also *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654.

We are of the opinion that the judgment is correct, and it is hereby affirmed.

OHIO SUPREME COURT.

LAKE SHORE & MICHIGAN SOUTH-ERN RAILWAY COMPANY, *Pff. in Err.*,

v.

Sarah B. ORNDORFF.

(55 Ohio St. 589.)

*1. When a person having in charge a child of sufficient age to require payment of fare takes passage on a railroad, such person becomes liable for the payment of the child's fare, and, upon refusal to pay, both may be ejected from the train at the next station.

2. When such person has paid fare, or purchased a ticket which is taken up by the conductor, such conductor must, before ejecting such person and child, return or offer to return to such person the unused value of such ticket or

* Headnotes by the COURT.

NOTE.—Ejection of custodian for nonpayment of child's fare.

The cases upon this question have been very few. In several cases the railroad authorities have not attempted to expel the guardian of the child from the train, but have expelled the child himself, and the guardian has voluntarily left with the child. Such action of the railroad authorities has generally been upheld.

The child may be removed from the train in case the fare for him is not paid. *Beckwith v. Cheshire R. Co.* 143 Mass. 68. In that case the counsel argued that the contract was with the guardian, of the child and that she, and not the child, was the one who should be put off, or, at least, both of them should be put off; but this argument did not prevail with the court.

The conductor may expel from the train children

fare over and above the fares of both for the distance already traveled.

3. If the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and expel the parties from the train render the company liable in damages.

(January 26, 1897.)

ERROR to the Circuit Court for Fulton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for alleged illegal ejection from defendant's train. *Affirmed.*

Statement by Burket, J.:

In the month of September, 1891, Sarah B. Orndorff, defendant in error purchased a ticket for herself from Kendallville, in the

for whom fare is not paid if they are of such age that under the rules of the company they should pay fare. *Pittsburg, C. & St. L. R. Co. v. Dewin*, 83 Ill. 296.

In *Cox v. Los Angeles Terminal R. Co.* 109 Cal. 100, where a girl ten years old and her two younger sisters entered the train, and she offered two full fares for the three, which the conductor refused to take, but offered to take it for two, saying the other must leave the cars, whereupon the one who offered the fare elected to get off also, it was held she had no right of action for expulsion from the train, since her act was voluntary.

But in a case where the conductor ejected a boy who was traveling on a half fare ticket because he thought him over the age which was entitled to ride on such tickets, and the mother left the train with him, the court said the ejection of

state of Indiana, to Wauseon, in the state of Ohio, and got aboard one of the regular passenger trains of the plaintiff in error, and took with her into the car her little boy, aged nine years. The conductor came around, and took up her ticket, and punched it, and demanded half fare for the boy, which she refused to pay. He informed her that she must pay half fare for the boy, or both get off at the next station, Corunna, 8 miles east. Upon arriving at Corunna, she still refused to pay, and also refused to get off, and he thereupon removed her and the boy as gently as possible, using no unnecessary force; she at the same time demanding the return of her ticket, and he refusing to return the same, as it was already canceled. After she and the boy had been put out onto the platform of the station, she offered to pay the boy's fare, and they again got upon the train, and she paid his fare, and they rode in safety to Wauseon, where they left the train and went to their home. The ticket was what is known as a "stop-over ticket," entitling her to a stop-over check at any station. She afterwards commenced an action against the railroad company for damages for unlawfully ejecting her from the train; resulting in personal injury, and shocking and wounding her feelings. Upon trial in the common-pleas court she recovered a judgment for \$700, which was reduced to \$400 by the circuit court, and then affirmed.

Upon the trial the counsel for the railroad company requested the court to charge the jury as follows: "(1) The plaintiff, Sarah B. Orndorff, being a passenger upon defendant's train, was responsible for the fare of a child under her charge and control, and upon plaintiff's refusal to pay the railroad fare of such child, the defendant, by its officers and agents, had the right to remove both plaintiff and the child from the train, although plaintiff had paid her own fare, and the conductor had refused to return same to her. (2) In this case, the minor child was accompanying his mother from Kendallville to Wauseon, and boarded the train with his mother at Kendallville, was in plaintiff's charge and under her control, and she was, in law, responsible for his presence in the car, and it was plaintiff's duty, in law, to see that his fare was paid. The defendant was under no obligation to carry the boy without being paid therefor, and had a right to demand the fare of the plaintiff, and,

upon refusal so to do, the defendant had a right to remove both from the train. (3) If, in effecting such removal, the conductor used no more force than was necessary to overcome the resistance made by the plaintiff, and therein did no bodily injury, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. (4) It was the duty of the plaintiff, after refusing to pay the fare of her minor son, to leave the train at Corunna, after notice so to do by the conductor, and, upon refusing so to do, the conductor was justified in removing her therefrom, using no more force than was necessary to accomplish the same." The court refused to charge as requested, and proper exceptions were taken to such refusal.

The court charged the jury as to the right of the conductor to eject her and her boy from the train as follows: "When the conductor demanded of the plaintiff that she pay the fare of or furnish a ticket for the child in her charge, her own child, it was her duty so to do, and, upon her refusal, and persisting in such refusal, the conductor had a right at the first station to stop and remove both her and the child from the train, if she refused to get off without such removal, providing, however, that he first restored or offered to restore to her the unearned value of the ticket he had taken from her for the ride from Kendallville to Wauseon. Therefore, before exercising the right to eject her from the car, and before ejecting her from the train, it was his duty to either tender her the ticket he had taken, and demand the regular fare of herself and child for the distance they had already ridden, or, if he retained the ticket, to tender her the difference between the price paid for the ticket at Kendallville and the regular fare of herself and child from Kendallville to Corunna, or tender her a stop-over check for herself from Corunna to Wauseon and demand the fare of the child from Kendallville to Corunna. If he did none of these things, but retained her ticket, and, while so retaining her ticket, he ejected the plaintiff and her child from the cars at Corunna, and while in the line of his duty as defendant's employee, and as such agent or conductor, then she will be entitled to a verdict at your hands."

Proper exceptions were taken to this charge by counsel for the railroad company, and a motion filed for a new trial, which was overruled. The judgment having been affirmed by

the boy was the same thing as the ejection of the mother, as it was unreasonable to ask her to leave the child under the circumstances and proceed on her own ticket. *Gibson v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 904.

And in *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442, which was a case for injury to the child, the court says that the contract was with the mother, and that if there was any fraud in not paying for the child, it was that of the mother, and not that of the child.

In only one case prior to *LAKE SHORE & M. S. R. Co. v. ORNDORFF* does the question seem to have been squarely raised, and that was *Philadelphia, W. & B. R. Co. v. Hoeftich*, 62 Md. 300, 50 Am. Rep. 223, where the court holds that the person having charge of a child may be put off the train for refusing to pay fare for the child, although she had paid her own fare. The court says the law would imply an agreement on her part to pay the fare of the

child, and if she refused to pay it the carrier had a right to put off both the guardian and the child, the guardian because she had not complied with the contract on her part implied by law, and the child because the carrier was not required to carry it unless its fare was paid. But in that case it appeared that the one ejected from the train was not in fact the guardian of the child, and so was wrongfully put off the train.

In a subsequent case it was held that the fact that a person over twenty-one years of age had disposed of his ticket would not authorize the expulsion of his father from the train for nonpayment of his fare, although the father procured the ticket for him originally, the court holding that the authorities which justify the expulsion of a person in charge of a child from the train for nonpayment of the child's fare do not apply. *Louisville & N. R. Co. v. Mabin*, 66 Miss. 63.

H. P. F.

the circuit court, a petition in error was filed in this court, seeking to reverse the judgments below.

Messrs. E. D. Potter, Thomas Emery and George C. Green for plaintiff in error.

Mr. W. W. Touville for defendant in error.

Burket, J., delivered the opinion of the court:

If the charge of the court as given was right, there was no error to the prejudice of the railroad company in the refusal to charge as requested. In the charge as given the court fully conceded the right of the conductor to eject the defendant in error for nonpayment of fare for her boy, but held it to be his duty, before ejecting her, to restore or offer to restore to her the unused value of her ticket over and above the fare of both from Kendallville to Corunna. While the court held the conductor to this duty, it gave him the option to perform the duty either by returning the ticket and demanding the fare of both for the distance already traveled, or by tendering a stop-over check for herself from Corunna to Wauseon, and demanding fare for the child from Kendallville to Corunna, or by tendering her the difference in money between the price of the ticket and the fare of both from Kendallville to Corunna. This charge conceded to the company all its rights, if not more.

Upon her refusing to pay fare for the boy, the company had a right to put both off the train at the next station, and collect fare for the boy at that station, but it had no right to confiscate her ticket to Wauseon, and appropriate the same to its own use without compensation to her. Before putting her off the cars, the conductor should have returned to her the unused value of her ticket, either by paying such value to her in money, or by giving her a stop-over check and collecting fare for the boy for the distance already traveled. If the ticket was already canceled, so as not to avail her on another train, its return would have been of no value to her, and this the company knew, while she may not have known it. In such case it was the duty of the conductor to give her a stop-over check, or compensate her in money to the amount of the difference between the cost of the ticket and the fares of both to Corunna. As between her and the company, the conductor represented the company, and the rights and liabilities of the parties were the same as if the company had been present and transacted the business through its highest officers; and therefore neither the inconvenient
38 L. R. A.

ence of making change, nor the want of authority on the part of the conductor to pay the unused value of the canceled ticket, can shield the company from liability. As the ticket was such as to entitle the holder to a stop-over at any station, the contract of carriage was not an entire but a severable contract; and upon notice to the conductor that she desired to stop at an intermediate station, it was his duty to give her a stop-over check; and, when he was about to forcibly eject her from the train, it was still more his duty to give her such check. It was his duty before commencing to eject her from the train, to either pay her the unused value of her ticket over and above the fares of both for the distance already traveled, or give her a stop-over check and demand the fare of the boy, and, if this had been done, she would most likely have paid the boy's fare, and avoided the disagreeable scene which followed. At all events, it was her right to have the unused value of her ticket restored to her before being ejected from the train. True, she was in the wrong in refusing to pay fare for the boy, but the company was also in the wrong in retaining the unused value of her ticket, and in ejecting her before returning or offering to return to her such value, either in money or stop-over check. Her wrong did not warrant the company in expelling her from the train without returning to her the remaining value of her ticket. The expulsion was therefore unlawful, and the company became liable to respond in damages.

There is always liable to be more or less friction between the traveling public and transportation companies, and, while railroads should be fully protected in the enforcement of their reasonable rules, passengers must be protected in their rights of property, and against unreasonable annoyances. The case of *Philadelphia, W. & B. R. Co. v. Hoeflich*, 62 Md. 300, 50 Am. Rep. 223, and *Wood, Railway Law*, § 353, cited by plaintiff in error, only go to the extent that, upon refusal to pay fare for a child, both the child and the person having it in charge may be ejected from the train. Nothing is there said as to the right to have the unused fare returned. The charge of the court in the case at bar fully conceded all that is covered by these two authorities. The following cases are in point, and throw some light upon the question under consideration in this case: *Wardwell v. Chicago, M. & St. P. R. Co.* 46 Minn. 514, 13 L. R. A. 596; *Bland v. Southern P. R. Co.* 55 Cal. 570, 36 Am. Rep. 50; *Van Kirk v. Pennsylvania R. Co.* 76 Pa. 66, 18 Am. Rep. 404.

We find no error in the record.

Judgment affirmed.

MAINE SUPREME JUDICIAL COURT.

James P. RANDALL

v.

James E. TUELL.

(89 Me. 443.)

An innholder who has no license cannot recover for board and lodging furnished by him in such inn, under Rev. Stat. chap. 27, declaring that "no person shall be a common innholder or victualer without a license under a penalty of not more than \$50," and requiring a license fee of only \$1, since the purpose of the statute is to protect the public, and not merely to obtain revenue.

(January 5, 1897.)

EXCEPTIONS by defendant to rulings of the Superior Court for Kennebec County made during the trial of an action to recover for board furnished by plaintiff to defendant, holding that the action was maintainable. *Sustained.*

The facts are stated in the opinion.

Messrs. Heath & Andrews, for defendant:

In some cases it has been held that where a license is for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void. In other cases, however, this rule has not been applied, and the contracts of unlicensed persons have been held valid.

13 Am. & Eng. Enc. Law, p. 516.

It cannot be contended that the statute is in any sense for revenue. The fee required (Rev. Stat. chap. 27, § 4) is \$1, not enough to pay the expenses of the licensing board.

The plaintiff admitted that the acts and services performed constituting his cause of action were all acts and services sufficient to convict him of a violation of Rev. Stat. chap. 27, §§ 1-14.

He cannot recover for acts and services done and goods furnished in plain violation of a penal statute.

Harding v. Hager, 60 Me. 340; *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *Stanwood v. Woodward*, 88 Me. 192; *Brett v. Marston*, 45 Me. 401; *Norcross v. Norcross*, 58 Me. 163; *Atwater v. Sawyer*, 76 Me. 589, 49 Am. Rep. 634; *Durgin v. Dyer*, 68 Me. 143; *Mace v. Putnam*, 71 Me. 238; *Meador v. White*, 66 Me. 90, 22 Am. Rep. 551; *Plaisted v. Palmer*, 63 Me. 576; Benjamin, Sales, Corbin's ed. § 825; Benne's 1893 ed. § 538.

When the statute has in view the protection of the public health or morals, or the prevention of frauds by the person who is required to procure a license, then, though there be nothing but the penalty, a contract which infringes it cannot be enforced.

D'Allex v. Jones, 37 Eng. L. & Eq. 475; *Cope v. Rowlands*, 2 Mees. & W. 149; *Le-man v. Housely*, L. R. 10 Q. B. 66; *Gremare v.*

Le Clerc Bois Valon, 2 Campb. 144; *Johnson v. Hudson*, 11 East, 180; *Smith v. Marwood*, 14 Mees. & W. 452.

In *Cope v. Rowlands*, 2 Mees. & W. 157, the revenue distinction was overruled, the court saying that if the contract be rendered illegal it can make no difference in point of law whether the statute which has made it so has in view the protection of the revenue or any other object.

In *Holt v. Green*, 78 Pa. 196, 18 Am. Rep. 737, the court held the contract void.

In *Best v. Bauder*, 29 How. Pr. 439, the United States revenue laws requiring peddlers to be licensed were held to be prohibitory.

In *Corning v. Abbott*, 54 N. H. 469, and in *Ruckman v. Bergholz*, 87 N. J. L. 437, the same statutes were held to have been for revenue purposes only, and contracts by unlicensed persons sustained.

The revenue test was applied, and contracts of unlicensed persons held unenforceable in *Griffith v. Wells*, 3 Denio, 226, and *Ferdon v. Cunningham*, 20 How. Pr. 154.

Under a statute saying that it shall not be lawful for persons to exercise the business of brokers without a license, one who sold stocks without a license cannot maintain an action for his commissions.

Hustis v. Pickands, 27 Ill. App. 270.

Under a statute requiring attorneys at law to be licensed, an unlicensed attorney was not allowed to recover for his services.

Tedrick v. Hiner, 61 Ill. 189. See also *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 181; *McConnell v. Kitchens*, 20 S. C. 480, 47 Am. Rep. 845; *Ostello v. Goldbeck*, 9 Phila. 158; *Farrow v. Vedder*, 19 Ill. App. 805; *Dolson v. Hope*, 7 Kan. 164; *Gardner v. Tatam*, 81 Cal. 870; *Whitfield v. Huling*, 60 Ill. App. 179; *Richardson v. Briz*, 94 Iowa, 626; *Kenedy v. Schultz*, 6 Tex. Civ. App. 461.

A penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even where it is not expressly declared by the statute that the contract is void.

Shippey v. Eastwood, 9 Ala. 200; *Saltmarsh v. Tuthill*, 18 Ala. 406; *O'Donnell v. Sweeney*, 5 Ala. 468, 39 Am. Dec. 336; *Millon v. Haden*, 32 Ala. 86, 70 Am. Dec. 528; *Dodson v. Harris*, 10 Ala. 566; *Gunter v. Lecky*, 30 Ala. 591; *McGehee v. Lindsay*, 6 Ala. 16; *Walker v. Gregory*, 36 Ala. 180; *Foster v. Taylor*, 3 Nev. & M. 244; *Hallett v. Novion*, 14 Johns. 278; *Webb v. Pritchett*, 1 Bos. & P. 264; *Swords v. Owen*, 43 How. Pr. 176; *Pennington v. Townsend*, 7 Wend. 276; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 632; *Sharp v. Teese*, 9 N. J. L. 438, 17 Am. Dec. 479; *Mitchell v. Smith*, 1 Binn. 110, 2 Am. Dec. 417; *Little v. Poole*, 9 Barn. & C. 192; *Tyson v. Thomas*, M'Clel. & Y. 119; *Bensley v. Ignold*, 5 Barn. & Ald. 335; *Parkin v. Dick*, 11 East, 502; *Houston v. Mills*, 1 Moody & R. 825; *Wheeler v. Russell*, 17 Mass. 258; *Russell v. De Grand*, 15 Mass. 35; *Siter v. Sheets*, 7 Ind. 182; *Roby*

NOTE.—As to the effect on a contract of the failure of a party to procure a license for the business, see note to *Buckley v. Humason* (Minn.) 16 L. R. A. 38 L. R. A.

423; also *Fairly v. Wappoo Mills* (S. C.) 29 L. R. A. 215.

v. *West*, 4 N. H. 285, 17 Am. Dec. 423; *Brackett v. Hoyt*, 29 N. H. 264; *Elkins v. Parkhurst*, 17 Vt. 105.

The revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license.

Stevenson v. Ewing, 87 Tenn. 46.

A contract for shingles not surveyed as required by law was held void.

Richmond v. Foss, 77 Me. 590.

Any person is a common innholder who keeps a public house of entertainment for all who choose to visit it.

Wintermute v. Clark, 5 Sandf. 247; *Taylor v. Monnot*, 4 Duer, 116.

The rule of law, said Parker, Ch. J., in *Russell v. De Grand*, 15 Mass. 85, 89, is of universal operation that none shall by the aid of a court of justice obtain the fruits of an unlawful bargain.

Messrs. Whitehouse & Fisher, for plaintiff:

To decide that an unlicensed innkeeper cannot collect debts due to him for board and lodgings furnished would be inflicting an additional penalty not contemplated by the legislature, or authorized by the law.

The statute does not make contracts of unlicensed innkeepers void.

Forfeitures and confiscation of honest debts must be the result of express legislation; these are not to be implied.

Burbank v. McDuffee, 65 Me. 185. *Harris v. Runnells*, 58 U. S. 12 How. 79, 13 L. ed. 901.

In *Norcross v. Norcross*, 58 Me. 163, it was held that a suit could be maintained against an unlicensed innkeeper, and the court said: "A license does not change the character of the business of those who entertain travelers."

Atwater v. Sawyer, 76 Me. 541, 49 Am. Rep. 634.

If an unlicensed innkeeper is subject to all the liabilities of an innkeeper to his guests it would seem no more than right and just that his guests should be under obligation to pay him for his services rendered.

Foster, J., delivered the opinion of the court:

The only question presented in this case is whether an innholder, who has no license, under Rev. Stat. chap. 27, can recover for board and lodging furnished by him in such inn.

While the statute contains no express provision declaring contracts by an unlicensed innholder to be void, it does by § 13 expressly provide that "no person shall be a common innholder or victualer without a license, under a penalty of not more than \$50."

It is the general doctrine, now settled by the great weight of authority, that where a license is required for the protection of the public, and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.

Did the legislature, by the requirement of a license, intend to prohibit the exercise of the business without a license, or was the statute enacted for revenue purposes only?

88 J. R. A.

It can hardly be contended that the statute is in any sense for mere revenue. The fee required is only \$1. The licensee must show that he is a man of good moral character, must give bond not to violate the prohibitory law, and must allow no gambling on his premises. The legislative intent is best inferred from the language of the statute itself. The statute is explicitly prohibitory, and the license required is clearly for the protection of the public, and to prevent improper persons from engaging in a particular business.

This question has come before the courts, not only in this, but in other states, and the great trend of authority is in but one direction.

The same principle was established in *Harding v. Bagar*, 60 Me. 340. There the plaintiff was a commercial broker, within the meaning of a statute of the United States, which provided that no person should be engaged in prosecuting or carrying on any trade, business, or profession thereafter mentioned until he should obtain a license therefor, under a penalty. That statute contained no express provision declaring the contracts of unlicensed persons void. Like the statute under consideration, it prohibited unlicensed employments. Suit was brought to recover for services as broker, and in the course of the opinion Kent, J., says: "It is too well settled to require the citation of authorities, that no party can recover for acts or services done in direct contravention of an express statute, or for property sold and delivered. When the case develops such forbidden acts, unless protected by a license or authority, it is incumbent on the plaintiff to show such license."

The same question was determined, authorities reviewed, and the principle affirmed in *Harding v. Bagar*, 68 Me. 515. In *Stanwood v. Woodward*, 88 Me. 192, an innholder without license sought to establish a lien for board upon the property of a guest committed to his charge, and the want of a license was held to be fatal to his claim.

This case falls within the rule laid down by this court in *Durgin v. Dyer*, 69 Me. 143, where the court says: "The rule is well established that contracts for the sale of chattels entered into in contravention of the terms and policy of a statute cannot be enforced; and it is immaterial whether the sale is expressly prohibited, or a penalty imposed therefor, because the imposition of a penalty in such case implies prohibition."

So, under a statute which in terms provides that "whoever offers for sale or shipment any pressed hay not marked" as required by law "forfeits \$1 for each bale so offered, to be recovered by complaint," this court has held that contracts for the sale of such hay were void. *Buxton v. Hamblen*, 82 Me. 448. The court there says that "the statute though not in express terms, yet by unavoidable inference, prohibits every such sale." *Pickard v. Bayley*, 46 Me. 200.

A contract for shingles not surveyed as required by law was held void in *Richmond v. Foss*, 77 Me. 590, although the statute contained no express prohibition.

In *Cope v. Rowlands*, 2 Mees. & W. 149, it was held that a person acting as a broker without license could not recover his commissions,

where the statute required a license, and imposed a penalty for its violation. "It is perfectly settled," says Baron Parke, "that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."

In Massachusetts the decisions are numerous that where a statute imposes a penalty for a failure to comply with its provisions, it is to be construed as prohibitory, and that contracts made in direct contravention of its requirements are unlawful and void. *Miller v. Post*, 1 Allen, 484,—where milk was sold by the can, and the cans were not sealed; *Libby v. Downey*, 5 Allen, 299,—where coal was sold without being weighed by a sworn weigher; *Sawyer v. Smith*, 109 Mass. 220,—hay sold without being weighed as required by statute; *Prescott v. Butterby*, 119 Mass. 285,—lumber sold without being properly surveyed.

The same doctrine was affirmed in Illinois in *Hustis v. Pickands*, 27 Ill. App. 270, where, under a statute making it unlawful for persons to exercise the business of brokers without a license, it was held that one who sold stocks without a license could not maintain an action for his commissions. And also in *Tedrick v. Hiner*, 61 Ill. 189.

Also in Pennsylvania, in *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 181; *Holt v. Green*, 73 Pa. 198.

In California, where it is made a misdemeanor for a person to practise medicine without a license, an action will not lie to recover for services so rendered. *Gardner v. Tatum*, 81 Cal. 370.

In Tennessee the court say that the revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license, and that under a statute providing that the business of a real-estate broker shall not be pursued without a license it was held that an unlicensed broker could not recover his commission. *Steenerson v. Ewing*, 87 Tenn. 46.

If the statute in question was enacted for revenue purposes only, instead of being prohibitory, the plaintiff might properly recover. But we are satisfied that such was not the intention of the legislature. The statute being by implication prohibitory by reason of the penalty attached, the plaintiff is precluded from recovering. Basing his action upon a clear violation of the statute, he cannot successfully invoke the aid of the court. *Miller v. Post*, 1 Allen, 484.

Exceptions sustained.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Sophie C. ROGERS *et al.*

v.

Loring W. BARNES.

(.....Mass.....)

1. An action for the wrongful execution of the power of sale contained in a mortgage does not arise from any injury to real property, but is transitory.
2. A mortgagor can recover the damages sustained by him from the wrongful execution of a power of sale in the mortgage when there was no default, even if the sale was an absolute nullity, if a subsequent transfer has placed the property in the hands of a purchaser for value with a title which appears perfect on the records and constitutes a cloud on the mortgagor's title.
3. A parol ratification by a mortgagor of a void sale under a power in the mortgage is sufficient to confirm the title of a bona fide purchaser who has bought the land in reliance upon the records which showed an apparently good title.
4. A mortgagee cannot sell the land under a power of sale when there has been no default of breach of the conditions of the mort-

gage, so as to pass a good title, even to a bona fide purchaser for value or to any subsequent purchaser from him.

5. A mortgagor may elect to recover full damages on account of the unlawful sale of the land under a power of sale in the mortgage when there was no default, and thus ratify the title of a purchaser who had bought the land for value in good faith, although he might instead repudiate the sale and redeem the premises.

(Allen, Holmes, and Knowlton, JJ., dissent.)

(September 12, 1897.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for the alleged illegal foreclosure of a mortgage. *Overruled.*

The facts are stated in the opinion.

Mr. Moses S. Case, for defendant:

This action was local and could only have been tried in the county where the land lay. 1 Chitty, Pl. 16th Am. ed. 280; 1 Chitty, Pl. 17th ed. 458, 459; *Warren v. Webb*, 1 Taunt. 379.

As to the application of the law of conversion to a wrongful discharge of a judgment, see *Langford v. Rivinus* (C. C. App. 2d C.) 83 L. R. A. 250.

NOTE.—The application to real estate of the doctrine of conversion by which the owner of property elects to ratify an unlawful disposition of it, seems to be novel.

83 L. R. A.

The declaration must state all of the facts necessary to maintain the action.

1 Chitty, Pl. 16th Am. ed. 270; *Sisterman v. Field*, 9 Gray, 331; *Hollis v. Richardson*, 13 Gray, 392; *Read v. Smith*, 1 Allen, 520; *Wright v. Boston & M. R. Co.* 129 Mass. 440; *Dickie v. Boston & A. R. Co.* 131 Mass. 516.

It was necessary to have alleged that the purchaser to whom the estate was conveyed after the foreclosure was a purchaser for value without notice, or that he was a purchaser in good faith.

1 Chitty, Pl. 285.

The attempt to foreclose a mortgage of real estate when there is no breach in its terms is absolutely void.

Brown v. Smith, 116 Mass. 108; *Dearnaley v. Chase*, 136 Mass. 288; *Shippin v. Whittier*, 117 Ill. 282; *Perry, Tr.* § 6023.

The subsequent deed to Rice only operated to convey to Rice whatever interest the defendant had in the property.

Hunt v. Hunt, 14 Pick. 379, 25 Am. Dec. 400; *Ruggles v. Barton*, 13 Gray, 506; *Holmes v. Turner's Falls Co.* 143 Mass. 590; *Tyler v. Brigham*, 143 Mass. 411; *Dearnaley v. Chase*, 136 Mass. 288; *Chapin v. Billings*, 91 Ill. 539.

By the subsequent deed Rice became assignee of the mortgage held by the defendant.

Murdock v. Chapman, 9 Gray, 156; *Southwick v. Atlantic F. & M. Ins. Co.* 133 Mass. 457; *Perry, Tr.* 602, cc.

For the purpose of sale of the mortgaged property the mortgagee is a trustee empowered to sell upon certain conditions, and only upon those conditions.

Perry, Tr. § 785. See also *Williams v. Peyton*, 17 U. S. 4 Wheat, 79, 4 L. ed. 519; *Stead v. Course*, 8 U. S. 4 Cranch, 403, 2 L. ed. 660; *Pratt v. Tinkcom*, 21 Minn. 142.

A power of sale does not become effective until all conditions precedent to its exercise have been performed.

Foster v. Boston, 133 Mass. 143; *Roarty v. Mitchell*, 7 Gray, 243.

Mr. William H. Baker, for plaintiff:

The mortgagee in executing a power of sale contained in a mortgage acts as trustee and agent for the mortgagor, and it is his duty to conform strictly to the terms and conditions of the power.

Briggs v. Briggs, 135 Mass. 309; *Montague v. Daves*, 14 Allen, 373; *Clark v. Simmons*, 150 Mass. 359.

There seems to be, therefore, no good reason why such mortgagee should not be held chargeable in an action at law for any damage that may have resulted from his unlawful act in interfering with the rights of the mortgagor.

Sherwood v. Saxton, 63 Mo. 83; *Fenton v. Torrey*, 133 Mass. 138.

Where real estate is purchased by one in good faith and without any notice of any defect of title either at a foreclosure sale or subsequent to the foreclosure sale, the record title being apparently good, he will be protected in his purchase against all the world.

Jackson, Bartlett, v. Henry, 10 Johns. 185, 6 Am. Dec. 328; *Jackson, Sternberg, v. Dominick*, 14 Johns. 435; *Gibbons v. Hoag*, 95 Ill. 45; *Warner v. Blakeman*, 36 Barb. 501; *Merchant v. Woods*, 27 Minn. 396; *Gunnell v. Cockerill*, 79 Ill. 79; *Montague v. Daves*, 12 Allen, 38 L. R. A.

397; *Thompson v. Heywood*, 129 Mass. 403; *Mullanphy v. Simpson*, 4 Mo. 319.

Field, Ch. J., delivered the opinion of the court:

The plaintiff's declaration contained three counts. The substance of the first count, which is in tort, is that the plaintiff made a mortgage dated March 2, 1893, to the defendant of a parcel of land to secure the payment of \$1,200 in one year from said date, with interest thereon payable semiannually; that there was no default in the performance of the conditions of the mortgage, but that on October 16, 1893, the defendant sold the mortgaged premises at public auction for an alleged breach of condition, and conveyed them to some person to the plaintiff unknown, after occupying them a long time for his own use, whereby the plaintiff has been greatly damaged, and has lost his said premises. It is unnecessary to describe the second and third counts, because it is conceded that the second is out of the case in some manner not disclosed by the papers before us, and the demurrer was sustained as to the third count. The demurrer was overruled as to the first count, and the defendant appealed. The case was afterwards tried on the first count.

On the appeal from the order overruling the demurrer as to the first count, the defendant contends that the cause of action there stated is local, and that the count is defective in not alleging good faith on the part of the purchaser of the premises from the defendant. The land mortgaged was in the county of Middlesex, and the action was brought in the county of Suffolk. We think that the gist of the cause of action alleged in the first count is the wrongful execution of the power of sale contained in the mortgage; there having been at that time in fact no breach of the conditions of the mortgage. Under the power of sale contained in the mortgage, it was not necessary for the defendant to enter upon the premises before executing the power, although it is provided in the mortgage that the sale must be on or near the granted premises. The cause of action alleged does not arise from any injury to the real property, but from misconduct in executing a power of sale. We think that the action is transitory. The objection that it is not alleged in the count that the person to whom the defendant conveyed the premises was a purchaser in good faith was not specifically pointed out in the demurrer, and, if such an allegation is material, we think that it is material only on the question of damages. The exceptions recite as follows: "It appeared that on the 16th day of October, 1893, the defendant made an entry on the premises for purposes of foreclosure, and attempted on the same day to execute the power of sale. It was not disputed that at this time there was no breach of the conditions of the mortgage by the mortgagor. It also appeared that, so far as the records showed, the foreclosure was apparently proper in form. It also appeared that the property was purchased at the sale by Hammond Reed, and afterwards conveyed by said Reed to the defendant; that the purchase by said Reed was on behalf of the defendant. It also appeared that on September 3, 1894, the

defendant sold and conveyed the property to one Thomas Rice by warranty deed, which deed was recorded September 10, 1894. All of the above-mentioned conveyances were duly recorded, together with the power of sale, foreclosure deed, and affidavit, as required by law."

The defendant requested the following instructions to the jury: "First. This action cannot be maintained, for the reason that the attempt to foreclose a mortgage of real estate when there has been no breach of its terms, is absolutely void, and no damages can result therefrom. Second. No subsequent act of either party can make a foreclosure of a mortgage of real estate, which foreclosure is void at its inception, valid. Third. A recovery in an action on the case, founded upon the attempt to foreclose a real-estate mortgage, when there was no breach of its terms, will not have the effect to make the attempted foreclosure valid, or the title conveyed thereby good." These instructions the court declined to give, except so far as they were embodied in the charge to the jury. In the charge to the jury the court said: "This action is brought by two people who had title and interest in certain real estate owned by one of them, the title to which was in one of them, the other being the husband of that person. A mortgage had been given by the plaintiff to the defendant for \$1,200. By the terms of that mortgage, the interest upon the principal sum was to be paid semiannually. The mortgage was given March 2, 1893. It appears that the last payment or advance of the \$1,200 to the plaintiff was made by the defendant shortly after August 14, 1893, at which time the total amount advanced under the \$1,200 mortgage was \$1,128. It is admitted that \$36 of the difference between that and \$1,200 was detained and retained as interest for the first six months, and that the balance, \$36, was retained for the payment of a commission.

It being admitted now that there was no breach of any of the conditions of that mortgage at the time of the pretended sale, the sale operated to convey no title under it. It was an absolute nullity, as if nothing had taken place. If it remains there, and that is all there is to it, then the only damage which the plaintiff has suffered is a nominal damage. But if you are satisfied that, prior to the commencement of this action, the property had been conveyed by the defendant to one Rice, without any knowledge on the part of Rice or notice to Rice of this unlawful act of the defendant, and that Rice bought it for value, then that would operate as conveying a good title to Rice; so that the plaintiff would have no means of getting himself back into possession of that property, it having gone into the possession, by that conveyance, of someone who purchased it for value, in good faith, and without notice of the unlawful act by which the record title of that property came into the defendant. The obligation upon the mortgagee is to deal with the utmost good faith with the mortgagor. If you are satisfied that this defendant knew, or ought to have known, that there was no breach of the condition of that mortgage at the time specified when he foreclosed, or attempted to, [when he] took the

foreclosure proceedings, and that subsequently, before this action was brought, title had been conveyed to an innocent purchaser for value without notice, then this action can be maintained for more than nominal charges, if you find more to exist." The jury returned a verdict for \$1,108.87.

There seems to be no doubt that such an action can be maintained if, in consequence of the sale, the absolute title to the premises has passed to Rice. *Fenton v. Torrey*, 138 Mass. 188; *Bennett v. Bailey*, 150 Mass. 257; *Sherwood v. Saxton*, 63 Mo. 83. Even if Rice has not acquired an absolute title as against the plaintiff, but should be held, on the facts found in this case, to be only an assignee of the mortgage, still the sale and the subsequent deeds we think have done some injury to the plaintiff. They constitute a cloud upon the title of the plaintiff to an equity of redemption in the premises, which cannot be removed without some expense to the plaintiff, and the damages might be more than nominal. When the sale under the power was made, it was apparent that there might have been a breach of the conditions of the mortgage, because more than six months had expired from the date of the mortgage, and the first payment of interest had become payable. Whether it had been paid or not was a fact which the record in the registry of deeds would not disclose. The exceptions recite that it appeared that the records "showed that the foreclosure was apparently proper in form," which means, we suppose, than within thirty days of the sale a copy of the notice of the sale and the affidavit of the person selling were duly recorded in the registry of deeds, pursuant to Pub. Stat. chap. 181, § 18, and that by the affidavit it appeared that the power of sale had been duly executed. By this section of the statute a duly certified copy of the record thereof "shall be admitted as evidence that the power of sale was duly executed." By the record the title conveyed to Rice appears to be a good, absolute title. The defendant contends that as in fact there was no breach of the conditions of the mortgage when the foreclosure sale was made, it was void, and that the conveyances at most operated only as an assignment of the mortgage, and that the plaintiff has the same right to redeem the land from the mortgage as he ever had, because the copy of the record of the notice of sale and of the affidavit is only evidence that the power of sale was duly executed, but not conclusive evidence.

The difficult question in this case is one of damages. It was a condition precedent to the exercise of the power of sale that there should be "a default in the performance or observance" of the conditions of the mortgage, and, as there was in fact no default, the sale was unauthorized. As between the mortgagor and the mortgagee, the sale would be declared void. So long as the title to the land remained in the defendant, the plaintiff undoubtedly could have redeemed it from the mortgage. But Rice, in effect, has been found by the jury to have been a purchaser for value without notice of any unlawfulness in the sale, and the jury have assessed the damages on the theory that the plaintiff, by the acts of the defendant, has lost all title or interest in the premises.

The law goes a great way in protecting the title of a purchaser for value, without notice or knowledge of any defect in the power of the vendor to sell, and his title is not to be affected by mere irregularities in executing power of sale contained in a mortgage, of which he has no knowledge, actual or constructive. *Burns v. Thayer*, 115 Mass. 89; *Dezler v. Shepard*, 117 Mass. 480; *Thompson v. Heywood*, 129 Mass. 401; *Stevenson v. Hand*, 148 Mass. 616; *Silva v. Turner*, 166 Mass. 407, 418. In *Montague v. Dawes*, 12 Allen, 397, it was held that a tender duly made by the mortgagor, but not followed by a bill to redeem, did not affect the title to a bona fide purchaser claiming title by mesne conveyances from the purchaser at a sale under the power in the mortgage. Still the general rule is that conditions precedent to the execution of a power of sale must be strictly complied with. *Smith v. Protin*, 4 Allen, 516; *Roarty v. Mitchell*, 7 Gray, 248; *Foster v. Boston*, 133 Mass. 143; *Dearnaley v. Chass*, 136 Mass. 288. See, for cases cited by the plaintiff, *Jackson, Bartlett, v. Henry*, 10 Johns. 185, 6 Am. Dec. 328; *Gibbons v. Hoag*, 95 Ill. 45; *Warner v. Blakeman*, 36 Barb. 501; *Hoit v. Russell*, 56 N. H. 559; *Merchants v. Woods*, 27 Minn. 396; *Gunnell v. Cockerill*, 79 Ill. 79; and for cases cited by the defendant, *Shippen v. Whittier*, 117 Ill. 282; *Pratt v. Tinkcom*, 21 Minn. 142; *Williams v. Peyton*, 17 U. S. 4 Wheat. 77, 4 L. ed. 518.

On principle, we think it must be considered that in this commonwealth a mortgagee, when there has been no default or breach of the conditions of the mortgage, cannot sell the land mortgaged under the usual power of sale contained in a mortgage, so as to pass a good title even to a bona fide purchaser for value, or to any subsequent purchaser from him. The mortgagor, undoubtedly, by laches, or by acts amounting to an estoppel, may be prevented from contesting the validity of such a title. He may ratify the sale, and the deed given under the power of sale, by parol. *McIntyre v. Park*, 11 Gray, 102, 71 Am. Dec. 690. The argument certainly is strong that a bona fide purchaser for value ought to be protected in his title by what appears on the record in the registry of deeds, in the absence of knowledge to the contrary; but the argument is, we think, stronger that a mortgagor should not be deprived, without his knowledge, of his equity of redemption, by a sale under a power contained in a mortgage, which authorizes a sale only in case of a default, when there has been no default. A majority of the court, however, do not think that the decision of this case necessarily depends upon the question whether Rice took a good, absolute title or not. The case of the plaintiff, taken most favorably for the defendant, somewhat resembles that of a conversion of personal property, where the owner can sue the wrongdoer, and recover the full value of the property converted, even though the title to the property did not pass by the conversion, or can recover the property; or that of a misappropriation or unauthorized

investment or sale of trust property, where the *cestus que trust* can compel the trustee to account for the full value of the property, even although the property, or some of it, can be recovered. In neither of these cases can the plaintiff recover both the property and full damages for the conversion or misappropriation of it, but if he recover judgment for full damages, and they are paid, the title to the property passes to the wrongdoer and his grantees. A mortgagee, in executing the power of sale contained in a mortgage, is, in a sense, trustee for the mortgagor. So, in the present case, a majority of the court think that the plaintiff, if he so elect, can recover full damages of the defendant, whether he can or cannot redeem the premises from Rice. If the damages recovered are paid, the effect is to make Rice's title good as against the plaintiffs. The defendant, for the purpose of mitigating damages, cannot be heard to say that he has not done what he intended to do, and what, on the face of the transaction, he appears to have done, when what he has done will become valid and effectual if he pays the damages. In the view of a majority of the court, there is no error of law in the exceptions prejudicial to the defendant.

Exceptions overruled.

Justices Allen, Holmes, and Knowlton, are unable to agree with the decision of the court. They had not been aware that the form of recovery for the conversion of chattels had been applied to real estate, or that, if land was wrongfully withdrawn from its owner, there was any remedy at common law except to recover the land. They had supposed, furthermore, that when a deed purporting to execute such a power as this in fact was outside the terms of the power, and was wholly void, it could not be resuscitated at a later moment by a parol ratification on the part of the donor, and more specifically that the doctrine of *Miller v. Hyde*, 161 Mass. 472, 25 L. R. A. 42, never had been applied to real estate. Furthermore, they doubt whether, if the mortgage sale is ratified, the plaintiff can have any claim except that the price actually received shall be accounted for. But in their opinion these questions are not open. The first count of the declaration insists throughout that the attempted sale was unlawful. It does not in any way purport to accept and ratify it. It expresses an erroneous opinion, it is true, that a subsequent second sale to a third person conveys a good title, whether the plaintiff assents or not, which is not the law. But the gravamen of the count is falsely alleging the conditions to exist which warrant a sale of the plaintiff's property under the mortgage, and unlawfully purporting to sell it, and by these acts slandering the plaintiff's title. Substantial damages properly could be allowed for such slander, but the instruction that, if the property had been sold again to a bona fide purchaser, this would give a good title, inevitably led to a verdict for the value of the property, and this constituted a mistrial.

Josiah S. CUMMINGS *et al.*

v.

Alonzo W. PERRY.

(.....Mass.)

The right to use an elevator for hoisting goods from a basement room up to the sidewalk, or lowering them from the sidewalk to the basement, cannot be implied as incidental or appurtenant to the estate in the basement room, where the elevator was not originally intended for use by occupants of that room, and suitable means of ingress and egress were furnished by steps and doors from the basement to the street, while there was at no time any access to the elevator directly from the basement but only through another room by a way which was not a common passageway.

(September 10, 1897.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for alleged breach of a leasing contract by which the lessees were deprived of the use of an elevator which resulted in a judgment in plaintiff's favor. *Sustained.*

The facts sufficiently appear in the opinion. *Messrs. Alfred Hemenway and William A. Knowlton*, for defendant:

Deeds are to be construed as meaning what the language employed in them imports, and extrinsic evidence may not be adduced to contradict or effect them.

Buss v. Dyer, 125 Mass. 287.

Whether the right to such use as is claimed, *i. e.*, between the basement room and the street, was created by implication, must depend on whether such use was a necessity. Nothing short of necessity will create such a right or easement when not expressed.

Buss v. Dyer, 125 Mass. 287; *Pyer v. Carter*, 1 Hurlst. & N. 916; *Lampman v. Milks*, 21 N. Y. 505; *Suffield v. Brown*, 4 De G. J. & S. 185; *Randall v. McLaughlin*, 10 Allen, 886; *Carbrey v. Willis*, 7 Allen, 864, 88 Am. Dec. 688; *Thayer v. Payne*, 2 Cush. 327; *Johnson v. Jordan*, 2 Met. 284, 87 Am. Dec. 85; *Nichols v. Luce*, 24 Pick. 103, 85 Am. Dec. 802; *Grant v. Chase*, 17 Mass. 448, 9 Am. Dec. 161; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 182; *Harlow v. Whitcher*, 136 Mass. 553; *Johnson v. Knapp*, 150 Mass. 267; *Cass v. Minot*, 158 Mass. 577, 23 L. R. A. 536; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Stevens v. Orr*, 69 Me. 323; *Stillwell v. Foster*, 80 Me. 333; *Lawton v. Rivers*, 2 McCord, L. 264, 13 Am. Dec. 741; *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *Manning v. Smith*, 6 Conn. 239; *Pierce v. Selleck*, 18 Conn. 821; Taylor, Land. & T. 8th ed. 173; Washb. Easements & Servitudes, 4th ed. 259; Innes, Easem. 3d ed. 39, 40; McAdam, Land. & T. 2d ed. 568, 286; 8 Kerr, Real Prop. 2215, 2216.

The right to the use of the elevator was one of convenience, not of necessity.

NOTE.—An implied right to use an elevator in connection with leased portions of a building seems to have been brought in question here for the first time.

88 L. R. A.

The right to the use of an elevator may reasonably exist apart from any tenancy.

Where evidence of the right to the use had been introduced, such right has been based on express grant.

Handyside v. Powers, 145 Mass. 128; *Kent v. Todd*, 144 Mass. 478.

The right granted to the plaintiffs by the first lease was, in express terms, "for the purpose of bringing their finished goods from the two upper chambers of the adjoining estate to said basement." Any other use was thereby excluded.

2 Parsons, Contr. 8th ed. 631; *Hammerquist v. Svensson*, 44 Ill. App. 627.

But if any right to use the elevator for the purpose of bringing their finished goods to the basement had passed by implication from the prior to the subsequent lease, such right would have ceased when the tenancy of the upper rooms terminated, and the purpose for which it was created ceased.

Innes, Easem. 3d ed. 61; *National Guaranteed Marine Co. v. Donald*, 4 Hurlst. & N. 8.

If the right to the use of the elevator could have arisen by implication as an easement of necessity in the case of the upper rooms, such right would have ceased when the tenancy of the upper rooms terminated and the necessity from which it took its origin vanished.

Taylor, Land. & T. 8th ed. 174; 2 Washb. Real Prop. 5th ed. 820; Innes, Easem. 3d ed. 61; *Pierce v. Selleck*, 18 Conn. 821; *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *Blum v. Weston*, 103 Cal. 863; *Proctor v. Hodgson*, 10 Exch. 824.

The use of the elevator in connection with the premises, as set forth in said lease, was merely permissive, and not a right upon which the plaintiffs could insist.

M. Donald v. Lindall, 3 Rawle, 492; *McAdam*, Land. & T. 2d ed. p. 568, § 236.

If the plaintiffs be entitled to damages by reason of being prevented from using the elevator, by the defendant, then the measure of damages is simply the diminished value of the lease, not damages suffered in their business or loss of profit.

Townsend v. Nickerson Wharf Co. 117 Mass. 501; *Dexter v. Manley*, 4 Cush. 14; Sedgw. Damages, 27; 1 Sedgw. Damages, 8th ed. *176; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Eisenhart v. Ordean*, 3 Colo. App. 162; *Martin v. Deets*, 103 Cal. 55; *Koch v. Merk*, 48 Ill. App. 26.

Messrs. R. M. Morse, D. F. Kimball, and Lewis Bass, Jr., for plaintiffs.

Field, Ch. J., delivered the opinion of the court:

The exceptions do not describe the basement room and the means of access to it from the street with exactness, but from the explanations made at the argument, and the rough plan exhibited, we think we are able to understand the case. As the building was originally constructed, it was plainly not intended that

As to implied grants generally, see *O'Brien v. Baltimore Belt R. Co.* (Md.) 13 L. R. A. 126, and note; and *Hahn v. Baker Lodge*, No. 47, *A. F. & A. M.* (Or.) 13 L. R. A. 163, and note.

the elevator should be used for hoisting goods from the basement room to the sidewalk of the street, or for lowering goods from the sidewalk to the basement room. The basement room was entered from the street by doors and steps in front of the building, and was lighted by windows from the street, as the height of the basement room extended several feet above the level of the sidewalk. In one corner of the basement had been built a boiler and engine room, with an elevator well, and this room had been separated from the basement room by a solid brick partition. This engine and boiler room was entered from the sidewalk by a door and steps, and the elevator well was in the corner of this room next to the sidewalk. There was also a door opening from the sidewalk by which goods could be placed on the elevator. By neither of these doors was there originally any communication with the basement room. The original construction of the building indicated that all goods must be carried into the basement room from the street, and be carried from the basement room to the street by means of the flight of steps and the doors in the front of the building on the street, and that the elevator was to be used for the stores above the basement, in connection with the sidewalk, where a door to the elevator was placed. Cummings & Thrope first entered into occupation of the basement room on January 1, 1884, under a lease from J. Franklin Faxon, Elms, and others for four years from January 1, 1884. This lease was dated April 8, 1883, and by it the lessors "do hereby lease unto the said Cummings & Thrope the basement room of the building known as Church Green, situated on the corner of Summer and Bedford streets, in the city of Boston, now occupied by the Shoe & Leather Association, and [sic] to make the necessary connection in said room with the freight elevator now in said building, and to furnish, free of charge, the use of the same to the said lessees, for the purpose of bringing their finished goods from the two upper chambers of the adjoining estate, which they are expecting to occupy for manufacturing purposes, to said basement, through the connection which is already made between said elevator and said chambers, making no new openings or connections." There follows a provision that the lessees, before they take possession, shall deposit with the lessors bonds or other securities satisfactory to the lessors, to the amount of \$2,000, as security for the payment of the rent, etc., and then occurs the following clause: "The opening from said premises to the said elevator to be made as soon as said Cummings & Thrope shall comply with the above conditions, and occupy said premises." The exceptions recite that "a door was cut, at the time of commencement of this lease, through said brick partition, from said basement into the engine room, so that access might be had from said basement to said elevator by going through said door-way in said brick partition, then through and across the engine room to the further corner thereof, where the elevator was situated," etc. The exceptions continually refer to the lessees under this lease as the plaintiffs in the action, but the lessees under this lease are Josiah Cummings and 88 L. R. A.

Walter Thrope, who sign the lease individually and as Cummings & Thrope, while the plaintiffs are Josiah Cummings and E. J. Cummings, co-partners under the name of Josiah Cummings & Co., who are the lessees in the lease from the Boston Real Estate Trust, hereinafter mentioned. We infer that one firm was the successor to the other, and that the change in the firm was made some time during the continuance of the first lease. For convenience we shall follow the language of the exceptions, and shall consider the plaintiffs as occupying under both the first and second leases, which is perhaps as favorable a view to the plaintiffs as can be taken. On December 23, 1887, the plaintiffs, Josiah Cummings and Edward J. Cummings, copartners, as aforesaid, as lessees executed a lease with the trustees of the Boston Real Estate Trust, to whom Faxon and others had conveyed the whole estate in September or October, 1886. By this lease there was demised and let to said lessees "the basement room of the building known as 'Church Green,' at the corner of Summer and Bedford streets in said Boston; also, with one-horse power only, rooms No. 29 and 30 in said building. The lessors reserve the right to terminate this lease as to said rooms 29 and 30 on the 1st day of January, A. D. 1890, by giving the lessees sixty days' notice in writing. In case of such termination, the rent from and after January 1, 1890, shall be for the remainder of the premises \$4,250 yearly. The lessors also reserve the right to enlarge the boiler room in the rear, in which case they shall first give the lessees sixty days' notice in writing." The Boston Real Estate Trust assigned this lease to the defendant on March 1, 1888, and thereafter, the defendant collected the rents, and stood in the place of the lessors.

The exceptions recite as follows: "From January 1, 1884, to December 31, 1887, these plaintiffs occupied upper chambers of an adjoining estate, called the 'Sprague Estate,' for the purpose of manufacturing their goods. A passageway was cut through the partition wall into the Church Green building, to enable the plaintiffs to load their merchandise from these upper rooms on to the elevator, so they might have it lowered to the engine room, thence across the engine room to the basement named in the lease. From January 1, 1888, to January 1, 1890, in addition to a portion of the said upper chambers the plaintiffs occupied rooms 29 and 30, which were in upper part of Church Green building, on a floor adjoining said upper chambers, in said adjoining estate. These were also used for manufacturing goods, which were transferred to the basement, by means of said elevator, for sale. The plaintiffs testified that during the continuance of the lease expiring December 31, 1887 (Exhibit B), and also during the continuance of the lease commencing January 1, 1888 (Exhibit A), up to January 1, 1890, the plaintiff used said elevator for the purpose of shipping from the basement all goods they handled. There was no evidence that this defendant or any prior lessors knew of, or assented to, this latter use of the elevator, unless it be contained in the following testimony,—that of E. J. Cummings, plaintiff, who testified that under the old lease the use of the elevator in connection with the

basement was continuous, and that it was used by the tenants throughout the building generally, and that the owners, the trust company, told the plaintiffs that the elevator was for the use of the tenant. J. Cummings testified that the elevator was used with the basement, and the arch cut out for such use by the lessor Elms, and so continued to be used until December 24, 1889."

It is conceded on both sides that the words "with one-horse power only," found in the last lease, relate to the elevator, and were intended to define the amount of power which the lessors agreed with the lessees to furnish in running the elevator. It is manifest that this agreement is connected with the letting of rooms numbered 29 and 30 in the building. In neither of the leases is there any express agreement for the use of the elevator in lowering goods from the sidewalk to the basement room, or in hoisting them from the basement room to the sidewalk. We infer that at some time, probably after the termination of the tenancy of the rooms 29 and 30 on January 1, 1890, the defendant prevented the plaintiffs from using the elevator to lower goods from, or to hoist them to, the sidewalk, or from using the elevator in any manner. This is the principal cause of action declared on, and the exceptions imply that there was some evidence of it; and, although this is not so distinctly stated as it should have been, we understand that it is conceded.

The principal question in the case is whether the plaintiffs had any right to use the elevator for hoisting goods from the basement room up to the sidewalk, or for lowering them from the sidewalk to the basement room, as incidental or appurtenant to their estate in the basement room under the last lease. The claim of the plaintiffs is stated in the charge of the presiding justice as follows: "In the first place, with reference to the right of the plaintiffs to make this use of the elevator and the approach to it from the basement, in connection with the business of the basement,—that is to take goods from the sidewalk into the basement, and from the basement out onto the sidewalk,—this right is not given by any express words in the lease. The lease is silent with reference to that. It merely leases the rooms,—the basement and the two rooms above,—so that the plaintiffs do not claim to have acquired this right to this approach and to the elevator by any express words in the lease; but they claim that it is given in the lease by virtue of the situation of the premises, and the use that had been and was made of them. The construction of the premises, and the design as to the use of the elevator in connection with the basement by the owner of the building. That, by reason of the circumstances, the situation and adaptation of the building, and the use that is made of it, this right to use the elevator passed to them as an incident to the use of the basement for their purposes, or, to use a technical word, as an appurtenance,—that is, something incidental to, and connected with, the principal thing, which was the use of the basement,—one of the conveniences for enjoyment of the basement which he had hired." The presiding justice instructed the jury, among other things, as follows: "Now, having considered the facts with refer-

ence to these different matters that I have called your attention to, I will instruct you that if the elevator and approach thereto were constructed and designed by the owner of said building to be used in connection with said basement and the other parts of said building for the purposes claimed by the plaintiffs, and the elevator and approach were used by the plaintiffs for the purposes claimed by them, in connection with the basement, in carrying on business therein, with the knowledge of the lessors, at the time of their lease to the plaintiffs, commencing January 1, 1888, and if from the date of said lease to the time of its assignment to the defendant the elevator and approach were used by the plaintiffs for the purposes now claimed by the plaintiffs in carrying on their business in said basement, with the knowledge and consent of said lessors, as a privilege belonging to the plaintiffs as the lessees of the basement, then the defendant would not have the right, upon becoming the assignee of the lease, to prevent the use and enjoyment of that privilege, the use of the approach, and the use of the elevator; and, if he did prevent the use of it by the plaintiffs, he would be liable to pay any damage which they sustained by reason of that prevention."

This court has held the doctrine of implied grants with a good deal of strictness. *Buss v. Dyer*, 125 Mass. 287; *Randall v. McLaughlin*, 10 Allen, 388; *Lowell v. Strahan*, 145 Mass. 1; *Johnson v. Knapp*, 150 Mass. 267; *Case v. Minot*, 158 Mass. 577, 23 L. R. A. 536. It is true that when a person hires a room in a building, a right to use the apparent means of access and exit often passes as appurtenant to the premises hired. In modern buildings of great height this doctrine we assume may be applied to elevators. Whether an active duty to maintain an elevator for the use of tenants can be implied may be open to question, but, if an elevator is in fact maintained by the landlord, the duty to permit tenants to use it, we assume, may be implied, if this is reasonably necessary for the beneficial occupation of the rooms let, and if, from the construction of the elevator and of the passageways, it is apparent that the elevator was intended for the use of the tenants. But in the present case it is apparent that the elevator was not intended originally to be used by the occupants of the basement room; that, although it might have been convenient for them to use it in connection with the sidewalk, yet suitable means of ingress and egress were furnished by means of the steps and doors from the basement room into the street; that at no time was there any access to the elevator directly from the basement room; that the elevator did not adjoin the basement room, and the way through the engine and boiler room to the elevator from the basement room was not a common passageway; but that, for the purpose of connecting the basement room with certain rooms in the upper part of the building, or of the adjoining building, access to the elevator from the basement room by a way through the engine and boiler room had been provided; that this was originally done "for the purpose of bringing their finished goods from the two upper chambers of the adjoining estate, which they are expecting to occupy for manufacturing purposes, to said

basement;" and that the only reference to the elevator contained in the last lease is in connection with the tenancy of the rooms 29 and 30 in the building. Under these circumstances, a majority of the court think that an implied grant of a right to use the elevator for the purpose of hoisting goods from the basement room to the sidewalk, and of lowering them from the sidewalk to the basement room cannot be implied. The fact, if it be one, that the defendant or his predecessors in title permitted the plaintiffs to make such a use of the elevator, under the circumstances stated, cannot establish the right. The express agreements concerning the elevator contained in the leases tend to negative the right to such a use of it, and the history of the opening into the engine

room and the use of a way across it to the elevator repel any implication of the right to use the elevator for all purposes for which it might be convenient to use it in connection with the basement room. In the opinion of a majority of the court, upon all the evidence recited in the exceptions, which purports to be all the evidence material to this issue, the presiding justice should have ruled, as requested by the defendant, that the plaintiffs showed no right to use the elevator after its tenancy of rooms 29 and 30 had been terminated, and no right to use it at any time for the purpose of hoisting goods to the sidewalk from the basement room, or of lowering them from the sidewalk to the basement room.

Exceptions sustained.

MAINE SUPREME JUDICIAL COURT.

Elsie G. LEAVITT

v.

CANADIAN PACIFIC RAILWAY COMPANY.

(90 Me. 153.)

1. **An insurance company is not denied the equal protection of the laws by a statute which in effect limits the liability of a railroad company for fires to the difference between the amount of loss and the amount of insurance on the property destroyed, thus depriving the insurer of the benefit of subrogation.**
2. **A statute limiting the liability of a railroad company for fires to the difference between the amount of the loss and the amount of insurance upon the property applies to a pre-existing policy of insurance on which a loss occurs after the passage of the statute.**
3. **The obligation of a contract of fire insurance made at a time when a railroad company was by statute liable for fires communicated by its engines is not impaired by a subsequent amendment of the statute restricting the liability of the railroad company in effect to the difference between the loss and the amount of insurance on the property, as the parties to that contract cannot limit the right of the legislature to change the statutory liability.**
4. **The right of recovery against the person causing the loss which is reserved to the insurer by a clause in the policy depends upon the law existing at the time of the fire.**

(April 9, 1897.)

SUBMISSION on agreed statement of an action brought to recover damages for injuries caused by fire alleged to have been negligently set out by defendant in which defendant claimed the benefit of insurance

which had been taken out by plaintiff upon her property. *Judgment giving defendant the benefit of the insurance.*

The facts are stated in the opinion.

Mr. Charles F. Stetson for plaintiff.

Mr. Charles F. Woodard for defendant.

Wiswell, J., delivered the opinion of the court:

On July 26, 1895, the plaintiff's property, both real and personal, was injured by fire communicated by a locomotive engine in use by the defendant corporation, but, as is admitted, without fault or negligence on the part of the defendant. The plaintiff had insurance upon her property against fire under policies dated in March, 1895.

Rev. Stat. chap. 51, § 64, prior to the amendment of 1895, was as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon." Under this statute it was well settled that, in accordance with the doctrine of subrogation, an insurance company which had paid a loss upon property injured by fire communicated by a locomotive engine could maintain an action in the name of the assured against the railroad corporation using the locomotive, and recover the amount which it had been obliged to pay by reason of the contract of insurance.

But the legislature of 1895 amended this statute by adding thereto the following provision: "But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages,

NOTE.—The statute construed in the above case is unusual. The effect, it will be seen, is quite different from the statute involved in *Matthews v. St. Louis & S. F. R. Co. (Mo.)* 25 L. R. A. 161. In the 38 L. R. A.

note to the latter case are reviewed the authorities on the constitutionality of statutes making railroads absolutely liable for damages.

if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had." Laws 1895, chap. 79.

In this case the insurance had been recovered prior to the assessment of damages by a referee; the question as to whether the amount of insurance received by the plaintiff should be deducted from the damages being expressly reserved in the reference, and presented to this court upon an agreed statement of facts. The action is prosecuted for the benefit of the insurance companies, who had paid a portion of the loss, as well as for the plaintiff.

There can be no question as to the meaning of the amendment. It is expressly provided that the corporation liable for the injury by reason of fire communicated from its locomotive engine "shall be entitled to the benefit of any insurance upon such property effected by the owner thereof," and that the insurance "shall be deducted from the damages, if recovered before the damages are assessed." The effect of the statute as it now stands is to make railroad companies liable in such cases for the difference only between the net amount of insurance recovered and the amount of the injury suffered by the property owner. Before the amendment, by reason of the statute. Liability, the railroad company was responsible to the owner of the property thus injured, notwithstanding that the property was fully insured, and notwithstanding that the owner had received full indemnity from the insurance company. But in the latter case, upon the equitable principles of the doctrine of subrogation, this responsibility of the railroad company to the owner insured to the benefit of the insurer. Since the amendment, the liability is limited to the difference, as we have already seen.

But it is contended upon the part of the counsel for the plaintiff, representing the interests of the insurers, that this amendment of 1895 is invalid, because in violation of the last clause of the Fourteenth Amendment to the Federal Constitution: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

This clause has very frequently been before the Federal Supreme Court in attempts by unsuccessful litigants in the state courts to have legislative acts of almost every kind and unfavorable decisions of the state courts held to be within the inhibition of this clause, and it has received so frequent judicial construction by that court that its meaning has become pretty well settled.

In *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923, Mr. Justice Field, in delivering the judgment of the court, said: "The 14th Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circum-

stances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.

. . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Legislation which is special in its character is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed. *Missouri P. R. Co. v. Mackey*, 127 U. S. 305, 32 L. ed. 107.

Whenever the law operates alike upon all persons and property similarly situated, equal protection cannot be said to be denied. *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544.

"It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marohant v. Pennsylvania R. Co.* 158 U. S. 380, 38 L. ed. 751.

"There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463.

In view of the construction which has so frequently been placed upon this clause by the United States Supreme Court, is the act of 1895 within the inhibition of the clause? We think not. The law operates alike upon all persons and property similarly situated. The act is general in its terms, and applies to all cases falling within its provisions. All persons and property subject to it are treated alike. The liability of the railroad corporation is the same, whatever the property injured, or by whomsoever it may be owned. There is no unjust discrimination in the protection given by the statute between different persons or classes of persons.

It is argued, however, by the counsel for the plaintiff, that an insurer has a vested interest in the property insured; "to a certain extent an ownership;" and that, while the statute as amended furnishes full and absolute protection to the actual owner, it affords none whatever to the insurer; that, therefore, there is an unjust discrimination against a class of persons, viz., insurance companies,—corporations being undoubtedly persons, within the meaning of the constitutional amendment.

But we think that the right which an insurer who has paid the loss has to prosecute for his own benefit any person primarily liable to the assured for the injury is not based at all upon the idea that he has a vested interest,

or any ownership whatever, in the property insured, but rather upon the doctrine of subrogation, which is founded, not upon contract, but upon the relationship of the parties, and upon equitable principles for the purpose of accomplishing the substantial ends of justice.

In accordance with these equitable principles, a surety who has been compelled to pay a debt for which another is primarily liable, succeeds to all the rights which the creditor had of enforcing the liability of the original debtor; or an insurer who has paid a loss for which another is responsible, either by statute or at common law, is subrogated to any claim that the insured had against the person whose tortious act caused the injury, or who, for any other reason, is liable to the owner thereof. If this were not so, the very inequitable result would follow that an insured owner of property, for an injury for which another is liable, would recover for one and the same loss full indemnity from the insurer, and compensation from the person liable therefor.

"Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728.

It necessarily follows from the very principles of this doctrine of subrogation that one cannot thereby succeed to or acquire any claim or right which the party for whom he is substituted did not have. A mere statement of this proposition is such that the citation of authority in support of it is not necessary, but ample authority is not wanting.

"The party subrogated acquires no greater rights than those of the party for whom he is substituted." *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728.

"In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured." *Phenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873.

The right of the insurance company "is a mere equity to be put in the place of the insurer, . . . whatever his rights may be." *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428.

The following cases are excellent illustrations of the doctrine of subrogation and of the proposition that the insurer by subrogation succeeds to such claims and rights as the person indemnified had, and to none other.

In the case of *Simpson v. Thomson*, L. R. 8 App. Cas. 279, decided by the House of Lords in 1877, an insured steamship was run down and destroyed by another steamship. Both vessels belonged to the same owner. The underwriters paid as for a total loss upon the steamship destroyed, and sought to share with the owners of the cargo in a fund which the vessel owner had paid into court under an act limiting the liability of the shipowners. The law peers who delivered opinions all agreed that the question must be considered just as if the underwriters had brought an action against the owner of both vessels; and the House of Lords decided that, although the underwriters

had paid for a total loss, and were entitled to all the rights in the injured ship which belonged to its owner, yet, if that owner could not assert a claim for damages against the wrongdoers, neither could the underwriters; that the underwriters' claim must be asserted in the name of the insured; and that any right of action that he had must be a right of action against himself, which is an absurdity, and thing unknown to law. The lord chancellor in delivering his opinion said: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured; and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all."

In *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728, the defendant insured the plaintiff on cotton in transit between different places in the United States and the plaintiff's mills in New Hampshire. The contract for transportation with a carrier contained a stipulation that "the company [carrier] incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton." It was held that it was no defense to an action on the policy for a loss insured against that the insured had, by contract with the carrier, given him the benefit of any insurance effected, if there was no fraud or concealment on the part of the insured in effecting the insurance, and if the policy of insurance contained no clause specifically subrogating the insurer to the rights of the insured in case of a loss through the fault of a carrier.

In *Phenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, goods in transit were insured by the plaintiff. A stipulation in the bill of lading allowed the carrier the benefit of any insurance procured by the owner. It was held that this stipulation was valid, although the loss was occasioned by the negligence of the carrier or his agents; and that, in the absence of fraudulent concealment or misrepresentation, the insurer could maintain no action against the carrier upon any terms inconsistent with the stipulation. Mr. Justice Gray, in delivering the judgment of the court, used language that has a special significance with reference to the plaintiff's contention in this case. "That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by

him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him."

These cases and many others which might be cited, many of which are collected in the last two cases referred to, clearly illustrate the principles of the doctrine of subrogation, and show that the rights of an insurer in no sense depend upon any vested interest or ownership in the property insured, but entirely upon the equitable rule that one who has indemnified a property owner against loss should, in case of loss and payment, either in full or in part, be allowed to succeed to whatever rights the owner had to the extent of such payment against the person primarily liable therefor.

This clause in the insurance policies: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom,"—gives the insurers no greater right, in a case of this kind, than they would have had without it. Its only effect was to prevent the assured from releasing any claim that she had against anyone responsible for the injury.

It is further urged that the act of 1895 cannot affect the plaintiff's right of recovery in this case, because otherwise it would impair the obligation of a contract; that it is not, and was not intended to be, retrospective. The plaintiff's property was injured by fire on July 26, 1895, some months after the act of 1895 became effective by the expiration of thirty days after the recess of the legislature passing it. The insurance policies were dated in March, some time before the act went into effect.

It is certainly true that the act was not intended to be and is not retrospective. The limitation of liability does not apply to any case where fire was communicated by a locomotive prior to the time that the law went into effect. But was it not intended, and does it not apply, to any injury thus caused afterwards? We think that such was the intention, and that the act does apply to this case. Nor can we see how it in any way affects or impairs the obligation of a contract. It undoubtedly very materially affects the rights of the insurer, but not his contractual rights. This was entirely within the province and power of the legislature. The liability of the railroad corporation was created by the legislature. It was not based upon negligence, but was placed rather as a condition upon its franchise. We have no doubt that the same power which created this unconditional liability could either limit or entirely take it away.

In *Buell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, in which it was decided that a statute which repealed usury laws and destroyed defenses to existing contracts on the ground of usury did not deprive parties of vested rights, nor impair the obligation of contracts, Mr. Justice Matthews, in the opinion, says "that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute

gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away."

It would hardly be claimed for a moment that a property owner along the route of a railroad has a vested right in this statutory liability, however much he might be injured by its repeal; nor do we think that an insurer has any more reason to complain of the unconstitutionality of the law. Certainly, the state cannot be said to have assumed any obligation, by the enactment of the original statute, to continue this liability of a railroad corporation without change beyond its pleasure.

It is said, however, that the clause in the policies already quoted gives to the insurer the right to be subrogated to this claim against a railroad corporation as it existed at the time that the contract of insurance was made. If this were the object of the clause, we are unable to see how two persons can, by contract, continue the statutory liability of a third person, not a party to the contract, beyond such a time as the legislature may see fit, by enactment subsequent to the contract, to limit or repeal the liability. While the legislature cannot impair the obligation of the contract between the insurer and the insured, the parties to the contract cannot prolong the statutory liability of a third and independent person, when the legislature has seen fit to limit or repeal it.

But the clause relied upon does not go to the extent claimed by the counsel. It simply provides that if the insurance company shall claim that the fire was caused by the act or neglect of any other person the company "shall on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom." This cannot refer to any right of recovery by the insured before the loss. It is a right of recovery "by the insured for the loss,"—necessarily such right as the insured had at the time of the loss and afterwards. This amendment in no way affected that provision in the policy. The insurance company after as well as before the time when this law went into effect had the right to be subrogated to all the right of recovery that the insured had, and this independently of the contract, as we have already seen.

What this right of recovery was that the insured had for a fire communicated from one of the defendant's locomotives, but without fault or negligence upon the part of the defendant, depended upon the law as it was at the time of the fire. We have already seen that this right did not depend upon any interest or ownership of the insurer in the property insured, but rested entirely upon the equitable rule that one who, by reason of a contract, has been obliged to indemnify another against loss, should succeed to all the rights that other had, to the extent of the amount paid, to recover of the person who, for any reason, was primarily liable therefor, but to no other nor greater rights than he had.

In this connection we again quote from the opinion of Mr. Justice Gray in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 812, 29 L. ed. 873: "But the insurer stands in no

relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter." This right of subrogation remained in the insurer precisely the same after the act of 1895 went into effect as before. But in the meantime between the making of the contract of insurance and the time of the fire the plaintiff's right had been limited to a recovery of the difference between the amount of the injury and the amount of the insurance received, thus indirectly affecting the insurer's rights, but not its contractual rights.

Our conclusion is that the act of 1895 is not in violation of any provision of the Federal Constitution, and that it does apply to this case. From the amount of damages assessed by the referee there will, therefore, be deducted the insurance received by the plaintiff, less the premium paid, and the expense, if any, of the recovery of insurance. The plaintiff will be entitled to judgment for this difference, together with interest thereon as provided by law.

Judgment accordingly.

NORTH CAROLINA SUPREME COURT.

B. M. HALLYBURTON, *Appl.*,

v.

BURKE COUNTY FAIR ASSOCIATION
et al.

(119 N. C. 525.)

1. The owners of a horse not known to be vicious or dangerous are not liable to a bystander injured by his bolting the track during a race in which he was entered while he was in charge of a good and expert rider.
2. A fair association is not liable for injuries to one who is injured by the bolting of a horse from a track where a race is being held if it has provided a suitable grand stand from which the race could be viewed and has erected a railing composed of 2x4 timber nailed to posts 3/4 or 4 feet high, between the race course and the place where spectators will be located.
3. Contributory negligence will prevent a recovery by a spectator of a race, who is injured by a horse bolting the track, if he remained at a point from which the marshal commanded him to stand back because the place was dangerous.

(December 8, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for McDowell County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. E. J. Justice for appellant.

Messrs. S. J. Ervin, Edmund Jones, Avery & Ervin, and W. C. Newland for appellees.

Montgomery, J., delivered the opinion of the court:

The plaintiff, in his complaint, alleged that Hinkle, Craig, & Co. and T. L. Craig, at the fair held by defendant the Burke County Fair Association, at Morganton, in October, 1891, were permitted and allowed by the fair association to enter and run a horse, which they knew to be wild and dangerous and un-

trained, in a race upon the course of the defendant association; that the defendant association, knowing when they permitted the other defendants to enter and run the horse that he was wild and dangerous and untrained, had failed and neglected to have the race course inclosed by a proper fence or guard so as to provide against accidents to persons who were witnesses of the race; and that by reason of such negligence the horse bolted the track, knocked down the railing, and ran over and injured the plaintiff, who was a spectator (having paid his entrance fee), standing where visitors to the fair usually stood when witnessing the racing. The defendants, while admitting the serious injury of the plaintiff by the horse, which they admitted belonged to Wilson & Craig, denied the other material allegations of the complaint, and averred that the plaintiff, by his being drunk, and standing where he ought not to have been, contributed to and caused his own injury. When the evidence was concluded, the court intimated that the testimony did not show negligence on the part of any of the defendants, and that in no view was the plaintiff entitled to recover. There was judgment of nonsuit and the plaintiff appealed.

There was no error in the conclusion of the court. We find no evidence tending to show that the horse was wild or dangerous, but, on the contrary, the witness Hinkle testified that he was gentle, and, although it appeared that he had never entered a race before that, yet he had never been known to jump the track or swerve before. There was no evidence that either of the defendants, at the time the horse was entered, or at the time of permitting him to be entered or run, had any knowledge that he was wild, dangerous, or untrained. Before the owner of a domestic animal can be charged for injuries inflicted by it, it must be shown that the owner had knowledge of the fact that the animal was vicious and unruly. *Harris v. Fisher*, 115 N. C. 322. In addition, the owner of the horse had him ridden by an excellent horseman. The plaintiff's witness Atkins testified that the rider Haney was "a good rider; no better in the state." We cannot see how it can be reasonably intended that the owner of a gentle horse or of a horse not known to be vicious or dangerous or unruly who enters him for a race, in charge of a good and expert rider, can be responsible in damages for

NOTE.—As to injuries to bystanders by horses at a race, see also *Hart v. Washington Park Club* (Ill.) 29 L. R. A. 492; also *Lane v. Minnesota State Agri. Soc.* (Minn.) 29 L. R. A. 708.

88 L. R. A.

an injury to a spectator, caused solely by the unforeseen unruliness of the horse, more especially where safe and suitable places are provided from which the race might have been seen. Such an injury must be regarded as an accident.

There is no testimony going to show negligence on the part of the defendant association. It seems that a building called the "Grand Stand," from which the race could be viewed, had been erected on the grounds. The race course, where necessary, was inclosed on both sides by a good pine railing 2 by 4 inches, nailed to posts planted in the ground, and 8½ or 4 feet high. We think that these precautions taken and provisions made for the safety and comfort of its visitors by the association were reasonably safe and suitable. And that is the degree of care which the law requires of them. *Hart v. Washington Park Club*, 157 Ill. 9, 29 L. R. A. 493.

It may be unnecessary to the decision of this case to consider the matter of contributory

negligence on the part of the plaintiff, but it may be proper to observe that, if the defendants could possibly be considered negligent under any view of the case, the plaintiff could not recover, because it plainly appears by the undisputed testimony that he caused and contributed to his own injury. The plaintiff's witness Campbell, who was policeman and marshal, testified that he announced to the crowd standing where the plaintiff was that the race was coming off, and to get back from that point; to get off the rail. He told them it was dangerous there, and that they might be hurt; and the plaintiff himself testified that he heard the marshal halloo out, "Stand back!" But he did not change his position. Upon a review of the whole testimony, we are of opinion that his honor was correct in holding that the plaintiff could not recover.

No error.

Avery and Furches, JJ., did not sit on the hearing of this case.

MICHIGAN SUPREME COURT.

Samuel MITCHELL *et al.*, *Appts.*,

City of NEGAUNEE et al.

(.....Mich.....)

1. The installation of an electric-light plant may be provided for at special election under Laws 1891, act No. 186, and the provisions of the charter of the city of Negaunee.
2. Municipalities may be authorized to own electric-lighting plants which shall furnish lights, not only to the municipality, but also to its citizens.

(June 7, 1897.)

APPEAL by complainants from a decree of the Circuit Court for Marquette County dismissing a bill to restrain the carrying out of certain contracts for the erection of an electric-light plant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hayden & Young, for appellants:

The action of a municipal corporation may be impeached for fraud at the instance of persons injured thereby.

Dill. Mun. Corp. p. 390, §§ 811, 812; *State, Atty. Gen., v. Cincinnati Gaslight & C. Co.* 18 Ohio St. 263; *Baird v. New York*, 96 N. Y. 567; *People v. Stephens*, 71 N. Y. 527; *Morgan v. Binghamton*, 102 N. Y. 500.

In case of a misappropriation of public funds the right of taxpayers who are injured thereby to unite in a suit asking for relief by injunction has been repeatedly affirmed in this state.

Scovell v. Lansing, 17 Mich. 437; *Cartenius v. Hoyt*, 87 Mich. 583; *Putnam v. Grand Rapids*, 58 Mich. 416; *Alpena v. Kelley*, 97 Mich. 550.

There is no authority either in the charter of the city of Negaunee or in the general law for submitting the question of erecting an electric-light plant to the electors at a special election.

NOTE.—As to municipal ownership of electric-light plant, see also *Citizens' Gaslight Co. v. Wakefield (Mass.)* 31 L. R. A. 457; *Jacksonville Electric*

City charters are to be strictly construed, and such municipalities possess no powers but those conferred by the acts creating them.

Dill. Mun. Corp. §§ 89, 90; *Cooper v. Alden*, *Harr. Ch. (Mich.)* 72; *Taylor v. Bay City Street R. Co.* 80 Mich. 77; *People v. Armstrong*, 73 Mich. 289, 2 L. R. A. 721; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 529.

The power to call a special election for the purpose in question is not given by the charter and therefore does not exist. There is no inherent reserved power in the people to hold elections. They are therefore of no effect unless held by virtue of some law in force when the election is held.

6 Am. & Eng. Enc. Law, 294; *People, Brooks, v. Melony*, 15 Cal. 58; *Sawyer v. Haydon*, 1 Nev. 75; *State, McHenry, v. Jenkins*, 48 Mo. 261; *People, Lore, v. Mutheson*, 47 Cal. 442.

It was never meant that the power to tax should be exercised to the detriment of the citizen. It is limited and can only be imposed for a public, and not a mere private, purpose.

People, Detroit & H. R. Co., v. Salem Turp. Board, 20 Mich. 452, 4 Am. Rep. 400; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Morford v. Unger*, 8 Iowa, 94; *Morse v. Stocker*, 1 Allen, 150; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Tide Water Co. v. Coster*, 13 N. J. Eq. 519, 90 Am. Dec. 634; *Cooley, Taxn.* p. 105.

To tax occupations outside of the city for the benefit of those living in the city is, in effect, taking the property of the citizen for a private use; that is for the use of a particular community of which the outside citizen forms no part. Whether it be called a tax or the appropriation of property, the result is precisely the same.

St. Charles v. Nolle, 51 Mo. 132, 11 Am. Rep. 440; *Cooley, Taxn.* p. 106; *People, Detroit &*

Light Co. v. Jacksonville (Fla.) 30 L. R. A. 540; *Linn v. Chambersburg (Pa.)* 25 L. R. A. 217; *Crawfordsville v. Braden (Ind.)* 14 L. R. A. 268, and *note*.

H. R. Co., v. Salem Twp. Board, 20 Mich. 452, 4 Am. Rep. 400.

Farming, wild, and uncultivated land cannot be taxed for city improvements from which it receives no benefit.

Morford v. Unger, 8 Iowa, 82; *Langworthy v. Dubuque*, 18 Iowa, 86; *Deeds v. Sanborn*, 26 Iowa, 419; *O'Hara v. Dubuque*, 23 Iowa, 144; *Dieman v. Fort Madison*, 30 Iowa, 542; *Covington v. Southgate*, 15 B. Mon. 491; *Arbogust v. Louisville*, 2 Bush, 278; *Swift v. Newport*, 7 Bush, 37.

Mr. F. D. Mead, for appellees:

The common council, acting honestly, are the sole judges of what is the best system to be adopted and the cheapest system to be adopted.

Detroit v. Hoerner, 79 Mich. 884; *Hubbard v. Sandusky*, 9 Ohio C. C. 638; *Gilmore v. Utica*, 181 N. Y. 26; *Terrell v. Strong*, 14 Misc. 258.

There is no doubt that the city has or will have sufficient money to pay for this expenditure.

Torrent v. Muskegon, 47 Mich. 117, 41 Am. Rep. 715; *Christensen v. Fremont*, 45 Neb. 160.

Lighting the streets and public places of a city, and supplying the inhabitants thereof, for compensation, with electric lights for use in their private residences and houses, by a municipality, is a municipal purpose authorizing the erection and maintenance of plants for that purpose at public cost.

Jacksonville Electric Light Co. v. Jacksonville, 86 Fla. 229, 30 L. R. A. 540; *Linn v. Chambersburg*, 160 Pa. 511, 25 L. R. A. 217; *Crawfordsville v. Braden*, 180 Ind. 149, 14 L. R. A. 268; *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487.

The charter of the city of Negaunee authorizes the council to light the streets and alleys. *Crawfordsville v. Braden*, 180 Ind. 149, 14 L. R. A. 268.

The cost of making all improvements may be paid out of the general fund, or may be assessed upon abutting property or other property specially benefited. It is a question of legislative expediency, with which the courts will not interfere.

Dill. Mun. Corp. §§ 739, 740-742; *Sheley v. Detroit*, 45 Mich. 432.

Messrs. Clark & Pearl, with **Mr. F. A. Bell**, for the City.

Moore, J., delivered the opinion of the court:

The city of Negaunee has a population of about 6,000 people. In 1896 it made a contract with Arbuckle, Ryan, & Co., for a steam plant complete, for \$3,474. At the same time it made a contract with the Ft. Wayne Electric Corporation for an electric plant complete, at a cost of \$6,500. This proceeding is brought by the complainants, who are large taxpayers, to restrain the carrying out of these contracts. The circuit judge, after hearing the proofs in open court, dismissed the bill. Complainants appeal, assigning as grounds of their appeal: (1) The contracts were vitiated by the fraudulent conduct of the council, engineer, and the two contractors. (2) There was no money on hand in the treasury which could lawfully be applied to the purpose of installing an electric

plant. (3) The electors could not authorize the installing of an electric plant at a special election. (4) That the city of Negaunee has no power, and the legislature cannot confer upon it power, to tax lands which can receive no benefit, for the installation of an electric-light plant to do municipal lighting, and to engage in the supplying of lights to private parties.

Taking these propositions up in the order in which they are presented, a careful examination of the record does not, in our judgment, establish any such fraud in relation to this contract, or in the proceedings leading up to it, as would warrant a court in restraining the execution of it for that reason. As to the proposition that there is no money on hand that can be applied to this contract. There is no suggestion that there is any requirement in the charter, nor has any provision of law been called to our attention, requiring that the money shall be in the treasury before a contract of this kind can be entered upon. It is not necessary to discuss the claim that a sufficient amount of money arising from the liquor tax is now on hand, or will be in the treasury in time to meet the terms of the contract. This brings us to the next question. Can the electors authorize the installation of this plant at a special election? A special election was called, at which a large majority of the electors voted in favor of establishing the plant. If the question was one that could be submitted at a special election, it was properly submitted, carried, and canvassed. The circuit judge found that act No. 186 of the Session Laws of 1891, as amended, and the provisions of the charter, authorize the electors to provide for the installation of such a plant at a special election, when ordered in the manner in which the special election was held. We think he was right in his conclusion. *George v. Wyandotte Electric Light Co.* 105 Mich. 1.

We now come to the important question in the case. Negaunee has been incorporated as a city a good many years. Lands of the complainant, which were unplatted vacant wild lands, were inside the corporation prior to 1891. In that year the area of the city was greatly extended by the provisions of an amended charter. At this time a still larger quantity of complainants' lands was included in the corporate limits. So far as the record discloses, no complaint has been made of this action until the filing of this bill. It is now claimed that the lands owned by the complainants which are not city lots, some of which are not improved, most of which are so remote as not to be benefited by electric lights, cannot be taxed to install a plant which is to be used, not only to light the streets and alleys of the city, but also to furnish lights to private parties. It is urged that the right of taxation was never meant to be used to the detriment of the citizen, but for his benefit; that taxes can be imposed only for a public, and not a private, purpose. It is the contention that the taxing-district in which the tax may be levied should be limited to the locality which is to be benefited by the expenditure of the tax, and that, as these lands will not be benefited by the installation of this plant, it is not right to tax the owners of them. Complainants say that

neither the legislature nor the municipality can tax vacant lands for such purposes; citing a number of authorities, and, among others, *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86; *O'Hare v. Dubuque*, 22 Iowa, 144; *Deeds v. Sanborn*, 26 Iowa, 419; *Deiman v. Fort Madison*, 30 Iowa, 542; *Cornington v. Southgate*, 15 B. Mon. 491; *Arbogast v. Louisville*, 2 Bush, 271. The Iowa cases fully sustain the contention of counsel, but as long ago as *Merrill v. Humphrey*, 24 Mich. 170, Justice Cooley, after quoting most of these cases, expressed a doubt as to whether they had not gone too far, and we now think they are clearly against the weight of authority. Cooley on Taxation [2d ed.] p. 157, reads as follows: "City boundaries having been extended so as to embrace the lands of parties who insisted that their premises were agricultural lands merely, and would receive no benefit from the city government, such parties sought the protection of the courts, and prayed for injunction to restrain the imposition upon them of any tax in excess of what they would have been chargeable with had the boundaries not been extended to embrace them. It is to be observed of such cases that the legislature, which alone had authority to determine and fix the proper bounds of the municipal divisions of the state, and also to establish the taxing districts, had proceeded to do so, and in fixing the city boundaries without any provision for a discrimination in the taxation of property within them, had in effect determined that no such discrimination should or ought to be made. The whole subject was one committed by the Constitution exclusively to the judgment and discretion of the legislature, whose members, as in other cases of legislation, would make inquiry into the facts in their own way, and act upon their own reasons. No question could be made of the complete legislative jurisdiction over the case, and if the action was unfair, and led to unequal and unjust consequences, it seems difficult to suggest any ground upon which it could be successfully assailed in the courts that would not warrant a judicial review of legislative action in every case in which parties complain of injustice and inequality. Nevertheless, in some cases the courts have considered themselves warranted in inquiring into the facts, in order to determine whether, in their judgment, the extension of municipal boundaries was fairly warranted; and having reached the conclusion that it was not, and that the extension was made for the purpose of subjecting to taxation adjacent property that would not receive the benefits of municipal government, and was not in fact urban property, they have undertaken to protect the owners of property thus unfairly brought in against the unequal taxation to which the legislation would expose them. In doing this they have not assumed to nullify the legislative action in extending the municipal limits, but they have undertaken to modify and relieve against its consequences, and to do this upon the express ground that the motive which has influenced the legislation was not legitimate. As the point is stated in one case, it is the palpable perversion of the power to tax which justifies the judicial interference. Some of these decisions are made by very able

judges, whose opinions are always entitled to the highest respect; but it seems difficult to harmonize them with the conceded principles governing the law of taxation. For, (1) they do not question legislation as being in excess of legislative authority, as might be done where taxes are voted for a purpose not public; but they leave the legislation to stand, and only interfere to qualify its effect, on the ground that it has been adopted on improper grounds and will operate unequally. (2) This is done on an inquiry into the facts, and a substitution of the judicial conclusion for the legislative on a subject not at all judicial; a subject, too,—the proper limits of city extension,—upon which persons are certain to differ widely, and where an inquiry into the facts after the judicial method of an examination of witnesses is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or to make. This is certainly laying down a rule which cannot be applied generally, it being admitted that the judiciary has no general authority to correct the injustice of legislative action in matters of taxation; and the weight of authority clearly is that, as regards these cases, the determination of the legislature is conclusive." This is undoubtedly according to the great weight of authorities. The inquiry naturally arises, Can the legislature authorize municipalities to own electric lighting plants which shall furnish not only the lights needed by the municipality, but lights to its citizens? Act No. 186 of the Session Laws of 1891 authorizes, in terms, certain municipalities to construct electric lighting plants. Act No. 139 of the Session Laws of 1893 provides "that it shall be lawful for any city or incorporated village in this state, not having more than 8,000 inhabitants, which own land operate works for the purpose of supplying such city or village with electric light, and lighting their streets and other public places with electric light, to furnish and supply electric light to the inhabitants of such cities or villages upon such terms and conditions as the common council may deem expedient." Act No. 41 of the Session Laws of 1895 authorizes cities and villages not having more than 10,000 inhabitants to furnish lights to the citizens. These provisions will stand if furnishing electric lights is a public purpose. This question arose recently in Massachusetts. The house of representatives of that commonwealth asked the opinion of the supreme court upon this question: Is the furnishing of electric lights a public purpose? The court replied in part as follows: "We have no doubt that, if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants, and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants, and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. . . . The maintenance of public streets and buildings is a public service and it may be reasonably necessary to light them, in order that the greatest public benefit may be obtained from using them. To

say nothing of the usefulness of lighting streets as a means of promoting order and of affording protection to persons and property, the common convenience of the inhabitants may require that they be lighted. Cities and thickly settled towns have for a long time been accustomed to light their public buildings and some of their streets at the public expense. If the streets and public buildings are to be lighted, the means is a matter of expediency. If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate means which it may think expedient. As a question of constitutional power, we cannot distinguish the right to authorize cities and towns to buy gas or electricity for their use from the right to authorize them to manufacture it for their use. . . . The maintenance of sewers and drains is a public service. One object is the preservation of the public health, but, apart from this, they are a great convenience to the inhabitants whose estates can be drained by them. It is impracticable for every owner of land in cities and towns to construct and maintain sewers and drains exclusively on his own account; they cannot ordinarily be constructed over any considerable territory without using the public ways, or exercising the right of eminent domain. They are therefore regarded as of common convenience, and are constructed at the public expense. The furnishing of water for cities and towns for domestic use affords, perhaps, the nearest analogy to the subject we are considering. It was long ago declared that 'the supply of a large number of inhabitants with pure water is a public purpose.' The statutes are well known which authorize cities and towns to maintain waterworks for supplying their inhabitants with water, and the constitutionality of these statutes has not been doubted. Water cannot ordinarily be supplied to a large city or town from ponds or streams without the exercise of the right of eminent domain and the use of the public ways; every inhabitant needs water, and often the only practicable method of obtaining it is by the agency of corporations or of the municipality. The land for the public ways having been taken for a public use, it may be subjected to other public uses, but it cannot be subjected to strictly private uses without the consent of the owners of the fee when the fee remains in the abutters. There is therefore often a necessity of having water, common to the inhabitants of a community, which cannot well be met except by the exercise of public rights, and therefore the furnishing of water has been considered a public service. In the case of water, as in that of sewers and drains, a portion of the service is exclusively public, and the benefit to individuals cannot be separately estimated from that of the community; but a part of the service is rendered to individuals, and the benefit of this can be separately estimated. The inhabitants are, therefore, required to pay for the water furnished for their private use, and special assessments for the use of sewers and drains are laid upon estates specially benefited; and for the same reasons, while in laying out high-

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ways the expense is public, betterment assessments may be laid upon the owners of lands specially benefited. Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for his own use. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town that it incidentally benefits some individuals more than others, or that from the place of residence, or for other reasons, every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But, in general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them, and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them. If the legislature is of opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think that the legislature can confer the power." *Opinion of Justices*, 150 Mass 592, 8 L. R. A. 487. See *Dill. Mun. Corp.* p. 828, note; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268. In this case the recent authorities are referred to, and reviewed. *State, Atty. Gen. v. Toledo*, 11 L. R. A. 729, 48 Ohio St. 112; *Conley*, Taxn. 134. It is conceded by counsel for complainants that municipalities may furnish water to their citizens. They seek to distinguish the right to furnish water from the right to furnish light by saying that water is a necessity for all, but that electric light is a luxury. It will hardly be contended that the necessities of modern life do not require light as well as water, and we think the reasoning of the cases cited shows conclusively that it is within the legislative province to confer upon municipalities the right to furnish both under proper restrictions.

The decree is affirmed, with costs.

The other Justices concur.

INDIANA SUPREME COURT.

City of EVANSVILLE *et al.*, *Appts.*,

v.

John A. MILLER.

(146 Ind. 613.)

1. A municipal corporation may not declare that to be a nuisance which in**NOTE.—Municipal power over buildings and other structures as nuisances.****I. Extent of power over buildings as such.****II. Limit of power.****a. In general.****b. To destroy.****III. Over the use of buildings.****IV. Wooden and frame buildings.**

As to the power of municipal corporations over nuisances in general, see *note* to *Grossman v. Oakland* (Or.) 38 L. R. A. 593.

Upon the question of municipal control over nuisances affecting safety, health, and personal comfort, see *note* to *Harrington v. Providence*, *post*.

For municipal power over particular trades or business as nuisances, see *note* to *Ex parte Lacey* (Cal.) — L. R. A. —.

The subject of municipal power over nuisances affecting highways and waters will be annotated with the case of *Hagerstown v. Whitmer*. — L. R. A. —.

The question of municipal power over nuisances affecting public morals, decency, peace, and good order will form a separate *note*, as will also the effect of prescription in case of nuisance.

For the question as to the right to compensation for property destroyed in abating a public nuisance, see *note* to *Orlando v. Pragg* (Fla.) 19 L. R. A. 196.

As to delegation of municipal power as to license, franchise, and buildings, see *note* to *St. Louis v. Russell* (Mo.) 30 L. R. A. 721.

I. Extent of power over buildings as such.

A municipal authority has the power, without special legislative grant, to prohibit the erection of works and factories, and the pursuit of industries, within the corporate limits which will be injurious to the public health, and destructive of the comfort of the inhabitants, by subjecting them, in crowded streets, to nauseous smells and sickening odors. *Monroe v. Hoffman*, 29 La. Ann. 631, 656, 29 Am. Rep. 345, 346.

In relation to the power of municipalities over buildings and other structures as nuisances, it has been said that the rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power, vested in them, by the Constitution, may think necessary and expedient. *McKibbin v. Fort Smith*, 35 Ark. 352, 355. To the same effect, *Com. v. Alger*, 7 Cush. 84.

So, in *Com. v. Alger*, 7 Cush. 84, the court stated it as a general principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community, all property being derived directly or indirectly from the government and held subject to those general

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fact is not, although it is empowered by law to declare what shall constitute a nuisance.

2. An ordinance declaring that any building or structure of any kind partially destroyed by fire which shall be permitted to remain in such condition after notification to remove, repair, or rebuild it shall constitute a nuisance, without making any limi-

regulations which are necessary to the common good and general welfare.

Again, in *Harvey v. Dewoody*, 13 Ark. 252, in an action for damages for destroying the plaintiff's house as a nuisance, it is said: The mayor and councilmen have the right to have the nuisance complained of removed or abated in some of the modes provided by law, even though, in doing so, it should be found necessary to destroy the house or tenement.

So, in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 669, 24 L. ed. 1036, 1039, the court admitted the right of the public authorities over buildings and the destruction of them to prevent fire, such right being given by the common law, although in that case the nuisance consisted in the carrying on of an offensive trade.

In the exercise of its police power, the legislature may not only provide that certain kinds of property, either absolutely, or when held in such a manner or under such circumstances as to be injurious, dangerous, or obnoxious, may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner, as in cases, *inter alia*, of the destruction of buildings, in order to prevent the spread of fire, or the impending falling of the buildings, or throwing overboard of decaying or infected food, or abating other nuisances dangerous to health. *Blair v. Forehand*, 100 Mass. 130, 139, 1 Am. Rep. 94. To the same effect, *Com. v. Alger*, 7 Cush. 85; *Fisher v. McGirr*, 1 Gray. 27, 61 Am. Dec. 381; *Parsons v. Pettingell*, 11 Allen, 512; *Salem v. Eastern R. Co.* 98 Mass. 443, 98 Am. Dec. 650; *License Cases*, 46 U. S. 5 How. 561, 559, 632, 13 L. ed. 221, 224, 314; *Dewey v. White*, *Moody & M.* 55; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 44.

Two things are necessary to constitute a public nuisance in a building: first, that from the nature of the establishment it may be a nuisance, and second, that from its situation it has actually become so. *State v. Purse*, 4 McCord, 1, 472, 474.

A house which, from the purpose for which it is used or the situation in which it is placed may not be a nuisance, may become so from the negligent and filthy state in which it is kept. *State v. Purse*, 4 McCord, 1, 472, 474.

So, the erection of any building which, from its disagreeable odor or noxious effluvia, is offensive or unwholesome may be a nuisance, but whether it actually is or is not so must depend upon circumstances. A house that is a nuisance in one place may not be so in another. *State v. Purse*, 4 McCord, 1, 472, 474.

When, however, property has become a nuisance dangerous to the public health, municipal authorities, when invested with power to abate nuisances, have a right to make such disposition of it as may be necessary for the protection of the public, and they may do this without making compensation to the owner. *Schoen v. Atlanta*, 97 Ga. 697, 33 L. R. A. 804. To the same effect, *Dunbar v. Augusta*, 90 Ga. 390; *Savannah v. Mulligan*, 95 Ga. 323, 29 L. R. A. 308. See also *note* to *Orlando v. Pragg* (Fla.) 19 L. R. A. 196.

tations with regard to its dangerous character by reason of its weak condition or location or surroundings, is void.

(January 26, 1907.)

APPEAL by defendants from a judgment of the Superior Court for Vanderburgh County in favor of plaintiff in an action brought to enjoin the collection of an assessment for the removal of a building from plaintiff's property which was alleged to have become a nuisance. *Affirmed.*

Municipal corporations have full power to abate nuisances, and may if necessary remove or compel the removal of buildings which have for any cause become nuisances, by getting into such a condition that they greatly endanger the public health or safety, or the safety of adjacent property, provided the danger inheres in the building and not simply in the use to which the building is put. *First Nat. Bank v. Sarlis*, 129 Ind. 201, 18 L. R. A. 481; *Reg. v. Pappineau*, 1 Strange, 668.

So, if a building is erected in violation of law and in a situation where it imperils personal property, no private right is invaded by its abatement as a nuisance, because none can grow out of an illegal act. *Baumgartner v. Hasty*, 100 Ind. 575, 576, 50 Am. Rep. 380.

A building dilapidated and vacated by reason of fire, occupied temporarily by disorderly persons and trespassers and used as a receptacle of filth, may become a common nuisance as recognized by law. *Hennessy v. St. Paul*, 37 Fed. Rep. 565.

And an unoccupied house used in such a manner as to endanger a town by fire, and also in a manner offensive to the citizens as endangering their lives, is a common or public nuisance such as may be removed by the city authorities. *Harvey v. De-woody*, 18 Ark. 252, 256.

In *Swett v. Sprague*, 55 Me. 190, the court upheld the action of the city authorities in pulling down and removing the plaintiff's brick building, after notice to abate the same as a public nuisance given pursuant to the terms of the state statute, the statute being legal and constitutional.

So, in *Van Wormer v. Albany*, 15 Wend. 262, the proceedings of the board of health in pulling down and destroying the plaintiff's barn and sheds as a nuisance, dangerous to the health and lives of the inhabitants of the city, were upheld, for the reason that it is necessary that such power should exist and be exercised upon the proper emergencies, the statute giving a summary remedy to remove or abate nuisances.

But the taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law under which it may be done must be closely followed. *Frank v. Atlanta*, 72 Ga. 423, 432.

So, the fact that a certain structure will constitute a nuisance, when erected, or that a building of which such structure is to form a part will, when such structure is completed, constitute such a nuisance, must be affirmatively proved with clearness and reasonable certainty. *Rochester v. Erickson*, 46 Barb. 92, 95.

If the property is not a nuisance *per se*, and is lawfully erected without being judicially determined to be a nuisance, or is not created or erected subsequent to the date and in defiance of the ordinance, the municipality has no power to destroy it. *Denver v. Mullen*, 7 Colo. 345, 353.

Yet the action of a city council, acting under its ordinance and charter, declaring certain premises a nuisance, is a *prima facie* protection to the city council, and casts the burden of proof upon the

The facts are stated in the opinion.

Messrs. George A. Cunningham and Elmer Q. Lockyear for appellants.

Messrs. Alexander Gilchrist and Curran A. De Bruler, for appellee:

The common council of Evansville has no power to enact by ordinance or otherwise that a building or other structure which has been partially destroyed and is suffered to remain in that condition shall from that fact alone be necessarily a nuisance, and that such a building may be taken down and removed by the city at the expense of the owner.

party calling the action of the council into question. *Montgomery v. Hutchinson*, 18 Ala. 573.

And therefore, under the power given to a city by its charter to remove all nuisances at the expense of the person causing them, or upon whose property such nuisance may be found, a city has authority to declare a fallen and dilapidated house or brick building in the city, which renders the passage of the sidewalk dangerous, a nuisance, and such declaration is *prima facie* evidence that such house is a nuisance, and the onus of disproving it rests upon the party maintaining the same. *Montgomery v. Hutchinson*, 18 Ala. 573.

Where the common council declares an old cement house to be a nuisance, and removes the same after notice to the owner, the act being done by the city authorities or under their direction in order to abate the nuisance, the owner of such house is not precluded, by the proceedings of such council, from contesting their action, as the mere declaration of a city that such building is a nuisance does not make it so, under Iowa Code, § 454, which gives cities and towns power to abate nuisances but contains no express or necessarily implied power to declare that a nuisance exists. *Cole v. Kegler*, 64 Iowa, 59, 62.

So, under the provisions of a charter and ordinance giving authority to abate and remove nuisances injurious to public health and safety, and to remove any dilapidated buildings which are imminently dangerous to life and property, or which, through defects in structure or other causes may become imminently dangerous to life or property, no exclusive jurisdiction is conferred upon the common council to determine what constitutes a nuisance, and therefore such council can only abate such cases as are declared such by the common law. *Hennessy v. St. Paul*, 37 Fed. Rep. 565.

And in *Frank v. Atlanta*, 72 Ga. 423, 432, it is said to be questionable, under § 145, of the city charter, (Ga. Acts 1874, p. 147), whether the mayor and general council of the city of Atlanta have authority, upon the report of its building inspectors and engineer, to destroy a building reported as unsafe, but which is not located on any street, alley, or lane of the city.

But under a condition contained in a subsequently repealed ordinance authorizing the erection of a warehouse which the defendant after notice has failed to remove as a nuisance, the corporation has the power at any time to cause it to be removed at his expense. *Herbert v. Benson*, 2 La. Ann. 770.

By chapter 519 of the Laws of New York of 1870 every building erected contrary to a city ordinance is to be deemed a common nuisance, and as such may be abated. *Young v. Scheu*, 56 Hun. 307, 303. In that case, however, the action was brought at the instance of a private individual to restrain the erection of a frame building contrary to the provisions of the ordinance, but the court refused relief, the police regulation not giving a remedy to a private party, no special damage being shown.

Old and almost worthless houses, filthy in condi-

Tiedeman, Pol. Power, § 123; Wood, Nuisances, § 744; *First Nat. Bank v. Sarila*, 129 Ind. 201, 18 L. R. A. 481; *Begein v. Anderson*, 38 Ind. 79; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

A partially destroyed building is not of itself more likely to be a nuisance than a cheap, ugly ill-formed building of any kind. A cheap building upon a street devoted to residences may be so cheap, so despicable in appearance, so unsightly, as to injuriously affect the value of all neighboring property. But be such a building never so much of an eyesore, unless it

is otherwise a nuisance, unless it is dangerous to health, life, or limb, the owner can maintain it despite the protests of his neighbors or of the city.

Wood, Nuisances, § 8; *State v. Jersey City*, 29 N. J. L. 170; *Des Plaines v. Poyer*, 123 Ill. 348; *Ex parte O'Leary*, 65 Miss. 80; *Pauer v. Albrecht*, 72 Wis. 416.

Jordan, Ch. J., delivered the opinion of the court:

This action was instituted by appellees to prevent the collection of certain assessments

tion and crowded with filthy tenants, which have been occupied by patients afflicted with the small-pox, situated in an improved and flourishing part of the city, and not repaired or improved by the owner, who is able to do so, are properly condemned as nuisances by the board of health, and may be removed as such by the city authorities, under the provisions of an act giving the city council power to prevent and remove all nuisances within the city, the act having special reference to decayed and dilapidated houses. *Ferguson v. Selma*, 43 Ala. 398, 400.

And where the act incorporating the town confers power upon the mayor or the council to prevent and remove nuisances, the authorities are clothed with unquestionable legislative powers and prerogatives to a certain extent, and are fully empowered to adopt measures of police for the purpose of preserving the health and promoting the comfort, convenience, and general welfare of the inhabitants of the town, among which powers are those for the preservation of the public health and property; and therefore city authorities are justified, under a town ordinance, in pulling down an unoccupied house used in a manner which endangers the town in cases of fire, and also offensive to the citizens, especially after the time limited by the notice of the city authorities to abate or remove the nuisance has expired. *Harvey v. De-woody*, 18 Ark. 322, 329.

So, where the incorporating and governing act gives the city and town council power to regulate the building of houses, and guard against accidents by fire, and to prohibit the erection, and provide for the removal, of any building, or any addition to any building more than 10 feet high, unless the outer walls thereof are brick and mortar, or iron, or stone and mortar, the city council may proceed in a summary manner to remove the same so as to prevent it becoming a nuisance or dangerous to the public. *McKibbin v. Fort Smith*, 35 Ark. 322, 355.

And the erection of a building was restrained as a nuisance, in *Coast Co. v. Spring Lake* (N. J. Ch.) 36 Atl. 21.

The ruins of a structure upon one of the principal streets of a city, unfit for human habitation or other lawful use, devoted to no use or purpose, but as a resort for tramps and disorderly persons, and a source of serious discomfort and annoyance to the public and of actual danger to useful and valuable property within the range of its influence, are within the definition of the term "public nuisance," which the city has power to declare a nuisance and to abate as such, the primary cause of public annoyance and danger being the decayed, dilapidated, ruined, and abandoned condition of the building. *Nazworthy v. Sullivan*, 55 Ill. App. 43, 51.

The Massachusetts Statutes of 1867, chap. 308, enabling the city to abate a nuisance existing therein and for the preservation of the public health, under which the city took the plaintiff's lands for the purpose of abating such nuisances, are valid coming within the clause of the Constitution L. R. A.

tution which confers authority upon the legislature to make all manner of wholesome and reasonable laws so as the same be not repugnant or contrary to the Constitution. *Dingley v. Boston*, 100 Mass. 544. In that case, however, the owner of the land was held entitled to compensation by reason of the nuisance being such that it was not within his power to abate, and no indictment could lie against him for its maintenance.

Again, in a case where the sanitary superintendent of the city-health department certifies to the board that a certain building is "unfit, and not reasonably capable of being made fit, for human habitation by reason of want of proper ventilation, want of repair and defects in the drainage and plumbing, and because of the existence of a nuisance on the premises likely to cause sickness among its occupants, and that the occupancy of said building is dangerous to life and detrimental to health," which condition is also determined by the board to exist, and an order is issued for the removal of the same, and for a vacation of the premises, forbidding their further use as a human habitation without a written permit, it is the function of the board, exclusively confided to it by the legislature, to determine whether a cause exists for the exercise of the power, and, having so determined, the court will not assume to reverse its action, unless it appears that such action is arbitrary, oppressive, or repugnant to justice; and in such a case the owner is not entitled to notice of the proceedings and is not deprived of the property without due process of law. *Eagan v. New York Health Dept.*, 20 Misc. 33.

So, the certificate of the city surveyor to the effect that the buildings in question are eminently dangerous, and the authority of the town clerk to such surveyor to cause the same to be taken down and repaired in such manner as he shall think requisite, are sufficient authority to justify the taking down and rebuilding of certain portions of such building, and also to warrant the action of the corporation in demanding payment from the property owner of the expenses thereby incurred, the action being for the purpose of preventing danger in the creation of a nuisance. *Cheetham v. Manchester*, L. R. 10 C. P. 249, 44 L. J. C. P. N. S. 139, 33 L. T. N. S. 28.

And the 27th section of the Pennsylvania act of 1818, which makes it necessary for the board of health to obtain a warrant from the justice of the peace for the inspection of the premises where the alleged nuisance is said to exist, does not apply where the nuisance exists on a vacant lot, and therefore such nuisance may be abated by the authorities without a warrant and a visit by the board, such act having reference only to cases where such nuisance exists in a house, store, cellar, or other inclosure. *Kennedy v. Philadelphia Bd. of Health*, 2 Pa. 366, 370.

A city ordinance, passed pursuant to its charter, which declares all buildings and structures in a situation or manner dangerous to the public to be nuisances, will be upheld. *Kiley v. Kansas*, 69 Mo. 102, 33 Am. Rep. 491. In that case, however,

levied by the board of public works of the city of Evansville on certain real estate owned by appellee, and situated within the city. The theory of the complaint is that this assessment of \$199 is void by reason of the invalidity in part of an ordinance under which the city undertook to levy said assessment. A trial resulted in a finding by the court in favor of the appellee, and a judgment was awarded canceling the assessment, and adjudging void the lien claimed thereunder by the city. The facts in the record show that the appellee, Miller, in May, 1895, became the owner by

purchase of lots 6, 7, 8, and 9 in block 7 of Goodsell's enlargement of the city of Evansville, and that the dwelling house situated on said premises at the time he became the owner thereof had been partially destroyed by fire. On June 24, 1893, the common council of that city passed an ordinance defining nuisances, etc. The 1st section of this ordinance provides as follows: "Be it ordained by the common council of the city of Evansville, that any building, shed, outhouse, or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be

the question turned upon the liability of the corporation for not enforcing the ordinance.

So, a wall situated upon private property at the edge of a sidewalk in a dilapidated and decayed condition by reason of fire, dangerous to the lives of passersby, is a nuisance within the provisions of a city charter, which may be abated by the city. *Parker v. Macon*, 39 Ga. 725, 729, 99 Am. Dec. 496.

And the destruction of an unhealthy house by the municipal authorities is justifiable, the same being a nuisance within the provisions of the Tennessee act of January 29, 1879. *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173.

But where such structures were attached to a public market, the power of the public authorities to remove them was denied. *Hoffman v. Schultz*, 81 How. Pr. 885, 896.

Under a charter giving power to municipalities to pass ordinances relating to nuisances, a structure erected in violation of an ordinance so enacted may be abated as such by the authorities. *Lake v. Aberdeen*, 57 Miss. 260, 263.

Again, such authorities have been held justified in destroying, breaking down, and injuring a fertilizer and the machinery used in manufacturing the same, as a nuisance. *Manhattan Mfg. & F. Co. v. Van Keuren*, 23 N. J. Eq. 251, 255.

And tenement houses built over tannery vats and declared a nuisance by the board of health in time of cholera, were held rightly destroyed, in *Meeker v. Van Benselear*, 15 Wend. 397, and *Van Wormer v. Albany*, 18 Wend. 169.

Yet the question whether a building erected inside the fire limits of a city and declared a nuisance by the city ordinance is such or not is one of fact for the jury. *Frank v. Atlanta*, 73 Ga. 423.

So, the question whether the defendant is guilty of unnecessarily erecting a building in a situation which is offensive and a nuisance to the neighborhood, or whether the inconvenience which is experienced is a necessary result of circumstances which are beyond his control, is a question for the jury and not for the court. *State v. Purse*, 4 McCord, L. 472, 474.

Under the Georgia Code, however, notice is necessary before a house can be pulled down or destroyed by such authorities in order to abate a nuisance. *Pruden v. Love*, 67 Ga. 190, 192.

And the Tennessee act of January 29, 1879, condemning all buildings, cisterns, wells, privies, and other erections in the taxing district which on inspection are found to be unhealthy as nuisances does not conflict with the provisions of the Constitution. *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173.

So, where the building or structure is erected, or encroaches, upon the highway, the same has been held to be abatable by the municipal authorities as a nuisance.

Where the erection or structure itself constitutes a nuisance, as where it is put up in a public street, its removal is necessary for the abatement of a nuisance. *Barclay v. Com.* 25 Pa. 503, 505, 64 Am. Dec. 715.

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And under an ordinance empowering the authorities to remove buildings or other obstructions or nuisances from streets, it is the city's duty to remove the same. *Parker v. Macon*, 39 Ga. 725, 729.

And this is so for the reason that the placing of a building upon a highway is a nuisance at common law. *Com. v. Blaisdell*, 107 Mass. 234; *Com. v. King*, 13 Met. 115; *Stoughton v. Porter*, 13 Allen, 191.

A stone column standing in a street so as to interfere with public travel is a nuisance per se, and may be abated in a summary way. *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553.

So, a wall extending 10 feet into a highway, even though it leaves sufficient room to pass and repass safely, is a nuisance abatable by the public authorities under the Connecticut General Statutes. *State v. Knapp*, 6 Conn. 415, 16 Am. Dec. 63.

Again, a house built beyond the street line marked out by the city surveyor may be pulled down and removed by the city authorities, the same being a nuisance as an obstruction of the street. *Daublin v. New Orleans*, 1 Mart. (La.) 135.

And the front steps leading to a dwelling house are clearly part of a building, and when they project into the highway the building is in the highway within the meaning of the Massachusetts statutes declaring such building a nuisance. *Com. v. Blaisdell*, 107 Mass. 234; *Hyde v. Middlesex County*, 2 Gray, 267.

But it has been held that Mass. Gen. Stat. chap. 19, § 13, authorizing cities to make "such rules and regulations for the erection and maintenance of balustrades, or other projections upon the roofs and sides of buildings therein as the safety of the public requires," do not confer on the municipal authorities power to pass an ordinance prohibiting the maintenance of doorsteps in the highway where such steps were lawfully placed there under the provisions of Mass. Stat. chap. 16, § 3, even though the city charter empowers the authorities to make "all such salutary and needful by-laws as towns, by the laws of this commonwealth, have power to make and establish," the words of the statute not being broad enough to authorize cities to make rules and regulations for the erection and maintenance of doorsteps within the actual limits of the highway. *Cushing v. Boston*, 128 Mass. 330, 331, 35 Am. Rep. 383.

In construing the above act the court stated that the language of the section intended to deal with those parts of a building which might project near or over the line of a highway, and which, if not properly constructed and maintained, would endanger the safety of the public, and that it did not attempt to deal with those additions to or parts of a building which might occupy the highway itself or obstruct travel thereon, and thus constitute a nuisance in a highway if not authorized by law. *Cushing v. Boston*, 128 Mass. 330, 331, 35 Am. Rep. 383.

Under Mass. Stat. 1824, chap. 16, § 3, steps projecting less than 8 feet into the highway, properly constructed and in good repair, can be lawfully maintained, and are not a nuisance, and do not consti-

suffered by the owner thereof to remain in such condition, after being notified by the department of public works to remove, repair, or rebuild the same, shall constitute a nuisance. Any building, shed, outhouse or structure of any kind that shall become filthy or unwholesome is hereby declared to be a nuisance." The part assailed by the appellee as invalid is indicated by italics. Section 2 provides that whenever the department of public works shall have knowledge "that any nuisance such as is defined in § 1 of this ordinance exists in said city, it shall thereupon make an order requiring the

owner thereof to abate the same within such time as said department may fix." This section further provides for giving notice to such owner of the order, and declares it lawful for said department to remove such buildings or structures, in whole or in part, by persons employed by it, or by letting such work by contract, etc. Section 3 contains provisions for assessing the cost of the removal of the building against the real estate in like manner as assessments of benefits are made. On July 13, 1895, the department of public works of the city, under this ordinance, made an order

tute an illegal obstruction of the highway. *Cushing v. Boston*, 123 Mass. 330, 331, 35 Am. Rep. 333, 122 Mass. 173, 124 Mass. 424.

Again, the steps of a building, and extension thereof into the public street contrary to the provisions of an ordinance specially forbidding it, are a public nuisance abatable by the public authorities. *Norfolk City v. Chamberlaine*, 29 Gratt. 534, 539.

So, it has been held that such authorities have power to remove as a public nuisance a fruit and confectionery store placed upon the sidewalk. *Com. v. Wentworth, Brightly (Pa.)* 318.

And in *People, Bentley, v. New York*, 18 Abb. N. C. 123, a mandamus was granted to compel the removal of a show case as a nuisance upon a street as extending beyond the house line.

Again, the action of the public authorities in removing show-boards and signs from the sidewalk was upheld in *Com. v. McCafferty*, 145 Mass. 384, under chap. 18, § 14, and chap. 27, § 15, Mass. Pub. Stat.

So, the obstruction of a public street or square by reason of a horse rack was declared a nuisance, and abated as such, in *Samuels v. Nashville*, 3 Sneed, 298.

And the erection of a nuisance in a public square is restrainable at the instance of the municipal authorities. *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, 82.

Upon this ground it was held that such authorities were justified in removing and abating as a public nuisance a county jail and cess-pool connected therewith situated in a public square, the same being dangerous to health. *Liano v. Liano County*, 5 Tex. Civ. App. 132.

And a city ordinance prohibiting the erection of private hospitals within the city limits upon the ground that the same may be injurious to health and so become a nuisance has been upheld in *Milne v. Davidson*, 5 Mart. N. S. 409, 18 Am. Dec. 180, 191.

II. Limit of power.

a. In general.

As to the limit of the power of municipal corporations over nuisances in general, see *note* to *Grossman v. Oakland (Or.)* 36 L. R. A. 593.

A municipal corporation without any general laws either of the city or the state within which a given structure can be shown to be a nuisance cannot, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 26, 44; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62; *Nazworthy v. Sullivan*, 55 Ill. App. 43, 51; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 503, 19 L. ed. 986.

Although a building erected in violation of a valid ordinance may be removed without reference to its character, yet cities can only condemn as nuisances, and compel the removal of, buildings which are in themselves for some reason dangerous or hurtful. *First Nat. Bank v. Sarila*, 129 Ind. 301, 13 L. R. A. 481.

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And so much only of the thing as causes the nuisance must be removed. *Babcock v. Buffalo*, 1 Sheldon, 817, 823, Affirmed 56 N. Y. 268.

While the charter may confer power upon a municipality to pass ordinances on the subject of nuisances, yet it does not confer the right to declare a particular business or structure, not condemned by any law or ordinance, a nuisance, and to have the structure removed or the business stopped or interfered with. *Lake v. Aberdeen*, 57 Miss. 280, 283.

A city council cannot declare a particular structure a nuisance in a summary manner and at its pleasure. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 503, 19 L. ed. 986.

And such authorities have no power to declare a particular structure, such as a flouring mill, not condemned by any law or ordinance, to be a nuisance, and to remove the same, even though their charter empowers them to regulate and prevent the carrying on of manufactures dangerous, causing or promoting fires, and to prevent and abate nuisances. *Lake v. Aberdeen*, 57 Miss. 280, 283.

The power given the common council, by resolution, to compel the owners or occupants of any wall or building within the city which is unsafe or ruinous, to render the same safe or to take down or remove the same and to prohibit such erections, and to require a summary removal or abatement of nuisances or substances likely to become such, from any street, lot, or building, does not authorize the corporation to enter upon private property and abate a private nuisance, and in such case it can only act indirectly by putting a command upon the owner and by punishing his disobedience under a certain section of its charter. *Cain v. Syracuse*, 95 N. Y. 83, 89.

So, they cannot, by an arbitrary ordinance, destroy private property by force or compel the owner to have it removed, if it is not a nuisance in fact, or so declared by the ordinance, and shown to be such by its location in the city or town, or by its sanitary condition. *Pieri v. Sheldaboro*, 42 Miss. 498, 495.

Again, structures attached to a public market cannot be summarily removed or destroyed by the public authorities. *Hoffman v. Schultz*, 31 How. Pr. 385, 386.

A municipal corporation before it can, by its mere declaration that a dwelling house is a nuisance, subject it to removal, must first resort to some proper judicial proceeding, giving the owner or occupant an opportunity to be heard. *Teas v. St. Albans*, 38 W. Va. 1, 19 L. R. A. 802, in which case it was sought to restrain the action of the city authorities in tearing down the plaintiff's house, which was alleged to encroach on a public street.

And this is so for the reason that the right of property cannot be invaded under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. *Austin v. Murray*, 16 Pick. 121, 126, in which case the Massachusetts Statutes of 1832, chapter 150, establishing a board of health for the town of Charleston, and the burial

as follows: "And now it is ordered by the department of public works of the city of Evansville: That whereas, the buildings situated on last 6, 7, 8, and 9 in block 7 in Goodsell's enlargement in said city have been partially destroyed by fire, and have been suffered by the owner thereof to remain in such condition for a period of twelve months, and by reason thereof have created a nuisance: Now, therefore, it is ordered by said department that the owner of said real estate abate said nuisance by the removal of the whole of said building, or so much thereof as remains unconsumed,

together with all offal, dirt, *débris* of every kind, situate thereon, on or before the 17th day of August, 1893. And, it appearing that John A. Miller, the owner of said real estate, is a non-resident of the city of Evansville, it is ordered that he be notified of this resolution by publication in a newspaper published in said city. At the expiration of said time, if such owner shall not have abated such nuisance, this department will proceed to abate the same by the removal of such structure, and by such other means as may be deemed necessary." After the time designated in this order for the

of the dead in a certain burying ground, was held invalid upon the above ground as absolutely prohibiting the use of property, and upon the further ground that it was wholly unauthorized by the act of the legislature.

The action of the trustees of a village under their charter, in declaring an encroachment, by building 6 feet into a street, to be a nuisance, is not conclusive of the fact that the same is a nuisance, the same not being a nuisance *per se*, and therefore its removal as a nuisance by a committee appointed by them is unwarranted. *Howard v. Robbins*, 1 Lans. 63.

In *People, Copcutt, v. Yonkers Bd. of Health*, 140 N. Y. 1, 23 L. R. A. 481, the court stated that whoever abates an alleged nuisance, and thus destroys and injures private property or interferes with private rights, whether he is a public officer or a private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and, when his act is challenged in the regular judicial tribunals, to protect him, it must appear that the thing abated is a nuisance in fact.

And it is not allowable for one or more citizens to exhibit a bill of complaint, alleging that certain buildings or operations are a nuisance, not within any law or ordinance previously passed and operating on all, but because of certain facts set forth in the petition, and to procure a decree to abate such alleged nuisance, not as being a violation of a precedent enactment, but by virtue of a decree of the mayor and selectmen that it is so in the given case. *Lake v. Aberdeen*, 57 Miss. 260, 263, in this case the authorities sought to declare a flouring mill a nuisance, and to have it taken down or removed as such on the petition of the citizens.

At common law, municipal corporations are only authorized to interfere with the erection and repair of buildings so far as to prevent the doing of that which from its nature would have a tendency to create or enhance danger and so become nuisances. *First Nat. Bank v. Sarlis*, 129 Ind. 201, 13 L. R. A. 481.

So, towns may not, in their corporate capacity, proceed by adversary methods by their own trustees, to adjudge a particular property or structure a nuisance, and by order against the owner secure its abatement. *American Furniture Co. v. Batesville*, 139 Ind. 77, and 35 N. E. 682.

And a city cannot, by means of its ordinance enacted under the terms of its charter, prohibit the building of any house in a certain locality and on certain roads or streets, without a special permit, and declare such house a nuisance, especially where it only cut off the breeze from, and the view of, the adjoining property, and such an ordinance is void and unconstitutional as the harmless, proper, and ordinary use of property cannot be converted into a nuisance by a mere declaration making it such. *Quintini v. Bay St. Louis*, 84 Miss. 483, 60 Am. Rep. 62.

And a special charter authorizing the council of a city not incorporated or acting under the general law of corporations of cities, "to regulate all wharves on the shore of the Ohio river adjoining 38 L. R. A.

the said city, whether the same be public or private, and the amount of wharfage to be charged at or for the use of the same" does not give the city authorities power, by ordinance, to declare certain things thereon erected or placed to be nuisances, or to provide for the establishment of a water line at high-water mark, and to declare any buildings or erections below such line of high-water mark at any place within the corporate limits of the city to be a nuisance. *Evansville v. Martin*, 41 Ind. 145.

So, in *EVANSVILLE v. MILLER* it is held that a city, authorized by statute to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing or suffering the same to exist, cannot declare a partially burned building to be a nuisance, for the reason that by so doing it attempts to declare that a nuisance which in fact cannot be said to be so; and even though such power may be conferred by the legislature it is utterly inoperative, unless the thing declared to be a nuisance is one in fact, or is created or erected after the adoption of the ordinance and in defiance thereof.

b. To destroy.

Where the nuisance is not in the building itself, but in the use to which it is put, the authorities cannot declare the building a nuisance and order its removal, but the cause of the offense must be removed. *Nazworthy v. Sullivan*, 55 Ill. App. 48, 51; *Dupree v. Brunswick*, 82 Ga. 727, 729; *First Nat. Bank v. Sarlis*, 129 Ind. 201, 13 L. R. A. 481; *Czarniecki v. Bollman (Pa.)* 10 Cent. Rep. 96; *Chicago v. Union Stock Yards & T. Co.* 164 Ill. 224, 35 L. R. A. 281; *Reg. v. Pappineau*, 1 Strange, 686; *Brown v. Perkins*, 12 Gray, 89, 100.

A building is not to be torn down or removed when the nuisance consists in the use to which it is put, and not in the building itself. *Allison v. Richmond*, 51 Mo. App. 183, 186.

So, where a nuisance is not caused by the erection of buildings themselves, but by the persons who resort thereto, the municipal authorities have sufficient power to suppress the nuisance without resorting to the demolition of the building. *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

And the town council have no such power to declare premises, left unoccupied, and resorted to by various persons as a "sink," a nuisance, and to order its sale and removal, the nuisance not being in the building itself, but in the use of it by the persons who resorted thereto. *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242.

Property is not to be destroyed until its destruction is lawfully ascertained to be necessary in order to stop the nuisance and then no other, or no more, of it is to be destroyed than is thus determined to be needful to effect that object. *Shepard v. People*, 40 Mich. 487, 492. *Welch v. Stowell*, 2 Dougl. (Mich.) 382; *Bloomhuff v. State*, 8 Blackf. 206; *State v. Kaster*, 35 Iowa, 221; *Finley v. Hershey*, 41 Iowa, 899; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Miller v. Burch*, 32 Tex. 208, 5 Am. Rep. 242, to the same effect.

removal of the building, the appellee, the board of public works, made the following order for its removal: "It is hereby ordered and directed by the board of public works of the city of Evansville that the clerk advertise for bids for removing all that part of the 'Jordan Giles' residence on Washington avenue, above the stone foundation, stacking all good lumber and brick on the premises, and removing all rubbish and burnt lumber from the premises."

It was admitted by the parties in the lower court that the proceedings by the city in the

matter in controversy were regular and consistent with the requirements of the ordinance, and that the assessment to the amount of \$199 was made against the real estate of appellee as alleged in the complaint, and that appellant Schwacke had complied with his contract in removing the partially destroyed building from the premises in question. It is clear, we think, that the city of Evansville, through her duly constituted authorities, in ordering the removal of this partially destroyed building, and in assessing the expense of such work upon appellee's real estate, proceeded under that

Even though buildings which have been condemned to destruction by a board of health as being nuisances detrimental to public health may not have been capable of being made fit for habitation, yet if they can be so put in repair that the ill smells will be removed and the sources of contagion taken away, the buildings will cease to be a nuisance, and the fact that they might not thereby be made fit for habitation would not authorize their destruction, and if they cease to be in such a condition as to bring pestilence and spread disease, and are rendered innoxious the owner of them has a right to have them remain upon the premises even though he may not be permitted to use them as tenement houses, for the reason that there are other uses to which he may lawfully put them, and the undoubted power of the public to refuse him permission to rent them for human habitation would not necessarily involve the right to destroy them if they were not used for that purpose. *New York Health Dept. v. Dassori*, 21 App. Div. 348.

If buildings which have been condemned to destruction by a board of health were themselves put into a proper condition the fact that they were located within a short distance of other buildings used as tenement houses, and that the close proximity of the two deprived each of them of the ventilation necessary to render them fit for the use to which the owners intended to put them, namely, that of habitation, yet such fact would not warrant the destruction of the buildings although it might furnish a good reason why the other buildings, not being supplied with sufficient air so that they could be occupied by a number of people, might be vacated. *New York Health Dept. v. Dassori*, 21 App. Div. 348.

In such cases the right to condemn grows out of the right to destroy the building because it is a public nuisance and can be abated in no other way, and unless that is made to appear there can be no final order for condemnation. *New York Health Dept. v. Dassori*, 21 App. Div. 348.

The object of the New York consolidated act, Laws 1882, chap. 410, as amended by chap. 587 of the Laws of 1895, giving power to the board of health to condemn buildings for the purpose of suppressing nuisances, was to meet evils seriously causing severe epidemics to suppress which it is necessary to take summary measures to prevent such nuisances. *New York Health Dept. v. Dassori*, 21 App. Div. 348.

All that the owner of any building can be called upon to do with regard to that building if he desires to use it as a tenement house is to keep it in such a condition as the statute requires, and if he does so he has complied with the law and his building is not a nuisance, and he cannot be compelled to submit to the destruction of his building if on his own land, for the reason that other buildings adjacent to it are deprived of proper ventilation. *New York Health Dept. v. Dassori*, 21 App. Div. 348.

So, property cannot be declared a nuisance for the purpose of devoting it to destruction. *Lawton v. Steele*, 119 N. Y. 220, 7 L. R. A. 134. 383 L. R. A.

The power to abate nuisances does not warrant the destruction of valuable property lawfully erected, or of a thing erected by lawful authority. *First Nat. Bank v. Sarila*, 129 Ind. 201, 18 L. R. A. 481.

A building cannot be abated simply on account of its noxious use, if not absolutely necessary to prevent it; the nuisance itself must only be abated and nothing more. *State, Rodwell, v. Newark*, 34 N. J. L. 284, 287.

And where the offense consists in the wrongful use of what is harmless in itself the remedy is to stop such use and not to tear down or remove the structure. *United States Illuminating Co. v. Grant*, 55 Hun. 225; *Moody v. Niagara County Supers.* 46 Barb. 659, 665, 666; *Barclay v. Com.* 25 Pa. 503, 64 Am. Dec. 715.

Where a barn was used for the feeding of cattle, and in such a manner as to render the water of a spring in near proximity thereto impure, thereby creating a nuisance, it was held that the remedy was not to tear down defendant's barn, but to prevent its use for such purposes. *Barclay v. Com.* 25 Pa. 503, 606, 64 Am. Dec. 715.

In *New York Health Dept. v. Dassori*, 21 App. Div. 348, the board of health sought to destroy the plaintiff's buildings as being a public nuisance detrimental to health, upon the ground that the bedrooms in the same had no ventilation whatever except such as they might get from living rooms, or from the window opening on an ill-smelling and narrow court; and that the buildings were occupied by school sinks, the cellars opening into a court yard with no other means of ventilation; that the same were damp and the smells from the cellars went through the whole house and were almost unendurable; the stairways being narrow and steep, always dark and foul, smoke and coal gas from defective chimney flues discoloring the walls and ceilings, the roofs leaking, the houses swarming with vermin throughout, every room being damp and filled with air foul and unfit to breathe; with no possibility of the sun shining into the building, the death rate in these buildings being considerable higher than the death rate in the ward, the infant death rate there being abnormally high, the deaths being largely caused by diseases nourished by the dampness and exposure to the foul air, which facts were entirely undisputed and unexplained. The court held that even though such facts existed, yet they did not sufficiently establish the fact that they were not capable of being made fit for habitation, or that the nuisance upon them could not be abated in any other way than by destruction, the evidence showing that the unsanitary condition of the buildings was caused to a considerable extent, if not entirely, by the filthy habits of the persons who inhabited them, and grew out of the fact that they were used for human habitation; and further, it did not appear that after the buildings had been vacated they might not easily have been put into a sanitary condition by proper repairs and the removal of the offensive apertures, and that such being the case the proper remedy was not the destruction of said buildings but the abatement of the nuisance by

part of § 1 of the ordinance which declares that any building, etc., that shall be partially destroyed by fire, etc., and suffered by the owner to remain in such condition after being notified, etc., to remove, repair, etc., shall constitute a nuisance. The controlling question, therefore, for our decision is that which relates to the validity of this portion of the ordinance, for as this is the basis upon which the city's proceedings rest, its invalidity must necessarily render them inoperative and void. Counsel for appellee deny that the common council of the city of Evansville has,

either expressly or impliedly, the power to declare by an ordinance that a building partially destroyed and suffered to remain in that condition shall, by reason of such facts alone, necessarily constitute a nuisance. It will be seen that the ordinance in dispute ordains that any building, etc., partially destroyed by fire, or any other cause, and suffered to remain in such condition after notice to the owner, etc., shall constitute a nuisance. The latter is declared to exist as the result of these naked facts, and authority is given to the department of public works to abate such declared nuisance,

putting them in a fit condition so as to render them capable of being used for other purposes, if not as habitations, for the reason that a thing which is a nuisance because of the use to which it is put cannot be destroyed by way of abating the nuisance unless the destruction is necessary, and if the nuisance can be abated by discontinuing the use it must be abated in that way.

The court distinguished the above case of *New York Health Dept. v. Dasso*, 21 App. Div. 348, from the earlier case of *Meeker v. Van Rensselaer*, 15 Wend. 397, which has been looked upon as establishing the proposition that a building which is in a filthy condition and calculated to breed disease, thereby becoming a public nuisance, might be torn down by way of abating the nuisance; but the court stated that such latter case was decided upon the facts of that case, which made it proper that the only way of abating the nuisance was by the destruction of the building, and for that reason alone the court held the destruction of the building justifiable in that case, no such facts appearing in the case then before the court.

But in *Golden v. New York Health Dept.*, 21 App. Div. 421, which was an appeal taken from a judgment rendered in the court below in favor of the defendants, the board of health had ordered certain buildings belonging to the plaintiff, which they alleged were not fit for human habitation by reason of defects, to be vacated and destroyed as a public nuisance, the plaintiffs contended that the defendant's orders were not conclusive of the question, and the court upheld such contention, holding that the proceedings by the board of health were reviewable by the courts, the proper protection of the rights of property owners making it necessary that they should have an opportunity to be heard in the courts as to the existence of the nuisance, upon the allegation of which the board of health practically took away the value of their property or destroyed it. In this case the court relied upon the earlier cases of *People, Copcutt v. Yonkers Bd. of Health*, 140 N. Y. 1, 23 L. R. A. 481; *Yonkers Bd. of Health v. Copcutt*, 140 N. Y. 120, 23 L. R. A. 485; *New York Health Dept. v. Trinity Church*, 145 N. Y. 23, 27 L. R. A. 710.

In the case of *New York Health Dept. v. Weekes*, 47 N. Y. Supp. 913, the health department sought to condemn certain real property under the authority of chapter 567 of the Laws of 1895, as amended by chapter 57 of the laws of 1897, which authorized the destruction of buildings which were not fit for human habitation and were incapable of being rendered so; but the question turned upon the right of review on a decision as to facts, and did not show in what way the building in question constituted a nuisance.

Again, an old building used for the storage of various articles cannot be itself declared a nuisance, torn down, and hauled away by the city as being in a dangerous situation and annoying to the public, where the public records do not show any establishment of, or that such building is within, the fire limits, or that the building has been erected since its establishment, and in violation of its order,

such building being not itself a nuisance, and therefore its arbitrary destruction by the city is the violation of a right of property. *Allison v. Richmond*, 51 Mo. App. 133, 136.

In a case where the city authorities claimed power under their charter to remove any forge, blacksmith shop, or other structure within the city where in their opinion it was necessary so to do in order to insure against fire, also to remove any stovepipe that should endanger the city by fire, it was held that they had no power to remove the building of a blacksmith shop where there was no necessity so to do, the building itself being harmless and the sparks emitted from the forge used therein being the danger, and the court therefore condemned the removal of the building itself and confined the action of the authorities to the removal of the forge used therein. *Dupree v. Brunswick*, 82 Ga. 727, 729.

So, the destruction of a house as a nuisance upon the report of the building inspectors and engineer of the city, where the city charter confers authority upon the municipal authorities to act, and cause nuisances to be abated which are likely "to endanger the health of the city or of any neighborhood" only upon the report of the board of health and in pursuance of its recommendation. *Frank v. Atlanta*, 72 Ga. 423, 432.

Buildings in which particular trades are carried on, or houses which are kept in a disorderly manner, or used for unlawful purposes, are not nuisances *per se*, but it is the abuse of them which constitutes the nuisance. *Miller v. Burch*, 82 Tex. 208, 5 Am. Rep. 242; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 685; *Dargan v. Waddill*, 9 Ired. L. 244, 49 Am. Rep. 421; *Welch v. Stowell*, 2 Dougl. (Mich.) 332; *Czarniecki v. Bollman* (Pa.) 10 Cent. Rep. 90; *Hex v. Pappineau*, 1 Strange, 636; *Chicago v. Union Stock Yards & T. Co.*, 164 Ill. 224, 35 L. R. A. 281.

So, in the case of a lawful business, carried on in a certain locality, declared a nuisance by a state statute, the nuisance consists in the use of the building for the purposes of such business, and not in the location of the building itself, and it cannot be abated by the public destroying the building without making the town liable for the damages occasioned thereby. *Brightman v. Bristol*, 65 Me. 436, 20 Am. Rep. 711.

Although a house kept as a house of ill fame and as a resort for thieves and other disreputable people is a public and common nuisance, yet such fact will not enable the public authorities to destroy the building and its furniture in order to abate such nuisance, and such a proceeding is therefore unlawful. *Ely v. Niagara County Supers.* 36 N. Y. 297, 300.

But a different rule would appear to exist where the building itself is of a highly inflammable and combustible nature. See *Fields v. Stuckley*, 99 Pa. 306, 44 Am. Rep. 100.

And in such cases the power of the common council is limited to the prevention and suppression of the nuisances even though the ordinance declares them to be nuisances and orders their abatement. *Welch v. Stowell*, 2 Dougl. (Mich.) 332.

sance at the expense of the owner of the property. These facts alone are the test. The ordinance erects no other standard by which the supposed nuisance is to be measured or determined. No reference or regard whatever is had as to the condition, character, situation, or surroundings, which might tend to render the buildings unsafe in any manner to the public, or a detriment to the health or inconvenience of the public. There is an entire absence of facts declared, tending to show that, if such partially destroyed building is suffered to remain, it may be productive of annoyance

or injury to the public. That such a building may become a nuisance, if maintained, by reason of the ruinous and weak condition of its walls or other parts, thereby rendering them liable to fall and do injury to persons passing by, or resulting in injury to an adjoining owner, is a well-established legal proposition. It is said by an eminent author that such a building as last mentioned, on a public street, is a public nuisance, and a private nuisance to those owning property adjacent to it. Wood, Nuisance, § 109. It is evident, however, that in such a case the nuisance would consist, not

It must be an extreme case which will authorize the municipal authorities of a city to doom a house to destruction by a simple resolution declaring it to be a house of ill fame and a nuisance. Welch v. Stowell, 3 Dougl. (Mich.) 332.

And the law of necessity alone will justify the common council of a city in resorting to the destruction of property in order to suppress houses of ill fame. Welch v. Stowell, 3 Dougl. (Mich.) 332.

As to the right to interfere in the case of particular trades as nuisances, see note to *Ex parte Lacey* (Cal.) — L. R. A. —.

The power to destroy buildings in order to remove the danger caused by the structure itself as distinguished from its use is further treated of in the cases of wooden buildings, *infra*, IV., and also in cases under I., *supra*.

III. Over the use of buildings.

The question of municipal control over nuisances arising from particular trades will be found discussed in note to *Ex parte Lacey* (Cal.) — L. R. A. —.

Where the nuisance consists in the use to which the building is put, the remedy is to stop such use. *Barclay v. Com.* 25 Pa. 503, 505, 64 Am. Dec. 715; *Nazworthy v. Sullivan*, 55 Ill. App. 48, 51; *Allison v. Richmond*, 51 Mo. App. 133, 136; *Miller v. Burch*, 82 Tex. 208, 5 Am. Rep. 242; *Ely v. Niagara County Supers.* 36 N. Y. 297, 300; *Moody v. Niagara County Supers.* 46 Barb. 659; *United States Illuminating Co. v. Grant*, 55 Hun, 222, *dictum*; Welch v. Stowell, 3 Dougl. (Mich.) 332; *State, Rodwell, v. Newark*, 34 N. J. L. 264, 267; *Dupree v. Brunswick*, 82 Ga. 727; *Chicago v. Union Stock Yards & T. Co.* 184 Ill. 224, 35 L. R. A. 231; *Czarniecki v. Bollman* (Pa.) 10 Cent. Rep. 96; *Reg. v. Pappineau*, 1 Strange, 686; *Brown v. Perkins*, 12 Gray, 89, 100.

So with respect to the use to which real property may be put it is said, every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. *McKibbin v. Fort Smith*, 35 Ark. 382, 385.

The city government has the general power to so regulate the use and enjoyment of private property in the city as to prevent its proving pernicious to the citizens generally. It may, when the use to which the owner devotes his property becomes a nuisance, compel him to cease so to use it, and punish him for refusing to obey its ordinances or regulations concerning such use. *Louisville City R. Co. v. Louisville*, 8 Bush, 416, 422; *Ashbrook v. Com.* 1 Bush, 139.

And this is so for the reason that the power to interfere with the citizen in the use and enjoyment of his property is indispensable to government. *Louisville City R. Co. v. Louisville*, 8 Bush, 416, 422.

Police regulations which direct the use of private property so as to prevent its proving pernicious to the citizens at large, and thus becoming a nuisance, are not void although they may in some measure interfere with private rights without providing

compensation. *Harvey v. Dewoody*, 18 Ark. 253, 259. To the same effect, *Baker v. Boston*, 13 Pick. 194; *Vanderbilt v. Adams*, 7 Cow. 349; *Stuyvesant v. New York*, 7 Cow. 538; *State, Marshall, v. Cadwalader*, 31 N. J. L. 233, 234.

The legislature may prohibit the use of land which the common law would regard as a nuisance if it endangers adjoining houses or the highway, and may authorize cities and towns by ordinances and by-laws to make similar prohibitions. *Com. v. Parks*, 155 Mass. 531, 532; *Salem v. Maynes*, 123 Mass. 372, 375; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 223.

Under the Pennsylvania statutes of 1849, the board of health have power "to remove the cause of all nuisances that now exist or may hereafter be created," and therefore they have power to order a lot upon which a nuisance exists to be fenced in, the absence of such fence being the reason of the nuisance, allowing persons by reason of its non-existence to deposit filth thereon. *Wistar v. Addicks*, 9 Phila. 145.

Where, by the city charter, all nuisances are under the supervision of the town authorities, and the act provides for a board of health whose duty it is to report all nuisances, and thereupon they are to be summarily abated, although the powers so given to the town by such charter are broader than those conferred by the Georgia general laws of 1833, yet the city authorities have full power under such charter to abate a nuisance on the report of the board of health, and therefore the abatement of a nuisance, such as a mill and machinery run by water, is valid even though nuisances of that character are provided for in the act of 1833. *Montezuma v. Minor*, 70 Ga. 191.

A city ordinance providing, *inter alia*, that the keeping or controlling of any house or building within the corporate limits of the city, where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane or vulgar language to the disturbance of others, is a common nuisance, is valid under § 456 of the Iowa Code; and as such ordinance, or the information filed thereunder, does not charge an unlawful assemblage, or the nuisance as defined by statute, the same is not void for the reason that the offense referred to therein is punishable under the laws of the state. *Centerville v. Miller*, 57 Iowa, 56 and 225.

Yet a trade, occupation, or establishment, or a thing useful in its character, and which in the common experience and observation of men is not a nuisance in fact, cannot be conclusively declared to be a nuisance by the council of a city. *Harrison v. Lewiston*, 48 Ill. App. 164, 165.

See further as to nuisances by trade or business, the note to *Ex parte Lacey* (Cal.) — L. R. A. —.

To make an occupation, indispensable to the health and comfort of a civilized man, and the use of property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, are simply to confiscate property and deprive its owner of it without due process of law, and it also abridges the liberty of the owner

alone in the fact that the building was one that had been partially destroyed, but in its being maintained in its unsafe or dangerous condition. It may, however, be maintained in a partially destroyed condition, and yet be harmless in all respects; the unsafe condition thereof depending upon the extent of the destruction; and another feature to be considered would be whether it was remote from a public street or passway. But the ordinance does not take into account any of these facts or features, but expressly condemns and outlaws as a nuisance the maintaining of any partially

destroyed building without regard to its character as to danger by reason of its weak condition or location or surroundings. By § 23 of the act under which the city of Evansville is operating, its common council is empowered to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing the same or suffering it to exist. Acts 1895, p. 259. But the rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in

to select his own occupation and his own methods in the pursuit of happiness, and prevents him from enjoying his rights, privileges, and immunities, and deprives him of the equal protection of the laws secured to every person by the United States Constitution. *Re Sam Kee*, 81 Fed. Rep. 680.

So, the particular use of property declared a nuisance by an ordinance of a municipal corporation does not make such use a nuisance, unless it be so in fact according to the common-law or statutory definition of a nuisance. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, 107.

And a law or ordinance which denies to the owner of property the right to conduct thereon a lawful business is invalid unless the business to which it relates is of such a noxious or offensive character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality. *Ex parte Whitwell*, 98 Cal. 73, 83, 19 L. R. A. 727.

The power to prevent nuisances does not directly or by implication carry with it the authority to hold the owner of a building, who may never himself visit it, responsible for the nuisance of keeping a house of ill fame, committed by his tenant without his knowledge or consent, and such a by-law is not only unauthorized but unreasonable. *State v. Webber*, 107 N. C. 963, 966.

An ordinance passed or amended after a decision prohibiting the erection of a wheel, such as the Ferris wheel, in a special locality, which prohibits the operation of such a wheel within a district created especially to include such locality, is not in any sense a regulation, but is an attempt at prohibition, which is an unlawful interference with the right to use private property, when such creates neither a private nor a public nuisance, nor is a nuisance *per se*, nor even a public nuisance with which the municipal authorities have power to interfere. *Ferris Wheel Co. v. Chicago*, 27 Chicago Legal News, 869.

A city cannot by ordinance, whatever its provisions, recover a penalty of an individual for keeping within the city limits articles of property which otherwise might be owned and kept, merely because they emit a disagreeable odor, the same not being a nuisance *per se*. *Lippman v. South Bond*, 84 Ind. 276, 279.

A city ordinance passed for the purpose of regulating the building and conducting of private hospitals within the city limits is not within the provisions of a statute incorporating a town which empowers the city authorities to enforce ordinances to erect and establish, *inter alia*, hospitals, hospitals therein referred to being public and not private; neither is such an ordinance valid as coming within the general power of a city over the public welfare and for the abatement of nuisance; neither is it a proper exercise of the implied powers of a city. *Bessones v. Indianapolis*, 71 Ind. 189, 195.

Hospitals and homes for the sick are not nuisances *per se*. *Bessones v. Indianapolis*, 71 Ind. 189, 195.

An asylum for the treatment of mild cases of insanity will not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of the occupants of such dwellings or schools. *Ex parte Whitwell*, 98 Cal. 73, 83, 19 L. R. A. 727.

Such an asylum for the treatment of mild forms of insanity is not like a private asylum for the confinement of dangerous lunatics, or a hospital for the treatment of loathsome or contagious diseases, and the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughterhouses, soap factories, tanneries with their offensive smells, magazines for the storing of powder, and powder mills with their attendant dangers, or any business or occupation which seriously interferes with the health or comfort of others, if permitted in such localities, do not apply to a hospital whose inmates are harmless, even though insane. *Ex parte Whitwell*, 98 Cal. 73, 83, 19 L. R. A. 727.

The fact that a stock-yard company in operating a railroad through a city creates a nuisance by the transportation of live stock or substances injurious to the health and general welfare of the community does not justify the city in removing its tracks from the streets as the easiest way of abating the nuisance, to the destruction of the value of the entire road,—especially where it is authorized by its charter to transport between railroads freight and property of every kind, inasmuch as the unlawful use may be prevented without destroying the structure which has been lawfully erected. *Chicago v. Union Stock Yards & T. Co.* 164 Ill. 234, 85 L. R. A. 231.

IV. *Wooden and frame buildings.*
The power of a municipal corporation to regulate or restrain the erection of wooden or frame buildings within its limits or within specified districts has, in many cases, been upheld as a valid exercise of the police power, although the provisions of the city ordinance upon the subject have not expressly declared such buildings to be nuisances. The following cases support this power: *Montgomery v. Louisville & N. R. Co.* 84 Ala. 127; *Canepa v. Birmingham*, 92 Ala. 368; *McCloskey v. Kreling*, 78 Cal. 511; *Ex parte Fiske*, 72 Cal. 125; *Re Yick Wo*, 68 Cal. 204, 207, 58 Am. Rep. 12; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *Tuttle v. State*, 4 Conn. 68; *Townsend v. Hoadley*, 12 Conn. 541; *Brown v. Hunn*, 27 Conn. 382, 71 Am. Dec. 71; *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383; *Stamford v. Studwell*, 60 Conn. 85; *Des Moines v. Gilchrist*, 67 Iowa, 210, 56 Am. Rep. 341; *Keokuk v. Scroggs*, 89 Iowa, 447; *State v. Schuchardt*, 42 La. Ann. 49; *State v. O'Neill*, 49 La. Ann. 1171; *Com. v. Tewksbury*, 11 Met. 55, 58; *Coffin v. Nantucket*, 5 Cush. 299; *Cordes v. Miller*, 39 Mich. 581, 38 Am. Rep. 430; *Hines v. Charlotte*, 72 Mich. 278; *Alexander v. Greenville*, 54 Miss. 669; *Eichlenlaub v. St. Joseph*, 113 Mo. 395, 18 L. R. A. 590; *State, Thompson, v. Kearney*, 25 Neb. 262; *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. C. 472; *New York Fire Dept.*

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fact is not. *First Nat. Bank v. Sarile*, 129 Ind. 201, 13 L. R. A. 481, and authorities there cited; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Des Plaines v. Poyer*, 123 Ill. 848; *Denter v. Mullen*, 7 Colo. 345; *Erevelt v. Council Bluffs*, 46 Iowa, 68; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Tiedeman*, Pol. Power, § 122; *Wood, Nuisances*, §§ 742-744; *Lippman v. South Bend*, 84 Ind. 276; *Dill. Mun. Corp.* § 874; *State v. Jersey City*, 29 N. J. L. 170; *Beach*, Pub. Corp. §§ 1026, 1029, 1031.

In *Yates v. Milwaukee*, 77 U. S. 10 Wall.

497, 19 L. ed. 984, the Supreme Court of the United States, in considering the power conferred upon the city of Milwaukee to declare what shall constitute a nuisance, per Justice Miller, said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property

v. Buffum, 2 E. D. Smith, 511; *New York Fire Dept. v. Buhler*, 35 N. Y. 177; *Ogden v. Welden*, 40 N. Y. 8, R. 235; *Cleveland v. Lenze*, 27 Ohio St. 333; *Hubbard v. Medford*, 20 Or. 315; *Hortman v. Young*, 18 Phila. 19; *Aldrich v. Howard*, 7 R. I. 199; *Olympia v. Mann*, 1 Wash. 839, 12 L. R. A. 155; *Carroll v. Lynchburg*, 84 Va. 803.

But in *Kneedler v. Norristown*, 100 Pa. 363, 45 Am. Rep. 384, the power of the borough to prohibit the erection of frame buildings within the limits of the city was denied, the charter of the borough containing no authority to enact ordinances prohibiting the erection of such buildings, the grant of the general power conferred upon the borough containing nothing from which an authority can be necessarily inferred or to which it is indispensable.

Again, under an act authorizing the corporation to pass by-laws to prevent the erection of wooden buildings within such parts of the city as the corporation may define, a by-law of the city council defining fire limits and prohibiting the erection of any building within such limits other than of stone, brick, iron, or other material of an incombustible nature is declared void, in *Atty. Gen. v. Campbell*, 19 Grant, Ch. (U. C.) 299.

And so, a by-law of a city passed under Ontario Rev. Stat. chap. 174, § 467, subsec. 6, which defines fire limits and describes the manner in which buildings are to be erected, and also restricts the relaying or recovering the roof of existing buildings, except in the manner prescribed by such ordinance, is held to be *ultra vires* so far as it relates to existing buildings. *Reg. v. Howard*, 4 Ont. Rep. 377.

So, it has been said that while the legislative power to authorize the prohibition of the erection of wooden buildings may be conceded, yet the nature of the power is so high, and the subjects themselves so various, that it is not naturally embraced in the subordinate power to declare and abate nuisances, fire limits having been generally treated as distinct and provided for by separate and distinct grants of power under the Texas laws. *Pye v. Peterson*, 45 Tex. 512, 23 Am. Rep. 608.

Yet, on the other hand, it has been stated that under the general welfare clause found in the charters of municipal corporations such bodies may regulate, *inter alia*, the manner of constructing buildings, the places where wooden buildings may be built, and may also prohibit the storage of inflammable substances in insecure structures. *Clark v. South Bend*, 85 Ind. 276, 278, 44 Am. Rep. 13, 15; *Williams v. Augusta*, 4 Ga. 509; *Frederick v. Augusta*, 5 Ga. 561; *Charleston v. Elford*, 1 McMill. L. 234; *Brady v. North Western Ins. Co.* 11 Mich. 425; *Douglass v. Com.* 2 Rawle, 232; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 183; *Vanderbilt v. Adams*, 17 Cow. 349; *Monroe v. Hoffman*, 29 La. Ann. 651, 652, 29 Am. Rep. 345, 346.

Such a right must exist *ex necessitate*, without special legislative authority, upon the principles of the maxim *sic utere tuo ut alienum non laedas*. *Monroe v. Hoffman*, 29 La. Ann. 651, 656, 29 Am. Rep. 345, 346.

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In *Hawley v. Harrell*, 19 Conn. 142, the power of the local authorities to remove wooden buildings from the streets as an obstruction and nuisance preventing street improvements, especially after notice to the owner, was upheld.

And again, in *Cheek v. Aurora*, 92 Ind. 107, 112, 113, the same power was upheld where such buildings had become nuisances as obstructing the streets.

So, with respect to the right of a municipal corporation to destroy buildings in order to prevent the spreading of fire, this is generally held to be a valid exercise of the police power, although the ordinance granting such power may not have placed the same upon the ground of nuisance. *Coffin v. Nantucket*, 5 Cush. 269; *Russell v. New York*, 2 Denio, 461; *People v. Brisbane*, 76 N. Y. 553, 32 Am. Rep. 337; *New York v. Lord*, 17 Wend. 285, 18 Wend. 126; *Stone v. New York*, 25 Wend. 157; *White v. Charleston*, 2 Hill, L. 571; *Keller v. Corpus Christi*, 60 Tex. 614, 32 Am. Rep. 613; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46.

In many cases, however, it has been sought to declare the erection of wooden or frame buildings contrary to the provisions of the city ordinance a nuisance, and the following cases show the light in which the courts have regarded this subject.

As in other cases involving the question of municipal control over nuisances, the authorities can exercise only such powers as are expressly or impliedly conferred by their charter, such powers being strictly construed, the restrictions placed upon such buildings being regarded as invasions of private rights. *Keokuk v. Scroggs*, 39 Iowa, 447; *Pratt v. Litchfield*, 62 Conn. 112, 113; *Booth v. State*, 4 Conn. 63.

A wooden building, though erected contrary to law, is not *per se* a public nuisance, although it may become such by the manner in which it is used or allowed to be used. *Fields v. Stokley*, 90 Pa. 206, 44 Am. Rep. 109.

And the erection of a wooden building within the limits of a city or village is not in and of itself a nuisance; neither does the fact that such erection is prohibited by ordinance make it a nuisance. *St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671.

Again, such a building, not being a nuisance *per se*, cannot, when erected, be abated by ordinance as being within fire limits afterwards established. *Allison v. Richmond*, 51 Mo. App. 133, 136; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 183; *Klingler v. Bickel*, 117 Pa. 333.

Neither in its legal or general meaning does the word "nuisance" apply to wooden buildings either in cities or towns, and their erection and occupation are an ordinary exercise of property right, and do not fall within the definition of a nuisance at common law. *Pye v. Peterson*, 45 Tex. 512, 23 Am. Rep. 608. Here the nuisances sought to be suppressed was wooden buildings erected within certain fire limits established by the municipality.

But when a wooden building is erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance, and if the locality and character of such a

of the city, at the uncontrolled will of the temporary local authorities." In the case of *Lake View v. Letz*, 44 Ill. 81, it is said: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances." In *Tiedeman, Pol Power*, 122a, it is said: "A certain use of lands, harmless in itself, does not become a nuisance, because the legislature has declared it to be so." In *Denver v. Mullen*, 7 Colo. 345, the supreme court of Colorado, in construing a provision

in the charter of the city of Denver conferring authority upon its council to declare what shall be a nuisance, and to prevent and abate the same, held that such conferred power did not authorize the council to arbitrarily declare any particular thing a nuisance which had not theretofore been pronounced such by law, or so adjudged by a judicial determination. In the course of the opinion, on page 353, 7 Colo., the court said: "The proper construction of this language is that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to

building endanger the safety of surrounding buildings it may be treated as a nuisance, and a governmental body having authority to legislate upon such subjects may prohibit its erection in places where it would endanger the safety of surrounding property. *Baumgartner v. Hasty*, 100 Ind. 575, 578, 50 Am. Rep. 830.

Municipal corporations, pursuant to the powers conferred upon them, may remove or compel the removal of wooden buildings erected in violation of a valid ordinance; not necessarily because the building thus erected is a nuisance, but because its erection is a violation of the ordinance and in defiance of the law. *First Nat. Bank v. Sarlis*, 129 Ind. 201, 18 L. R. A. 481.

An ordinance prohibiting the erection of wooden buildings within the city limits was upheld in *Easton Comra. v. Covey*, 74 Md. 262, as within the general powers conferred by the city charter, and not limited or qualified by the subsequent special grants of power, such as the abatement of nuisances, such ordinance not being unreasonable but useful and essential to the welfare and prosperity of the town.

Where the act of incorporation declared that buildings already erected within the original plan of the street should not be considered nuisances, but that new buildings erected in place thereof, owing to decay, etc., should not be built on such streets, and if so built should be considered nuisances, the action of the public authorities in abating the erection of the defendant's new building in place of his old one was justified, such erection being subsequent to the passing of the charter. *Com. v. McDonald*, 16 Serg. & R. 890; *Arundel v. McCulloch*, 10 Mass. 70.

So, where a valid municipal ordinance prohibits the location of wooden buildings within certain limits, and the building is located within the prohibited district and endangers the safety of surrounding property, it may properly be treated as a public nuisance, and as such abated. *Baumgartner v. Hasty*, 100 Ind. 575, 578, 50 Am. Rep. 830.

And it has been said that every frame building erected in a closely built portion of a town in violation of a lawful ordinance prohibiting it may be said to be a nuisance owing to the danger from fire, although it is not such a nuisance *per se* as will justify a private person in abating it. *Klingler v. Bickel*, 117 Pa. 323, 339.

Laws having for their object the protection of property from fire and the health of the community in densely populated cities must, from necessity, be promptly and arbitrarily enforced, and therefore a summary procedure, for the abatement of a nuisance under an ordinance making wooden buildings a nuisance, and establishing the fire limits of the city, on behalf of the municipal authorities, is a proper exercise of power, such an ordinance being essential to the protection of the city. *Hine v. New Haven*, 40 Conn. 478.

Yet the governmental authorities of a locality must determine in what places wooden buildings shall not be erected, for courts cannot exercise legislative functions in such matters, and for them 38 L. R. A.

to undertake to prescribe such localities would be to usurp governmental powers which rest in the local authorities. *Baumgartner v. Hasty*, 100 Ind. 575, 578, 50 Am. Rep. 830.

An ordinance, passed pursuant to the powers of a charter, establishing a fire district, defining the limits thereof, and prohibiting the erection, enlargement, or elevation of any wooden building of any kind within such district, authorizing the removal thereof and declaring the same a common nuisance abatable by any person, or the mayor, or the chief engineer of the fire department, or the fire marshal of a city, with the advice of the mayor after giving reasonable notice, is reasonable and valid, and the court will refuse to grant an injunction staying the abatement of such nuisance. *Hine v. New Haven*, 40 Conn. 478.

So, under a city charter giving the mayor and common council "power to abate nuisances public or private, and to pass all ordinances they may deem necessary for preserving the health, peace, good order, and good government of the city, and to enforce all ordinances by them adopted not inconsistent with the laws of this state," an ordinance forbidding the erection of wooden or frame buildings on certain streets and giving power for the marshal to remove the same is valid and within the provisions of the charter. *Ford v. Thrakill*, 84 Ga. 169, 170.

And an ordinance providing that all steam grist mills, saw mills, and other machinery run by steam, contained or operated in buildings or structures wholly or partially of wood, which by reason of defects or dilapidations in the same, or in the machinery, or boiler, or from any other cause, are dangerous to persons or property, shall be considered a nuisance, is a valid exercise of police power and within a charter giving power to regulate and prevent dangerous manufactures as causing or promoting fires, and to prevent nuisances. *Green v. Lake*, 60 Miss. 451.

So, if the structure or building in which a laundry business is carried on is by its structure, form, or material unsafe, the public authorities may, by proper proceedings, have it altered or removed, such power being possessed with reference to all vocations and buildings in which they are prosecuted. *Laundry Ordinance Case*, 7 Sawy. 526, 13 Fed. Rep. 229, 231.

The business of a laundry, although not opposed to good morals or subversive of public order or decency, may when conducted in certain localities be highly dangerous to the public safety so as to require its regulation by terms of a city ordinance. *Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12.

Upon appeal, the decision in this case was reversed, on the ground that the ordinance prohibiting such a business in wooden buildings within a certain part of the city without the consent of a board of supervisors, and providing that it should be unlawful for any person to engage in the laundry business within the corporate limits "without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone," did not

say, the city may, by such ordinance, define, classify, and enact what things or classes of things, and under what conditions and circumstances such specified things, are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughter houses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health or causing obstruction or danger to the public in the use of the streets and sidewalks, should

be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination." We think it is clear under the authorities that the common council, by the ordinance in controversy, attempted to declare that a nuisance which in fact under the law cannot be so considered, and therefore transcended the power with which it was invested. As ascertained by the authorities it would be a dangerous doctrine, and fraught with much

prescribe a rule and conditions for the regulation of the use of laundry property, to which all similarly situated might conform, but conferred a naked arbitrary power upon the board to give or withhold consent, and made all engaged in the business the tenants at will as to their means of living under the board of supervisors. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

A similar ordinance was upheld in *King v. Daventport*, 98 Ill. 805, 38 Am. Rep. 89, where the city had power by ordinance to establish fire limits and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, the ordinance establishing such fire limits, and enacting that any building built or repaired with other than fire-proof material, or any roof or gutter placed on any building the outer surface of which was made with materials other than fire proof within the fire limits, without permission, should be deemed a nuisance, the city marshal upon the written authority of the mayor having power to remove or tear down such building in cases where the offender after reasonable notice failed to remove the building.

Again, if by the terms of a city ordinance the city is empowered to inflict a fine upon a person erecting wooden buildings within the limits of the city, contrary to the terms of the ordinance, such power is not the only one which the city has, and it is lawful for it to remove such buildings in order to protect the public from the hazardous consequences of a continuance of such combustible matter in a dangerous position. *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188, 189.

Where, however, the village ordinance establishing fire limits prohibits the erection or repair of any wooden building within the prescribed limits without permission, and provides that any building standing, fronting, or cornering on the public square, becoming damaged by fire, decay, or otherwise, to the extent of 50 per cent of its value, shall be deemed and declared to be a nuisance, it is held that before the city authorities can proceed in a summary manner to tear down or abate such nuisance they must first notify the owner to remove the same in the manner provided by the ordinance. *Louisville v. Webster*, 108 Ill. 414.

So, where a valid municipal ordinance prohibits the location of wooden buildings within certain limits, and the building is located within the prohibited district and endangers the safety of surrounding property, it is properly treated as a public nuisance and as such abated. *Baumgartner v. Hasty*, 100 Ind. 575, 576, 50 Am. Rep. 830.

And the action of the common council of a city in destroying a house as a nuisance by reason of its endangering the town by fire was upheld in *Harvey v. Dewoody*, 18 Ark. 252, the owner having neglected or refused to comply with the notice of the council.

When the power over wooden buildings is expressly given by the city charter, the court will enforce and uphold the proceedings of such authorities thereunder so long as they are within the lines pointed out by such charter or necessarily implied 33 L. R. A.

from the act of incorporation. *Troy v. Winters*, 4 Thomp. & C. 256.

The above case was distinguished from that of *Hudson v. Thorne*, 7 Paige, 261, upon the ground that in that case the court refused to enjoin the erection of the wooden buildings, the same not being a public nuisance, the action not being based upon an ordinance giving power over such buildings.

An ordinance establishing and extending fire limits, so as to include the defendant's contemplated wooden buildings, to restrain which, as a public nuisance, an action was brought previously to the passing thereof, was upheld in *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326, although the action was not discontinued until after it was passed, and it was alleged that it was really procured for the benefit of those specially affected by the alleged nuisance.

And an ordinance making wooden buildings erected within the fire limits nuisances, and enacting that they be pulled down and abated as such, is within the terms of a charter prohibiting the erection of such buildings within the defined limits. *Baxter v. Seattle*, 3 Wash. 352.

So, ordinances preventing the erection or construction of wooden buildings, and regulating the building of such houses, etc., within the city limits, being for the public safety and benefit, have been upheld when they have not exceeded the powers given to municipalities by their charter or the general state law, or when they are fairly and necessarily implied or are essential for the purposes of such corporations, although not expressly declared nuisances. *Charleston v. Reed*, 27 W. Va. 651, 55 Am. Rep. 836.

And an ordinance establishing fire limits and prohibiting the erection or reconstruction of wooden or frame buildings within the city limits was upheld in *Brady v. North Western Ins. Co.* 11 Mich. 426, the common council having power to pass such laws, not contrary to the Constitution, as are a proper exercise of police power necessary to the safety of the city, and such ordinance is no condemnation of property to public use. An ordinance passed under the Pennsylvania laws of April 18, 1795, prohibiting the erection of wooden buildings in certain parts of the city, was upheld as preventing damage and the maintaining of a public nuisance. *Respublica v. Duquet*, 2 Yeates, 493.

The elevation and enlargement of a wooden building is an erection within the meaning of an ordinance prohibiting the erection of wooden buildings. *Douglass v. Com.* 2 Rawle, 262.

And with respect to the power of municipal authorities to prevent the spreading of fire, the legislature, in the exercise of its police power and for the protection of persons and property against the dangers of fire, may authorize cities and towns by ordinance and by-laws to restrict or prohibit the erection of wooden buildings within the municipality, or within any district thereof, and therefore a city ordinance passed pursuant to Mass. Stat. 1872, chap. 243 (13 of which provides for their removal and abatement as nuisances), which prohib-

evil, to recognize the authority of a municipal legislature to declare that a nuisance which its own caprice might deem proper to outlaw as such. Even though such power is expressly conferred by the legislature, it is utterly inoperative, unless the thing so declared to be a nuisance is one in fact, or was created or erected after the adoption of the ordinance, and in defiance thereof. *Wood, Nuisances, § 744.* What the legislature cannot do directly

in this respect it cannot authorize a municipal corporation to do. Without further extending this opinion, we are, under the authorities cited, constrained to hold that the part of § 1 of the ordinance as indicated by the italics is void for the reasons herein stated, and the proceedings thereunder by the city, involved in the case at bar, consequently cannot be maintained.

Judgment affirmed.

its the erection of wooden buildings within a certain district and within a certain distance apart, is a valid exercise of police power. *Salem v. Maynes, 123 Mass. 372.*

So, the action of the mayor of a city in destroying certain wooden buildings or houses composed wholly of highly inflammable and combustible materials, and used night and day by drunken and disorderly persons in such a manner that the lives, health, and property of the citizens are greatly endangered and the public safety imperiled, will be upheld on the ground that such buildings, although not of themselves a nuisance *per se*, are such by reason of the manner in which they are used, or allowed to be used. *Fields v. Stokley, 99 Pa. 303, 44 Am. Rep. 109.*

And the court will uphold a borough ordinance which prohibits the erection of wooden buildings within a certain district, the same having been found by the jury to constitute a public nuisance. *Klingler v. Bickel, 117 Pa. 323, 339.*

So, in *Aronheimer v. Stokley, 11 Phila. 283*, the court refused to restrain the action of the mayor in tearing down the plaintiff's sheds and wooden buildings erected contrary to the provisions of the city ordinance, although there was no statute or ordinance clothing the mayor with the power to summarily adjudge such buildings nuisances, and to proceed to abate them by tearing them down.

And a city ordinance declaring buildings erected within fire limits, thereby established, contrary to the provisions of such ordinance, and a nuisance was upheld, although it provided for its summary removal by the authorities. *McKibbin v. Fort Smith, 35 Ark. 352.*

But where the terms of the city ordinance passed for the purposes of the prevention of fire and the preservation of life are broader than the provisions contained in *Mass. Stat. 1872, chap. 243*, relating to nuisances (*Pub. Stat. chap. 104, § 1*), such ordinance is invalid. *Newton v. Belger, 143 Mass. 598.* The above case is distinguishable from that of *Salem v. Maynes, 123 Mass. 372*, which upheld a city ordinance and the constitutionality of such act, upon that ground.

And where the charter authorizes the city to ordain and establish such acts, laws, regulations, and ordinances, not inconsistent with the Constitution or laws of the state, as shall be needful for the government, order, and welfare of such body, an ordinance of a city, establishing fire limits, and declaring wooden buildings erected within such limits to be nuisances, is invalid, no express power being conferred by either the charter or by statute to establish such limits and to declare such buildings nuisances, the clause in the charter not conferring power upon the city to abate and remove nuisances. *Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608.*

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So, where, outside of the village ordinance, the erection of a wooden building within a specified area is not a nuisance *per se* the court will refuse an injunction to restrain the erection of such building. *Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446.*

Where the building which the defendant sought to repair has existed for years, and the proposed alteration and repairing of the same do not create a nuisance in fact or occasion irreparable mischief or injury, and the case does not show that the proposed change either increases or diminishes the danger of fire, relief in equity will be denied. *Manchester v. Smyth, 64 N. H. 380.*

And the fact that the defendant erected a building partly of brick and partly of wood does not bring him within the terms of an ordinance of a municipality prohibiting the erection of wooden buildings within certain parts of a city, and thereby occasioning damage and creating a common nuisance. *Stewart v. Com. 10 Watts. 307.*

In *Hudson v. Thorne, 7 Paige, 261*, the city charter contained no power whereby the authorities could prohibit the erection of wooden buildings, and as it was not alleged in the bill that the building was a nuisance, the court refused to enjoin its erection and use for the purpose of the manufacture of compressed hay.

By the charter of the city of Buffalo, every building erected or placed contrary to any ordinance passed on by the provisions thereof is to be deemed a common nuisance and may be abated as such, and by the city ordinance persons are prohibited from erecting, placing, or moving any building, constructed in whole or in part of wood, wholly within the limits of the city as defined by the charter, without the permission of the common council. Where, therefore, the defendant had obtained the permission of the council to the erection of his building, and before the same was completed the common council sought to revoke the license and abate the erection as a nuisance, the court stated that the ordinance referred only to buildings which should be erected in the future and not to existing buildings or those erected by the permit of the council, so that neither the charter nor the ordinance authorized the city to interfere with existing buildings or those constructed by its permission, and therefore the authorities had no power to deprive the defendant of any vested rights in the building by rescinding its permit after the building was partially constructed, the general entry upon the construction of the building being sufficient to give him a vested right. *Buffalo v. Chadesayne, 134 N. Y. 163, 168.*

As to power to prescribe fire limits, see *note to Olympia v. Mann (Wash.) 12 L. R. A. 150.* E. W.

CALIFORNIA SUPREME COURT (In Banc.).

Mary A. LIVINGSTON

SUPERIOR COURT OF LOS ANGELES COUNTY.

(117 Cal. 638.)

1. An order to compel a woman to support her husband out of her separate property when she is required to do so by Civ. Code, § 176, can be made by a court of equity in the exercise of its general powers without any express provision of the statute therefor, since the legal remedy, if any, is inadequate.
2. The obligation of a wife to pay money for the support of her husband under an order of court in a case within Civ. Code, § 176, is not a debt within the provisions of the Constitution against imprisonment for debt.

(August 5, 1897.)

PETITION to have an order of the Superior Court of Los Angeles County adjudging petitioner guilty of contempt for failure to pay money toward the support of her husband adjudged void. *Order affirmed.*

The facts are stated in the opinion.

Messrs. J. H. Johnson and Edward W. Fory for petitioner.

Temple, J., delivered the opinion of the court:

It is sought in this proceeding to have reviewed and declared void an order made by the above court adjudging that the petitioner was guilty of a contempt, and ordering her to be punished therefor. The contempt order was made in a proceeding instituted by the husband of the petitioner, under § 176 of the Civil Code, to compel her to support him out of her separate property. He obtained an order requiring her to pay for his support \$24 per month. An injunction was issued, enjoining her from conveying her property so as to defeat any judgment he might obtain against her. In violation of this injunction, petitioner conveyed all her property to her daughter on the day the decree was made. At the hearing in the superior court, petitioner presented her affidavit showing that she had no means from which to make the payment. Upon this question the court found against her, and with that issue we have no concern in this proceeding. The attack made here is solely upon the power of the superior court to make such an order on any state of facts. This contention seems to be based upon the fact that, in § 137 of the Civil Code, provision is made for compelling the husband to support the wife, and it is provided that the final judgment in such case may be enforced by the court "by such order or orders as in its discretion it may from time to time deem necessary." This, it is said, authorizes such procedure when the wife is suing her husband for separate maintenance, but the statute does not authorize such orders when the husband sues the wife for his support. In

Galland v. Galland, 38 Cal. 265, this court said: It is within the general powers of courts of equity, independent of the statute, to decree alimony to the wife, without divorce. The question has been variously decided in the United States, and it is said that in England courts of equity do not give such relief except as an incident in an action seeking some other redress. It is said in 2 Story, Eq. Jur. § 1422, that, to the question whether courts of equity have general authority to decree alimony to the wife when she is left without other means of maintenance, "it can scarcely be said that according to the result of the authorities an answer in the affirmative can be given in positive terms." This jurist further says, however (§ 1423a), that a broader jurisdiction over the matter has been asserted by some of our courts of equity, and it has been held that "a court of equity may in all cases decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished it were generally adopted." The question has been much discussed, and in many cases is very fully and elaborately considered. Among these cases, *Garland v. Garland*, 50 Miss. 694, contains an able review of the English cases, and shows that even there some cases support the jurisdiction. *Prather v. Prather*, 4 DeSauss. Eq. 83, contains another thorough discussion of the question, and upon principle and authority the jurisdiction of courts of equity to decree alimony is maintained. A later case in which the same doctrine is held is *Milliron v. Milliron* (S. D.) 68 N. W. 286. Such being the state of the authorities, there is no reason why we should not adhere to the doctrine announced in *Galland v. Galland*. It is in accord with the general principle that where a right exists, and there is no adequate legal remedy, equity will take jurisdiction. If, independently of any statute, courts of equity had jurisdiction to decree alimony to a wife, although no divorce was sought, it would necessarily follow that they have jurisdiction when the husband applies for support from the wife. In each case the right comes from the same source,—the obligations assumed by the marriage, as expressed in § 155 of the Civil Code: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support." Primarily the husband is the bread winner, and assumes the responsibility for the support of the family, and he becomes the owner of the marital accumulations. But in the exceptional case provided for § 176 of the Civil Code the burden of maintenance shifts to the wife. It is an obligation of the same kind, however, as that which ordinarily rests upon the husband, and the legal remedy, if it can be said that there is any, is as inadequate in the one case as in the other.

It has been held that the obligation to pay alimony is not a debt, within the provisions of the Constitution against imprisonment for debt. *Ex parte Perkins*, 18 Cal. 60; *Sharon v. Sharon*, 67 Cal. 183. The power of the

NOTE.—For note as to the allowance of alimony to the husband from his wife's property, see *Greene v. Greene* (Neb.) 84 L. R. A. 110.
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court to enforce payment of an allowance by proceedings in contempt cannot be doubted, and in *Smith v. Smith*, 113 Cal. 268, this court sustained the authority of the superior court to change a final decree for permanent maintenance of the wife after it had been entered, and then to enforce it by the process of contempt. But I think the order complained of cannot be considered an order changing or modifying the final decree. The petitioner was already in contempt for disobeying the lawful order of the court, and the subsequent proceedings were simply to ascertain if her failure to obey was contumacious. The obligation to pay not being a debt, I see no inability on the part of the court to provide a remedy which shall be adequate. It is said the remedy of the husband must be by an ordinary action. Counsel have not pointed out by what ordinary action the obligation could be enforced, and I know of none. In what action at law could the court ascertain and determine what monthly allowance should be made for the future support of the husband, and enter a judgment awarding an execution each month for the amount? If such a thing could be done, the remedy would not be adequate. A defendant who, in defiance of the injunction of the court, transferred her property to put it beyond the reach of an execution, would easily so delay the collection as to render the relief of no avail. An action by the administrator of the husband for damages for permitting him to starve, in violation of her duty, is not a support for the husband.

The order is affirmed.

We concur: **Beatty, Ch. J., Henshaw, J.; Van Fleet, J.**

(Department 1.)

Max WASSERMANN, Appt.,

v.

Louis SLOSS, Resp't.

(117 Cal. 425.)

1. **The illegality of a transfer of stock** to the president of a corporation for the purpose of having it used to corrupt government officials for the benefit of the corporation will not prevent the owner from recovering the stock by action if it has not been used for the illegal purpose but has been taken by the transferee for his own use.
2. **A variance between the evidence of a plaintiff and his principal witness is not the ground of a nonsuit.**

(June 22, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action brought to recover possession of certain corporate stock which was alleged

NOTE.—For some authorities on the remedies in case of unlawful contracts, see notes to *McClintock v. Lottseu* (W. Va.) 2 L. R. A. 317; *Richardson v. Buhl* (Mich.) 6 L. R. A. 453, and *Knight v. Lanzey* (Mich.) 8 L. R. A. 473.
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to have been transferred by plaintiff to defendant for the purpose of advancing the interests of the corporation and converted by defendant to his own use. *Reversed.*

The facts are stated in the opinion.

Messrs. Dorn & Dorn and Theodore Savage, for appellant:

There is sufficient evidence to justify the court in finding that the defendant, at the time he made the promises alleged and proved, intended to break them.

Subsequent acts may be resorted to, to prove antecedent fraud, and as illustrative of the intent and character of the transaction.

Butler v. Collins, 12 Cal. 457; *Sukeforth v. Lord*, 87 Cal. 399; *Lawson, Presumptive Ev.* pp. 100, 273, rule 64; 2 *Thomp. Trials*, § 1978; *Strauss v. Kranert*, 56 Ill. 254; *Kempner v. Churchill*, 75 U. S. 8 Wall. 369, 19 L. ed. 462.

One of the five different things which constitute fraud under our Code is "a promise made without any intention of performing it."

Cal. Code, § 1572, subdiv. 4; *Dowd v. Tucker*, 41 Conn. 204.

When a contract is capable of two constructions, the one lawful and the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 569, 29 L. ed. 941; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173; *Oregon Steam Nav. Co. v. Winor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Greenhood*, Pub. Pol. rule 189, p. 123; *Swaine v. Wilson*, 38 Week. Rep. 262; *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 590, 22 L. ed. 176; *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940; *Lorillard v. Clyde*, 86 N. Y. 384; *Merrill v. Melchior*, 30 Miss. 516; *Crittenden v. French*, 21 Ill. 598; *Whart. Ev.* § 1249; *Best, Ev.* §§ 346, 347; *Shore v. Wilson*, 9 Clark & F. 897.

Where a contract is capable of two constructions, the one making it valid and the other void, the first will be adopted.

Lorillard v. Clyde, 86 N. Y. 384; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *Curtis v. Gokey*, 68 N. Y. 300; *Guernsey v. Cook*, 120 Mass. 501; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794.

The acts of the parties, performed under a written contract, will be given effect to by the court as placing a construction upon the contract.

Lyles v. Leacher, 108 Ind. 333.

It is the benefit of the public, and not the advantage of the defendant to the action, that is to be considered in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality of the transaction out of which the claim arises.

Lewis v. Davison, 4 Mees. & W. 654; *Bibb v. Miller*, 11 Bush, 306; *Mittelholzer v. Fullarton*, 6 Q. B. 989.

The law will not presume an agreement void, as illegal or against public policy, when it is capable of a construction which would make it consistent with the laws, and valid.

Curtis v. Gokey, 68 N. Y. 304.

Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the

former will be adopted, so as to uphold the contract.

Saunders v. Clark, 29 Cal. 299; *Brooks v. Haigh*, 10 Ad. & El. 834; *Atwood v. Cobb*, 16 Pick. 237, 26 Am. Dec. 657; *Field v. Leiter*, 118 Ill. 17.

Any person having an interest in obtaining any legislative enactment has a legal right to urge its passage by all honorable means, provided he does not conceal, but openly acknowledge, his interest in the measure.

Miles v. Thorne, 88 Cal. 335, 99 Am. Dec. 384; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 334, 14 L. ed. 962; *Foltz v. Cogswell*, 86 Cal. 550.

There is nothing illegal, or immoral, or contrary to public policy in the employment of agents or attorneys to argue before legislatures, or committees, or officials, to obtain privileges in their power to grant, provided they do not conceal their interest in the matter, but let it be known and understood, by the persons whose judgment they undertake to influence, and such agreement is not against public policy.

Lawson, Contr. pp. 380 *et seq.*; *Miles v. Thorne*, 88 Cal. 335, 99 Am. Dec. 384; *Beal v. Polhemus*, 67 Mich. 180; *Salinas v. Stillman*, 30 U. S. App. 40, 66 Fed. Rep. 680; *Lyon v. Mitchell*, 86 N. Y. 242, 93 Am. Dec. 502.

There is nothing unlawful or against public policy in the employment of persons because of their exalted position in the community, their relations to the dominant party of the government, or their prominence or influence with persons with whom they seek to transact business.

Southard v. Boyd, 51 N. Y. 177; *Beal v. Polhemus*, 67 Mich. 180; *Barry v. Capen*, 151 Mass. 99, 6 L. R. A. 808; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64; *Wylie v. Coxe*, 56 U. S. 15 How. 415, 14 L. ed. 753; *Formby v. Fryor*, 15 Ga. 258; *Moyer v. Canthieny*, 41 Minn. 243; *Chadwick v. Knox*, 81 N. H. 226, 64 Am. Dec. 329; *Workman v. Campbell*, 46 Mo. 805; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* 16 Beav. 451.

The highest moment and importance to the public welfare, even where public policy is in question, is the observance of good faith among parties, and the upholding of private contracts, and enforcing their obligations.

Dubugue & S. C. R. Co. v. Richmond, 86 U. S. 19 Wall. 584, 22 L. ed. 173; *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465; *Richardson v. Mellish*, 2 Bing. 242; *Gilbert v. Sykes*, 16 East, 150.

Even if the original agreement for the transfer of the stock between appellant and respondent had been an illegal one, appellant is entitled to recover because resort is had to such contract only incidentally, as one of the elements going to determine the fraud of which the respondent has been guilty, and there is no rule of law which precludes the resort, even to an illegal contract, for a purpose so purely incidental.

Wells v. McGeoch, 71 Wis. 196; *Scott v. Duffy*, 14 Pa. 18; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 732; *Sharp v. Taylor*, 2 Phill. Ch. 801; *Planters' Bank v. Union Bank*, 33 U. S. 16 Wall. 483, 21 L. ed. 473; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 38 L. R. A.

38 L. ed. 747; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389, 39 Am. Rep. 519; *Bryant v. Fairfield*, 51 Me. 149.

Even if the original agreement between appellant and respondent were illegal, the appellant is entitled to the relief demanded in his complaint, because he is not *in pari delicto* with the respondent.

Where the party asking to be relieved from the effects of an illegal agreement was induced to enter into such agreement under the influence of strong pressure, he is not regarded as being *in pari delicto*.

Brooks v. Martin, 69 U. S. 2 Wall. 70, 17 L. ed. 732; *Smith v. Cuff*, 6 Maule & S. 165; *Green v. Corrigan*, 87 Mo. 359; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Curtis v. Leavitt*, 15 N. Y. 9; *Mount v. Waite*, 7 Johns. 434; *Baehr v. Wolf*, 59 Ill. 470; *Atkinson v. Denby*, 6 Hurlst. & N. 778, 7 Hurlst. & N. 934; *Reynell v. Sprue*, 1 De G. M. & G. 660.

Where one of the parties intends a contract, innocent in itself, to further an alleged purpose, and the other enters into the contract in ignorance of this intention, the innocent party is not *in pari delicto*, and is entitled to the full benefit of the contract.

Clark, Contr. 485.

Even if the original contract between appellant and respondent were an illegal one, it has never been carried into effect, and therefore appellant having disaffirmed the contract, is entitled to a return of his property.

Johnston v. Russell, 87 Cal. 670; *Gridley v. Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Hill v. Kidd*, 43 Cal. 616; *Peters v. Grim*, 149 Pa. 168; *Tyler v. Carlisle*, 79 Me. 210; 2 Comyn, Contr. 361; 2 Parsons, Contr. 746; *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291; *Morgan v. Groff*, 4 Barb. 524; *White v. Franklin Bank*, 22 Pick. 181; *Merritt v. Millard*, 4 Keyes, 209.

A person who has authorized the application of his money to any illegal purpose may revoke the authority, and recover back the money at any time before it has been paid over.

Bone v. Ekless, 29 L. J. Exch. N. S. 488; 2 Addison, Contr. Abbott & W.'s notes, p. 766; 1 Story, Contr. § 617; *White v. Franklin Bank*, 22 Pick. 189; *Adams Exp. Co. v. Reno*, 48 Mo. 264; *Tappenden v. Randall*, 2 Bos. & P. 467.

Appellant is entitled to the record prayed, and to relief from the fraud of respondent, without regard to the question whether a trust was created or not.

Bispham, Eq. § 91; *Perry*, Tr. § 166.

A principal may recover money paid to an agent on an illegal transaction, because no resort need be had to the illegal transaction, except, incidentally, by way of illustration.

Daniels v. Barney, 22 Ind. 207; *Murray v. Vanderbilt*, 39 Barb. 140; *Baldwin Bros. v. Potter*, 46 Vt. 402; *Auburn v. Draper*, 23 Barb. 425; 1 Lawson, Rights, Rem. & Pr. § 81, note 8; 7 Wait, Act. & Def. chap. 31; *Anderson v. Moncrieff*, 5 Dessaus. Eq. 132; *Union P. R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391.

Messrs Chickering, Thomas, & Gregory and Gerstle & Sloss, for respondents:

The contract set forth in the complaint is against public morals and against public policy, and therefore void. The court must leave both parties in exactly the position in which it finds them, and enforce the rights of neither.

The objection is one which may be taken for the first time in this court.

Code Civ. Proc. § 484; *Hentsch v. Porter*, 10 Cal. 555.

It was the duty of the trial court to dismiss the case without specification of the particular grounds for a motion for a nonsuit without any motion at all, even against the objection of the defendant, upon being satisfied that the contract was against public policy.

Oscanyan v. Winchester Repeating Arms Co. 108 U. S. 261, 26 L. ed. 539; *Valentine v. Stewart*, 15 Cal. 387; *Kreamer v. Earl*, 91 Cal. 112.

To make the contract alleged against public policy, and therefore void, it was not necessary to allege affirmatively that the influence to be used was a corrupt one, as no other influence could be used upon "persons high in authority and influence with reference to the two governments."

Gibbs v. Dewey, 5 Cow. 503; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261, 26 L. ed. 539; *Greenhood*, Pub. Pol. Rule CCC. p. 837; *Thorne v. Yontz*, 4 Cal. 321; *Martin v. Wade*, 37 Cal. 168; *Powell v. Maguire*, 43 Cal. 11.

The illegal contract is the only basis of the plaintiff's claim.

1 Pom. Eq. Jur. § 402; 1 Story, Eq. Jur. § 298; *Valentine v. Stewart*, 15 Cal. 404; *Holman v. Johnson*, 1 Cowp. 343; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 517; *Wyman v. Moore*, 103 Cal. 218.

Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again.

Martin v. Wade, 37 Cal. 168, 175; *Collins v. Blanner*, 2 Wils. 341; *White v. Franklin Bank*, 22 Pick. 186; *Lovell v. Boston & L. R. Corp.* 23 Pick. 32, 34 Am. Dec. 38; *Tracy v. Talmage*, 14 N. Y. 181, 67 Am. Dec. 132; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742.

To establish a resulting trust, contradicting the terms of an instrument of positive transfer, the evidence must be clear and strong.

Browne, Stat. Fr. § 91; 1 Perry, Tr. § 137. The testimony must be of the most reliable character.

McKeown v. McKeown, 33 N. J. Eq. 384; *Merwitz v. Floring* (Ill.) 2 N. E. 529.

The trust must be clearly and definitely proved.

Sitcey v. Hodgdon, 52 Cal. 369.

Garoutte, J., delivered the opinion of the court:

By this action it is asked that a certain 400 shares of stock of the Alaska Commercial Company be declared to be held in trust by defendant for the benefit of plaintiff, and that an accounting be had of the earnings of said stock while so held by defendant. Defendant set up title to the stock in himself. Plaintiff offered evidence in support of his case, and upon motion was nonsuited. He moved for a new trial, which motion was denied, and thereupon appealed to this court from the judgment and

order denying his motion. The motion for the nonsuit was based upon five distinct and separate grounds, and it was granted by the trial court solely upon the fourth ground. In view of the law that, if any of the grounds upon which the motion was based justified the action of the trial court, then the order of said court will be affirmed upon appeal, appellant's counsel, in their brief, have reviewed and discussed these grounds *seriatim* in detail. In reply, respondent's counsel, for the purpose of sustaining the action of the trial court in granting the nonsuit, have limited themselves to the fourth and fifth grounds stated in the motion. For these reasons this court will likewise limit its consideration to those grounds, deeming respondent's present position a waiver of the remaining grounds insisted upon at the hearing of the motion before the lower court.

The trial court granted the nonsuit upon the fourth ground, namely, that the action was one which attempted to enforce a contract that was against sound morals and public policy. The pith of the action disclosed by the complaint as bearing upon this particular question of morals and public policy may be stated substantially in a few words. Defendant, Sloss, was president of the Alaska Commercial Company, a corporation engaged in the sealing industry in and about the territory of Alaska. It held certain leases from the government of the United States and also that of Russia. Plaintiff was a stockholder in this corporation. These leases were soon to expire, and renewal of them was greatly desired by the corporation. Defendant, as president of the corporation, was actually engaged in the effort to secure such renewals. He represented to plaintiff "that in order to obtain such new leases, or any or either of them, it would be necessary for him (the defendant) to be in such a position as to enable him to interest certain persons high in authority and influence in the respective undertakings and with the respective governments aforesaid; that all of the members of said company should be willing to make some sacrifices to that end; that, in order to place the defendant in a position to interest certain persons high in authority and influence in the said respective undertakings, and that to successfully negotiate the obtaining of the said new leases respectively, it would be indispensable for him (the said defendant) to have a certain amount of stock of the old company at his disposal, to be used by him in and about the procuring of the said new leases; and that said negotiations could not be successfully conducted by the defendant unless he had the said shares of stock at his disposal, to be used in the manner hereinbefore stated. The said defendant then requested of the plaintiff that he (plaintiff) should transfer to the defendant 400 shares of the capital stock of said company (out of the 1,400 shares so owned by plaintiff as aforesaid), and represented, promised, and agreed to plaintiff that he (the defendant) would use the said shares of stock so placed at his disposal by plaintiff as aforesaid in the course of said negotiations looking towards the obtaining of the new leases, respectively, and for the purpose of influencing certain persons high in authority and influence with reference to the government of the United States and that of Russia, respectively,

88 L. R. A.

whose good offices it would be necessary to obtain to that end." The plaintiff believed these statements of the defendant, and relying upon them, transferred to him 400 shares of said stock to be used for the purposes aforesaid. The complaint further alleges that this stock was thereupon converted by defendant to his own use. As tending to show a contract against good morals and public policy, after a careful consideration of the evidence, we are prepared to say that it is weaker than the allegations of the complaint. And, if the objection here insisted upon as to the character of this evidence is good, then an objection could well have been taken to the complaint at the very inception of the litigation.

This case has been thoroughly argued, and a great portion of that argument has been addressed to the character of the contract entered into between these parties. But from the standpoint at which we view the litigation that question is immaterial. We are satisfied that the action is in no sense one to enforce a contract. Whatever relationship the transaction pictured by the aforesaid recitals of the complaint bears to the cause of action, it is a relationship disaffirmed and repudiated. The good or bad morals of this undertaking are immaterial, for the reason that the venture was in no sense executed, and until executed both parties are given an opportunity for repentance and rescission. Seeing the error of his ways, the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering the inducement of giving back to him anything of value with which he has parted. Putting this case against plaintiff as bad as may be imagined, he transferred his stock to be used by defendant in corrupting the servants of the respective governments. The transaction progressed no further. The stock was not so used. The precipice which would have been death to plaintiff's cause of action was never reached. No one was corrupted, and the stock was not stained. The parties' intentions as to the use to which this stock was to be put are not the controlling factor. It is not what was intended to be done with the stock that christens the transaction, but rather what was actually done. If defendant had disposed of the stock as contemplated, plaintiff would have had no remedy, for the evil would have been accomplished, the harm would have been done, and of necessity his plea for relief would not have been heard. In this case plaintiff gave certain stock to defendant, to be used for a certain purpose. He was plaintiff's bailee of the stock. The bailee did not use it for the purpose agreed upon, but took it to his own use. There is no principle of law to justify such a transaction. If plaintiff, upon the second day subsequent to the transaction, had changed his mind, and notified defendant of such change, and demanded a return of his stock, upon principle and authority he would have been entitled to such return. The authorities all told that, if he had done this any day prior to the time when the agreement was fully executed, he would be entitled to the return of his stock. That this agreement was purely executory cannot be questioned. It could not be executed until the stock was applied to the purposes intended. If the question

as to what company should obtain the leases here sought were still an open one, if it had not been settled at the commencement of this action, and if the stock had not been applied as contemplated, then, certainly, plaintiff could recover. The fact that these leases have been secured by other parties is wholly immaterial. That fact does not enter as an element in the question here discussed, and upon principle the case stands exactly as it did a moment after the stock was transferred to the defendant. The authorities seem to be in direct accord with the views we have expressed. Our investigation has led us to the examination of many cases aside from those cited by counsel, and we find no case opposed to the doctrine of a right of recovery upon the part of a plaintiff where similar facts are presented. There are hundreds of cases found in the reports of this country and England where courts have refused to entertain actions based upon unlawful or void contracts. Our state reports contain many of them. At the present day it may be said that all courts agree upon that doctrine. In *Langton v. Hughes*, 1 Maule & S. 599,—a case which is the landmark upon this question in English reports,—it is held that a druggist is not entitled to recover for drugs sold a brewer which he knew were to be used by the brewer in unlawful manufacture. The judge declared that by such sale the druggist aided and abetted the brewer in violating the law. A common and simple illustration is found where an action is brought to recover money loaned to another for the purpose and intention of playing a gambling game prohibited by law. *McKinnell v. Robinson*, 3 Mees. & W. 434; *Tyler v. Carlisle*, 79 Me. 211.

The case at bar, upon its facts, does not bring it within the rule declared by the foregoing authorities. Those are all actions to recover money agreed to be paid upon an illegal contract. It was sought to enforce agreements made by contracting parties. Here Sloss was the agent or bailee of the plaintiff. He was given stock to be used by him for a certain purpose. The stock was still the property of the plaintiff; the title was still in him. Sloss, as long as he retained possession of it, as long as he did not apply it according to instructions, held it purely as the agent of the plaintiff. He could only apply it to the single purpose authorized. If he converted it to his own use, it would be criminal embezzlement. For a court to support his present position would not be in the interest of sound public policy, but, on the contrary, would be offering a premium upon the dishonesty of agents, servants, and bailees. It is said in *Norton v. Blinn*, 39 Ohio St. 145, 22 Am. L. Reg. (N. S.) 785: "In the second place it is contrary to public policy and good morals to permit employees, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations." In this case, if the stock had been applied to the purpose intended, plaintiff would have no standing in court, for in the language of many cases the unlawful purpose would have been carried out; and this principle applies in all those cases

where money or property is given to another party to be used in an illegal transaction. Persons may not be punished, either in civil or criminal courts, for unlawful intentions. It is the consummation of these unlawful intentions that places a party without the law. If the unlawful intention or transaction is not carried out, if nothing is done under it, my servant has my property, and I am entitled to its return. As in the present case, he is acting under a special agency which I have a right to revoke at any time before performance, and, when so revoked, I am entitled to my own. It cannot be better public policy to deny me a recovery of the stock than to encourage my agent to commit a criminal offense. Dunlap's Paley, Agency, *66, declares the general principle thus: "As long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before application, it is a debt which may be recovered at law or in equity." Wood, Mast. & S. § 202, says: "While the courts will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor, upon the ground of the illegality of the original transaction." In *Adams Exp. Co. v. Reno*, 48 Mo. 204, it was held that Reno, who had deposited a certain sum of money in the bank, which money was to be paid to a sheriff when he secured the pardon of Reno's brother, who was then in the penitentiary, could recover the money as his money as long as it remained in the possession of the bank. *Taylor v. Lendey*, 9 East, 49, is a case where plaintiff gave a sum of money to the governor of the poor house to be used for the use of the poor, a magistrate agreeing to stifle a threatened prosecution against him in consideration thereof. Plaintiff brought an action to recover the money so given to the governor. Lord Ellenborough said: "Take it that the money had been paid by the plaintiff to the defendant for a charitable purpose, but before the defendant had made any application of it the plaintiff countermanded the payment: was there not then an end of the authority, and could the agent persist in applying it against the direction of his principal? The question, therefore, is reduced to the case of a countermanded agent." In *Peters v. Grim*, 149 Pa. 164, in referring to an unlawful transaction in stocks, the court said: "If when the first deposit was made by plaintiff with directions to buy the stock, he had countermanded the directions before anything was done under them, it could not be pretended that defendant could have retained the money on the ground of illegality in the contemplated transaction. Intent as to a future act does not make illegality." In *Morgan v. Groff*, 4 Barb. 524, it is held that "as long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before its application, it is a debt which may be recovered from the agent by the principal, either at law or in equity." That was a case where money was given to an

agent to be bet upon an election, which money the agent failed to bet, but converted to his own use. In *Bone v. Ekless*, 5 Hurlst. & N. 924, the owner of a ship authorized his agent to sell the same for £8,500 to the Turkish government, and to expend £500 of that amount in bribing government officials to assist in making the sale. The ship was sold, and the agent paid out £300 of the £500 as contemplated. In an action the owner was held entitled to recover the £200, notwithstanding the agent pleaded the facts showing the use to which the money was to be applied; one of the judges saying: "But the real nature of the case is, that the plaintiff received the whole of the money upon the sale of the defendant's ship, and now claims to retain part of the money upon the illegal arrangement, which, however, he has not carried out. He might have discharged himself by actual payment of the money, but he has not paid it: the illegality would have been the payment for illegal purpose. Before that was done the defendant claimed the money and was entitled to recover it." See also *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291. In *Johnston v. Russell*, 87 Cal. 670, the law is declared that either party to a wagering contract upon the election may withdraw from the transaction at any time before the event upon which the result of the wager is dependent has happened, and under such circumstances the party withdrawing may recover his money from the stakeholder. From the legal principle declared by that case, it necessarily follows that the same party could have recovered his money from an agent to whom he had given it to be wagered. When the money has passed into the hands of the stakeholder the law has been violated. When it is in the hands of the agent or servant to be wagered no violation of the law has yet occurred. It follows that the doctrine of the above case goes to lengths beyond anything demanded by the facts of the case at bar. It will thus be seen from the array of cases cited that authority is not lacking to support plaintiff's right of recovery. There are cases containing incidental statements that may look the other way, but the facts there were not the facts of this case. In those cases it will be found that the plaintiff relied upon an illegal contract for a recovery, and the statements made were not necessary to the decision of the case, and not called for by the facts before the court.

The court is asked to sustain the order granting the motion for a nonsuit upon the fifth ground stated. It is claimed by respondent's counsel that a serious "variance" exists between the evidence of plaintiff and his principal witness, Seligman. Conceding such a variance to exist, any question arising from it cannot be raised upon a motion for nonsuit. It is but fair to respondent, Sloss, to say that by his answer he in no way relies upon the illegality of any contract entered into between himself and Wassermann for the purpose of defeating Wassermann's cause of action. He claims that he purchased the stock from Wassermann, and relies upon his title under such purchase.

Judgment and order reversed and cause remanded for a new trial.

We concur: **Harrison, J.; Van Fleet, J.**

George H. GOULD, *Respt.*,

v.

C. F. EATON *et al.*, *Appls.*

(117 Cal. 539.)

1. A riparian proprietor cannot confer upon another person the right to divert water from a stream to use on nonriparian lands to the injury of a lower proprietor, since the riparian owner himself has a right to divert waters to riparian lands only.

2. Equity may restrain the diversion of water under a claim of right in order to prevent the claim from ripening into a right.

3. The manner in which water diverted from a stream is returned to it is immaterial to a lower riparian proprietor if the water is returned before the stream reaches his land.

(July 9, 1897.)

APPEAL by defendants from a judgment of the Superior Court for Santa Barbara County in favor of plaintiff in a proceeding to enjoin them from diverting to nonriparian lands certain waters from a stream which flowed through plaintiff's property. *Modified and affirmed.*

The facts as stated in the report in 111 Cal. 639, mentioned in the opinion, are as follows:

The Cold Spring branch of Montecito creek has its rise in the Santa Inez mountains, and flows in a southerly direction through a canyon on the southerly slope of said mountains. These mountains in the neighborhood of said stream are composed chiefly of parallel strata of sandstone, extending across the canyon, and separated by seams parallel with the strata, filled with clay which is impervious to water. This sandstone is porous and fissured with seams and cracks, both parallel with the strata and transversely thereto. The trend of the strata is nearly east and west, and nearly at right angles with the general course of the canyon and of the stream, and the dip of the strata is toward the north, and at an angle of about 80 degrees. The stream has a fall of about 400 feet to the mile, and its natural supply is the rain which falls upon the adjacent mountains, and descends into the sandstone, precolating through it, and passing along the seams and cracks thereof in a direction with the trend of the strata. The plaintiff is the owner of a tract of land through which the stream flows, and from which his land derives a benefit. In October, 1892, the owner of a tract of land extending on both sides of the stream above that of the plaintiff granted to the defendants the right to enter thereon and excavate a tunnel for developing water, and in pursuance thereof the defendants commenced the construction of a tunnel at a point about 30 feet west of the stream, and at an elevation of about 4 feet above its level, and continued the construction of said tunnel in a northerly direction for about 600 feet. The tunnel was constructed so as to be throughout the greater part of its length below the level of the stream,

and so that this depth increased gradually toward the head or northern end, where it was about 50 feet below the level of the stream. At a point about 300 feet from the mouth of the tunnel there is a bold out-cropping of one of the strata of said sandstone, and for a space of 80 yards along the canyon, extending from near the foot of the western slope of the mountains to the margin of the stream, a distance of about 100 feet, the water prior to the construction of the tunnel, percolating through this stratum, moistened the ground and sustained thereon a growth of ferns. Within the growth of ferns there were, prior to the construction of the tunnel, certain small springs, the waters of which came to the surface in such quantities as to be visible, and percolating through said ferns seeped into the stream along the western bank thereof, but did not form a defined channel or current. The line of the tunnel was a short distance west of this growth of ferns and the locality of these springs, and also about 40 feet below the level of the same, and the effect of its construction has been to intercept and divert into and through the tunnel the waters that had previously supplied the springs, and to cause the same, and the seepage therefrom into the stream, to wholly disappear. The porous character of the sandstone formation which crosses the canyon permits water from the ground neighboring to and overlying the tunnel, and water from the channel of the stream, to drain into the tunnel. The court finds that the intention of the defendants in running the tunnel was to intercept and divert into said tunnel the subterranean waters stored in and percolating through said sandstone, and passing along the seams and cracks thereof, and particularly to intercept the aforesaid stratum of sandstone, and to intercept and divert into the tunnel the water precolating and passing through and along said stratum and the seams and cracks thereof, but that they did not intend to divert from their natural course any waters flowing from said springs, or to divert from said stream any water naturally flowing in the channel thereof, and that the said small springs and the waters precolating or seeping therefrom are the only tributaries of said stream affected in any way by the construction of said tunnel.

The plaintiff brought the present action to restrain the defendants from diverting the waters of the stream by means of said tunnel, and from preventing the water which would issue from the mouth of the tunnel from flowing back into the channel of the stream.

Messrs. Robert Y. Hayne and W. S. Day for appellants.

Mr. R. B. Canfield, for respondent:

Even if the appellants owned Barker's land no question as to their riparian rights would be here presented; because these have reference only to the use of water on the riparian land, while the only use defendants intend to make of the water in controversy is on nonriparian land.

NOTE.—On the general question of the rights of riparian owners to divert water from a stream, see *Ulbricht v. Eufaula Water Co. (Ala.)* 4 L. R. A. 572, and *note*; also *note* to *Whitney v. Wheeler* 38 L. R. A.

ton Mills (Mass.) 7 L. R. A. 613; *Horn v. Miller (Pa.)* 9 L. R. A. 810, and *note*; and *Barre Water Co. v. Carnes (Vt.)* 21 L. R. A. 769.

Pom. Riparian Rights, § 182; *Creighton v. Evans*, 58 Cal. 56.

Injunctions are construed according to the facts upon which the decrees are based and the purposes to be defeated or accomplished. When defendants become riparian owners and undertake to make a riparian use of the water, or when the upper riparians absorb it all, it will be time to consider the application of the judgment to their changed conditions.

Pennsylvania v. Wheeling & B. Bridge Co. 59 U. S. 18 How. 421, 15 L. ed. 485; *Mahoney v. Van Winkle*, 83 Cal. 448; *Larrabee v. Selby*, 52 Cal. 508.

If Barker himself were the owner of the tunnel he could not do what defendants have intended to do. If he should undertake to divert any of the water of the creek to nonriparian land, to that extent he would be as much a wrongdoer as though he had no riparian rights.

Pom. Riparian Rights, § 183.

If the quantity was indeterminable in consequence of the conditions under which the tunnel was constructed, it could not have been found that defendants had developed any water to which they were entitled, and the use of their tunnel as a means of obtaining water should have been prohibited altogether.

Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265.

A riparian owner has a right to prevent a nonriparian from taking the waters of a stream by means of a tunnel into which the water is drained through the intervening ground, and which accelerates the natural percolations from the stream or creates currents from it where none formerly existed, to such an extent as to diminish the flow materially and to the detriment of lower riparians.

Gould, Waters, § 245; *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Brookline*, 127 Mass. 69; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. App. 488; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

If the use of percolations to or from a stream is to be regulated in analogy with the use of water in a watercourse it must be under the same restrictions.

Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

The extent of injury or the fact that plaintiff is or is not in a position to make present use of the stream is no criterion of his right to prevent its diversion, as against a nonriparian.

Moore v. Clear Lake Waterworks, 69 Cal. 146; *Stanford v. Felt*, 71 Cal. 250.

The use of any one of the riparians is always subject to regulation in consideration of the reasonable demands of the others.

Pom. Riparian Rights, Black's ed. § 125; *Luz v. Haggin*, 69 Cal. 890.

Riparian uses are reasonable uses by a riparian owner on riparian land.

Pom. Riparian Rights, § 182; *Creighton v. Evans*, 58 Cal. 56; *Indianapolis Water Co. v. American Strawboard Co.* 53 Fed. Rep. 970; *Luz v. Haggin*, 69 Cal. 890.

38 L. R. A.

Harrison, J., delivered the opinion of the court:

The facts involved in the judgment herein are set forth in the opinion given upon an appeal therefrom by the plaintiff. *Gould v. Eaton*, 111 Cal. 639. The present appeal is by the defendants from that portion of the judgment which enjoins them from diverting to lands not riparian to the creek any of the waters naturally flowing in its channel, and from preventing or interfering with the flow directly back into the stream from the mouth of the tunnel constructed by them, of 1.43 inches of water, measured under a 4-inch pressure. The court found that this amount of water was abstracted and diverted from the channel of the stream by reason of the tunnel constructed by the defendants, and the appeal is directly from the judgment, upon the judgment roll, without any bill of exceptions. The finding by the court of the amount of water diverted by means of the tunnel cannot be questioned, by reason of the statement therein of the mode by which this amount can be ascertained. The evidence before the court by which it determined that the loss could thus be ascertained is not before us, and it must be assumed that it was of a satisfactory character, and the conclusion of the court thereon must be accepted by us as correct.

To the extent that the water diverted by the tunnel is taken from the stream, the defendants are in no different position than they would have been if Barker, the riparian owner from whom they received the right to construct the tunnel, had given them the right to lay a pipe from the stream, and granted them the water that should flow through it. The only right in the riparian land which was granted to the defendants was "to enter thereon to prospect for water and to excavate a tunnel to develop the same at a place to be selected by them within thirty days from the date of their agreement, and the right of way over said land for the purpose of making said tunnel." Under this agreement they selected a place for the tunnel about 80 feet west of the stream, and constructed it in a direction nearly parallel with the stream. The defendants are therefore in no respect riparian owners, nor are their rights in the water which flows from the tunnel in any respect those of a riparian owner. The grant from Barker gave them no right in the land which is adjacent to the stream, and they took by the contract no riparian rights in the waters of the stream, and no greater right to these waters than Barker could confer upon any other nonriparian owner. The rights of a riparian owner are limited to the ordinary and reasonable use of the water which flows in the stream, and do not include a proprietorship in the *corpus* of the water. His right to the water is limited to its use for such as are termed ordinary purposes,—*ad lavandum et ad potandum*,—or such other uses as are connected with the land bordering on the stream. It is not necessary here to determine the extent to which such uses may be carried, or the purposes to which the water may be applied. They do not in any case include the right, as against an inferior proprietor, to divert the water to nonriparian lands. Each

riparian owner is entitled to the natural flow of the stream through his land, with the limitation, however, that the superior proprietor may take therefrom such an amount as he is entitled to for riparian purposes. The superior proprietor cannot, however, divert to non-riparian lands the water which he would have a right to use for riparian purposes, but which he does not in fact use. His riparian right is appurtenant to the land bordering on the stream, and does not give him the right to divert the water to lands which are not riparian to the stream; and, as he cannot exercise this right himself, he cannot, as against an inferior proprietor, confer it upon another. As against himself or his grantee, he may contract for the diversion of the water to nonriparian lands. *Gould v. Stafford*, 91 Cal. 146; *Yacco v. Conroy*, 104 Cal. 468. But the rights of the inferior proprietor will not be affected by such contract. If he does not in fact use any of the water himself the inferior proprietor has a right to the flow of the entire stream. *Stockport Waterworks Co. v. Potter*, 8 Hurlst. & C. 300; *Ormerod v. Todmorden Joint Stock Mill Co.* L. R. 11 Q. B. Div. 155; *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697. The plaintiff's right to an injunction does not depend upon the amount of injury which he has received. Being a riparian owner, he has a right to the flow of the entire stream, as against any diminution thereof by one who is not a riparian owner, and the claim of the defendants that they have a right to divert a portion of its flow authorizes him to invoke the aid of equity in order that this claim may not ripen into a right. *Moore v. Clear Lake Waterworks*, 69 Cal. 146; *Stanford v. Felt*, 71 Cal. 249; *Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 705.

That portion of the judgment which requires the defendants to permit this amount of water to flow back into the creek "in the manner in which the water from said tunnel was flowing back into said creek at the time of the commencement of the trial of this action" is not authorized. If the water which is diverted from the creek is allowed to return to it before it reaches the land of the plaintiff, the manner in which it is returned is immaterial to him; and, if the defendants can at any time change the manner in which it at present is returned, with advantage to themselves, they should be allowed this privilege, so long as the rights of the plaintiff are not impaired.

The judgment should be modified in another particular. The court finds that, as the tunnel is now constructed and used, it diverts the amount of 1.43 inches of water from the stream, and will continue to divert this amount of water "under the conditions now existing." The judgment, however, renders it incumbent on the defendants to permit 1.43 inches of water to flow back into the stream under all circumstances, and independent of the conditions now existing. It should be modified by giving to either party leave, upon showing that these conditions have changed to an extent authorizing the interference of the court, or that the operation and use of the tunnel will justify it, to apply for a corresponding change in the judgment.

The Superior Court is directed to modify its judgment in accordance with the foregoing opinion, and, as so modified, the judgment will stand affirmed.

We concur: **Garoutte, J.; Van Fleet, J.**

IOWA SUPREME COURT.

Mrs. J. B. RABBITT

v.

**William M. WILCOXEN, Receiver, etc., of
Union Building & Savings Association, Appt.**

R. M. DIHEL et al., Interveners.

(.....Iowa.....)

Notice of withdrawal before the appointment of a receiver of a building and savings association does not give priority to a shareholder of an insolvent association under by-laws providing for the payment of withdrawals "according to the priority of notice," but also providing that no more should be paid in any month than 30 per cent of the cash receipts of the loan fund during that month, as these by-laws contemplate a going concern.

(October 8, 1897.)

NOTE.—For the general subject of withdrawals from building and loan associations, see *Engelhardt v. Fifth Ward Permanent Dime, Sav. & L. Assn.* (N. Y.) 85 L. R. A. 239.
38 L. R. A.

APPEAL by the receiver of the Union Building & Savings Association from a judgment of the District Court for Polk County allowing certain claims to the interveners in settling the affairs of the association. *Reversed.*

Statement by **Granger, J.:**

The following, including some provisions of the law of the association, to be noticed in the opinion, is substantially appellees' statement of the facts. "The Union Building & Savings Association was incorporated under the laws of Iowa, on the 26th of June, 1890, with its principal place of business in the city of Des Moines. The object of the association, as stated in its articles of incorporation, being 'to afford profitable investment of money, and encourage and assist its shareholders in the acquisition of real estate, by loaning money to them, to be paid back in monthly instalments, thereby increasing the proportion of home owners in the country, in the manner and by the means provided in chapter 6, title 9, of the Code of

Iowa.' On the 15th of December, 1894, Mrs. J. B. Rabbitt, plaintiff in the original cause, petitioned the district court of Polk county for the appointment of a receiver for the association; and on the 28th day of December, 1894, the court appointed William M. Wilcozen, Esq., receiver, to take charge of the assets of the association, and collect and convert the same into money, with a view to the winding up of the association. On the 4th day of December, 1895, R. M. Dihel *et al.* filed their petition of intervention, and, in a few days thereafter, others filed petitions of intervention, all of said petitions claiming the same relief. The petitions of intervention are substantially the same, and claim that the petitioners filed their notices of withdrawal, as provided by § 9 of article 13 of the by-laws, and for that reason they are entitled to be paid, according to said § 9 of article 13 of the by-laws, prior to the payment or distribution of the funds among the stockholders of said corporation who did not file their notice of withdrawal. They claim that they are no longer stockholders of said corporation, and have not been since the moment of filing their notices of withdrawal, but are creditors with claims, according to the terms of § 9 of article 13 of the by-laws. On the 7th day of December, 1895, William M. Wilcozen, receiver, filed his answer, and it was agreed that this answer should apply to all the petitions of intervention. Said answer is found on page 11 of the abstract, and in substance states that the association, at the time of filing said notices of withdrawal, was insolvent; that article 17 of the by-laws of said association provides that said association shall not be liable to pay out, on account of withdrawals of all classes of stock during any month, more than 30 per cent of the cash receipts of the loan fund during such month; and that there had been since January 1, 1894, during each month, more than 30 per cent paid out; and, further, it states that said interveners have not complied with all things necessary in order to perfect their withdrawals, in accordance with the 'Articles of Incorporation and By-Laws' of the association; and, further, it is stated that to allow the claims of these interveners to be paid in full would impair the value of the outstanding securities, etc.; and then prays that the claims of the interveners be adjudged to be on a parity with the claims of the nonwithdrawing shareholders of said association, and that they be made to share their *pro rata* proportion with the other shareholders in the funds coming into the hands of the receiver." The district court determined the issues in favor of the interveners, and gave judgment accordingly, and the receiver appealed.

Messrs. Sammis & Scott, for appellant:

When the constating instruments of a building association permit the withdrawal of shares, but limit the payment of the sum withdrawn to a particular fund, the existence of that particular fund is a condition precedent to the right of payment,

Re Blackburn & Dist. Ben. Bldg. Soc. L. R. 24 Ch. Div. 421.

When the constating instruments of a building association permit the withdrawal of shares, and base the withdrawal value thereof

upon an assumed condition of solvency of the association, such solvency is a condition precedent to the right of payment.

Christian's Appeal, 102 Pa. 184; *Hanney v. Enterprise Sav. Fund & Bldg. Asso.* 16 W. N. C. 450.

The true English rule is to the effect that to entitle a withdrawing member to payment, the notice of withdrawal must have been matured—"become effective" before the association is known to be insolvent.

Re Sunderland 32d Universal Building Societies, L. R. 24 Q. B. Div. 894; *Endlich, Bldg. Asso.* 2d ed. § 108.

Messrs. William M. Wilcozen and Bishop, Bowen, & Fleming, also for appellant:

After a stockholder in a building and loan association has given notice of the withdrawal of his stock he is no longer entitled to vote his stock, no longer obliged to pay his monthly dues, no longer liable to fines and penalties for failure to pay monthly dues, but he is still a stockholder, he has not ceased to be a stockholder, or shareholder, all he has is represented by those shares. He may become a creditor under certain conditions, or rather when certain conditions have been fulfilled.

Heinbokel v. National Sav. Loan & Bldg. Asso. 58 Minn. 840, 25 L. R. A. 215; *Englehardt v. Fifth Ward Permanent Dime. Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289.

Appellees would at no time after giving notice of their withdrawal have been entitled to maintain a suit thereon against the association, even while it was a going concern, the amount paid each month on withdrawals being in excess of the limit provided for in the by-laws.

Texas Homestead Bldg. & L. Asso. v. Kerr (Tex.) 18 S. W. 1020; *Toules v. American Bldg. Loan & Inv. Soc.* 61 Fed. Rep. 446.

The rights of the interveners were at the time of their notice of withdrawal, not to withdraw the money that they had paid in and what was shown by the books to be profits, but to withdraw their proportionate share of the net collectible assets of the association.

Knoblanck v. Robert Blum Bldg. & L. Asso. 25 Pittsb. L. J. 39; *Puffert v. Robert Blum Bldg. & L. Asso.* 25 Pittsb. L. J. 40.

To allow a member to retire and demand all he paid in, without contributing anything to losses which are manifest and impending, would be unjust toward his fellow members. And it would be bad faith in him. He has a right to share the profits while a member, and he must also bear his proportion of the losses.

Endlich, Bldg. Asso. 2d ed. §§ 77, 78; *Edelin v. Pascoe*, 22 Gratt. 826; *Cason v. Seldner*, 77 Va. 293; *United States Bldg. & L. Asso. v. Silberman*, 85 Pa. 894.

Messrs. C. A. Ballreich and Read & Read, for interveners:

The concern was going until December 23, 1894, and all who filed their notices of withdrawal before that date changed their relation according to former agreement, and now have a claim against the fund in the hands of the receiver, according to the terms of withdrawal.

Re Blackburn & Dist. Ben. Bldg. Soc. L. R. 24 Ch. Div. 421.

This court must not only find that the association was in fact insolvent when appellees filed their respective notices of withdrawal, but it must find that appellees knew it, before it can find for appellants.

United States Bldg. & L. Asso. v. Silverman, 85 Pa. 394.

Mr. W. H. Keating, for interveners C. P. Searle *et al.*:

A stockholder of a building association can arbitrarily divest himself of his membership, cut loose from the association, and end his debts and liabilities.

Thompson, Bldg. Asso. chap. 7, §§ 1, 8.

The action of the association, as relates to appellees, determined them to be creditors,—so recognized them because they ceased paying dues, fines, or other expenses; and no court in christendom can change the relation of these interveners to the association after having been established by its officers and under the articles for withdrawal.

Hennighausen v. Tischer, 50 Md. 588; *McKenney v. Diamond State Loan Asso.* (Del.) 18 Atl. 905; *Thompson, Bldg. Asso.* p. 87, § 11.

The law recognizes the investing member, or the member who is an investor, as a member who assumes debts and rights which differ from those of a borrower.

Thompson, Bldg. Asso. chap. 8, § 6.

The by-laws require a withdrawing member to give a written notice of his intention to withdraw. This the interveners did. The secretary, or some person having control of such matters in the organization, should enter upon the book kept for that purpose the amount to be paid upon the withdrawal, which was done in this case.

Thompson, Bldg. Asso. p. 63, chap. 8, § 9; pp. 6-8; § 6, p. 24; pp. 81, 82, § 6; United States Bldg. & L. Asso. v. Silverman, 85 Pa. 394; *State v. Redwood Falls Bldg. & L. Asso.* 45 Minn. 154, 10 L. R. A. 752.

The moment a member gives notice of withdrawal his character and relation to the association have changed; he at once becomes from debtor to creditor to the amount of his legal claims, and is entitled to recover as much of the withdrawal value as fixed by the by-laws in withdrawing, and if payment was refused he is strictly within the rule as creditor.

Hennighausen v. Tischer, 50 Md. 588; *McKenney v. Diamond State Loan Asso.* (Del.) 18 Atl. 905.

It is supposed that while an organization is in force the withdrawing member shall be paid out of the funds designated for that purpose, but it is not intended that a lack of funds shall defeat the member's right, and when he has given notice of withdrawal before the association has wound up he is entitled to be paid out of the assets after outside creditors in the priority of those members who had not given notice, though there were no funds for payment at the time he gave notice.

Thompson, Bldg. Asso. p. 63, § 18; Bergman v. St. Paul Mut. Bldg. Asso. No. 1, 29 Minn. 275.

In construing the by-laws concerning withdrawals, they should be construed favorably for the member.

Thompson, Bldg. Asso. p. 69, § 16; Fuller 38 L. R. A.

v. Salem & D. Loan & Fund Asso. 10 Gray, 94; *Booz's Appeal*, 109 Pa. 592.

Corporations of this character must be governed by their by-laws.

People v. Love, 117 N. Y. 175; *Re Sunderland 32d Universal Bldg. Soc.* L. R. 24 Q. B. Div. 894; *American Dig. U. S.* 1860, p. 457, § 11; *Holyoke Bldg. & L. Asso. v. Lewis*, 1 Colo. App. 127; *Thompson, Bldg. Asso. chap. 5, § 6.*

The general rule is, that the stockholder is to be governed by the articles of incorporation and by-laws of the organization unless there is special legislation as in some of the states.

McDonough v. Hennepin County Catholic Bldg. & L. Asso. 62 Minn. 122.

Courts favor the diligent creditor, and when he has taken all the necessary steps, and the party having the authority places him in a situation where his claim is preserved and made collectible, even though the less diligent suffer, still the latter cannot complain.

Crouse v. Morse, 49 Iowa, 385; *Chase v. Walters*, 28 Iowa, 460.

The appointment of a receiver involves the decision of no right, but is desired to secure and husband the fund, that it may be appropriated without delay and inconvenience as the court upon the final trial may adjudicate.

20 Am. & Eng. Enc. Law, p. 17; *McGowan v. Myers*, 66 Iowa, 102; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 28; *Ex parte Dunn*, 8 S. C. N. S. 288; 20 Am. & Eng. Enc. Law, p. 17; *Snow v. Winslow*, 54 Iowa, 200.

The date of receipt of notice to withdraw from such associations determined the rights of such members, because they ceased to pay dues, fines, or assessments from the date of receipt of withdrawal, and not thirty days after.

Thompson, Bldg. Asso. pp. 6, 7, 8, chap. 64, § 9; p. 24, § 6; pp. 81, 82, § 6; United States Bldg. & L. Asso. v. Silverman, 85 Pa. 394; *State v. Redwood Falls Bldg. & L. Asso.* 45 Minn. 154, 10 L. R. A. 752.

The interveners in this case were creditors entitled to bring suit against the association for the value of their stock before the receiver was appointed.

United States Bldg. & L. Asso. v. Silverman, 85 Pa. 394; *Holyoke Bldg. & L. Asso. v. Lewis*, 1 Colo. App. 127; *Re Blackburn & Dist. Ben. Bldg. Soc.* L. R. 24 Ch. Div. 421; *Hennighausen v. Tischer*, 50 Md. 588; *McKenney v. Diamond State Loan Asso.* (Del.) 18 Atl. 905; *Engelhardt v. Fifth Ward Permanent Dime Sav. & L. Asso.* 5 Misc. 518; *Toole v. American Bldg. Loan & Inv. Soc.* 61 Fed. Rep. 447; *Granite State Provident Asso. v. Lloyd*, 145 Ill. 620.

As creditors of said association they are entitled to be paid in full out of the assets of said association in priority to members who did not give notice of withdrawal and immediately after the general creditors of the association have been paid, when the association has been placed in a receiver's hands.

Re Blackburn & Dist. Ben. Bldg. Soc. L. R. 24 Ch. Div. 421; *Re Mutual Society*, L. R. 24 Ch. Div. 425, note; *Walton v. Edge, L. R.* 10 App. Cas. 88; *Murray v. Scott*, L. R. 9 App. Cas. 519; *Re Sheffield & S. Y. Permanent Bldg. Soc.* L. R. 22 Q. B. Div. 470.

Even though there were no funds on hand

applicable at the time of the commencement of the winding up for their payment, insolvency at the time of the expiration of the notice will not defeat the appellant's right to priority.

McKenney v. Diamond State Loan Assn. (Del.) 18 Atl. 905.

These associations are not partnerships. The contract in each particular case depends on the rules of the particular society.

Walton v. Edge, L. R. 10 App. Cas. 83; *Brownlie v. Russell*, L. R. 8 App. Cas. 285; *Tosh v. North British Bldg. Soc.* L. R. 11 App. Cas. 489.

The fact that there were not sufficient funds on hand to pay the interveners does not affect their rights as to preference over the members who did not withdraw.

Walton v. Edge, L. R. 10 App. Cas. 83; *Murray v. Scott*, L. R. 9 App. Cas. 519; *Re Sheffield & S. Y. Permanent & Bldg. Soc.* L. R. 22 Q. B. Div. 470; *Barnard v. Tomson* [1894] 1 Ch. 874.

Messrs. Dudley & Coffin, E. T. Morris, Ayres, Woodin, & Ayres, and J. K. Macomber for appellees.

Granger, J., delivered the opinion of the court:

The case involves no controversy as to general creditors, nor as to any creditors except in so far as the withdrawing shareholders may be regarded as creditors, as to which fact there is some controversy in argument. There are two classes of persons who claim to be entitled to participate in the distribution of the assets of the corporation: First, those who gave notice of withdrawal before the appointment of the receiver, who claim to be preferred, and to be entitled to full payment before the other shareholders are entitled to anything; and, second, those who did not give such notice, who claim that all shareholders (that is, both classes) should share equally. The articles of incorporation provide for two funds,—a loan fund and an expense fund. The following is a provision of the by-laws under which it is claimed that the withdrawing shareholders should be preferred and first paid: "Sec. 9. Any shareholder in good standing, after giving thirty (30) days' notice in writing, and upon the surrender of his certificate, may withdraw, after three (3) months' dues have been paid, the full amount of his payments to the loan fund, together with the earnings up to the last dividend period. Said withdrawals shall be paid according to the priority of notice." The stock of the corporation is classed from A to F, but the classification is not important for our consideration. The following is a further provision of the by-laws: "Article XVII. This association shall not be liable to pay out on account of withdrawals of all classes of stock, during any one month, more than thirty (30) per cent of the cash receipts of the loan fund during such month, upon all classes of stock except Class F, and except stock issued under the provisions of § 2 of article VII. of the by-laws. In case of withdrawal before maturity, there shall be charged against the book value thereof a withdrawal fee of 10 cents on each share." By a misappropriation, the loan fund has been used for the expenses of the corpora-

tion to an amount in excess of \$36,000, and while, in argument, there is some contention otherwise, the corporation is insolvent. In considering the rights of withdrawing shareholders from such associations, the cases discuss the effect of the association being, at the time of withdrawal, "a going concern," or insolvent, and its affairs being "wound up." It is quite evident that the by-laws of this association were adopted with reference to doing business, rather than with reference to closing up its affairs. This fact is important in determining what must have been the mutual understanding of the incorporators in their adoption of the article and laws, and also the understanding of those who became shareholders afterwards. Section 9 of article 13 gives the absolute right of withdrawal on thirty days' notice, and just as absolute a right to withdraw payments to the loan fund, except that it must be done in a way prescribed. That method is fixed by article 17, which exempts the association from liability for such withdrawals, so that it is not required to pay, in any one month, more than 30 per cent of the cash receipts of the loan fund during such month. Speaking of such an association as a going concern, there would seem to be no question but that a withdrawing shareholder, on presentation of his certificate, could demand and should receive payment, in the order of his withdrawal, of as much money as the treasury afforded, of the 30 per cent specified, and no more. If there were no provision for such payment, none could be made from the fund, and the shareholder must hold his stock or exchange it in the market. The right of withdrawing the stock—that is, withdrawing the payments—depends entirely on the by-laws authorizing it. The by-law is not a limitation on a prior right,—that is, a right existing independent of the by-law, perforce of a person being a shareholder,—but it is a grant of a right, and limited by the terms of the grant.

In *Heinbokel v. National Sav. Loan & Bldg. Assn.* 58 Minn. 340, 25 L. R. A. 215, this particular question is considered. The by-law in that case is so like the one in this case as to make the authority entirely applicable. It is said in that case: "In assuming the relation of a member of the association plaintiff contracted with reference to, and was to be governed by, its by-laws in so far as they were reasonable, and not opposed to our statutory provisions regulating associations of this character. He agreed to abide by the condition of the treasury in case of a withdrawal, and to take his money when funds properly applicable for the purpose were on hand. He was not to be paid until these funds were in the treasury, and, although he could at any time cease to be a member, and terminate his obligation to make monthly payments, the amount to be returned to him did not then become due or payable except in a certain contingency. If not absolutely and immediately due and payable at withdrawal, it is difficult to see how his cause of action was then maintainable." In that case the questions are considered whether or not a withdrawing shareholder becomes a creditor upon complying with the law for withdrawing his payments, and also whether he could bring an action and obtain judgment against the as-

association when there is no money legally applicable for the payment of his claim. It is held that such a shareholder is not to be regarded as having the rights of the ordinary creditor, and hence that he could not maintain such an action. It is further said in that case: "The right to withdraw and to receive back what has been paid into the treasury by a member of the association exists solely by virtue of the by-law or the statute. If this right to receive money out of the treasury is made to depend upon its condition, the right is not perfect or absolute until that condition exists." In *Texas Homestead Bldg. & L. Assn. v. Kerr* (Tex.) 13 S. W. 1020, where the right of withdrawal was given in the by-laws, and there was a provision that at no time should more than one third of the funds in the treasury be applied to the demands of the withdrawing stockholders without the consent of the directors, it was held that there could be no recovery by such a stockholder in the absence of a showing that there were funds applicable, or that the directors had consented to the use of other funds. *Christian's Appeal*, 102 Pa. 184, involved a question as to the right of withdrawing stockholders to preference after the payment of the general creditors, under by-laws so similar to those in the case at bar as to make the rule of the case authority; and it is there said as to such stockholders: "If the association has been prosperous, they have a right, under certain limitations and restrictions, to demand and receive their proportionate share of the accumulated fund, but, if bad investments have been made or losses have been sustained before actual withdrawal, they must bear their just proportion thereof. . . . When a building association has failed to fulfill the object of its creation and has become hopelessly insolvent, it cannot be justly or equitably wound up on any other principle than that above suggested. After expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the fund should be distributed, *pro rata*, among those whose claims are based upon stock of the association, whether they have withdrawn and hold orders for the withdrawal value thereof, or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof." The case refers to *United States Bldg. & L. Assn. v. Silverman*, 85 Pa. 894; and, while it does not overrule or distinguish it, it announces the above rule with the former case in mind. It is not easy to reconcile the two cases in some particulars, and undoubtedly the last should be

taken as the judgment of the court wherein, if at all, the cases are not in harmony. The *Silverman Case* is reviewed in *Heinbokel v. National Sav. Loan & Bldg. Assn.* 58 Minn. 340, 25 L. R. A. 215 (the Minnesota case), and the holding is disapproved. In *Endlich, Bldg. Assn.* 2d ed. § 114, it is said, speaking of the by-law provisions of such corporations, that only a proportion of the funds can be withdrawn for the purpose of paying withdrawing stockholders: "This, then, becomes a charter limitation upon the rights of withdrawing members, and operates to prevent a conflict between them and the undisturbed exercise of the association's corporate functions, by narrowing them down to a certain portion of the assets as the source of their payment."

It seems to us that these authorities, as well as the language of the by-laws of the association in this case, fix a limitation on the rights of withdrawing shareholders as to the funds applicable to the payment of their claims, and that beyond such limit they cannot go. In this case there is, confessedly, no such fund available. We have seen no case in which the limitation is like the one in this case, it being limited to 80 per cent of the monthly receipts. This limitation, throughout the authorities, in this country, seems to be of controlling importance. Insolvency but adds to the strength of such a position, and the holding in *Christian's Appeal*, 102 Pa. 184, is in a case where the corporation was insolvent, and the rule was there applied. Both parties have quoted from, and argued the effect of, some English cases, and, conceding them to announce a different rule (and to quite an extent they do), we are still content with the rule that is supported by the weight of authority in this country, and best accords with reason. No one contends that such a conclusion is not the equitable one, the contention of interveners being only that a correct legal construction of the by-laws justified their claim, but in that view we do not concur. As we said at the outset, the provision of the by-laws for paying back contributions to the loan fund contemplated monthly receipts to such fund, so that the corporation, as a going concern, could apply a percentage thereof to such a purpose; and there is nothing to show a purpose to make such payments after such receipts have ceased, and the only business of the corporation is a final settlement and an equitable division of the assets. We think the judgment should be so changed as to make a *pro rata* payment of all stockholders, regardless of notices of withdrawal, and the cause is remanded for such a decree.

Reversed.

MAINE SUPREME JUDICIAL COURT.

City of AUBURN, *Appl.*,
v.
UNION WATER-POWER COMPANY.

(90 Me. 578)

1. A city may be given the right by the legislature to use a reasonable portion of the waters of a great pond for the domestic purposes of its inhabitants without being liable to purchase the water from persons having mill privileges upon streams flowing from the pond.
2. Taking one-fifteenth of the water supply of a great pond for the domestic purposes of the inhabitants of a city is not so unreasonable as to give the owners of mill privileges a right to complain, where the whole supply is 15,000,000 gallons daily.
3. Mere use of the water flowing from a great pond for mill privileges is not so adverse to the rights of the public to the water that it will ripen into a title which cannot be interfered with by a state grant to a city of the right to use the water for the domestic purposes of its inhabitants.

(October 22, 1897.)

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full bench of an appeal by the city of Auburn from an award of county commissioners assessing damages to the Union Water Power Company of Lewiston for water taken by the city of Auburn from a great pond for domestic purposes. *Reversed.*

The facts are stated in the opinion.

Messrs. N. W. Harris, J. A. Pulsifer, W. W. Bolster, J. W. Symonds, D. W. Snow, C. S. Cook, and A. R. Savage for city of Auburn.

Messrs. W. H. White, S. M. Carter, and J. A. Morrill for Union Water Power Company.

Walton, J., delivered the opinion of the court:

This is a petition for the assessment of damages. It is presented by the Union Water Power Company of Lewiston, and the question is whether, under the circumstances disclosed by the evidence, the company is entitled to damages.

It appears that in 1891 the legislature authorized and employed the city of Auburn to take water from Wilson pond sufficient for domestic purposes and the extinguishment of fires and the supply of hotels and livery stables and laundries, and for sprinkling its streets. Private and Special Laws 1891, chap. 82.

For water taken under the authority of this act, the Union Water Power Company of Lewiston claims that it is entitled to compensation. The company claims that it has a superior and paramount right to the entire waters of the

pond, "including all the natural flow of the same," and that, if any portion of the water is diverted and used by the citizens of Auburn for domestic purposes, the company is entitled to damages. The question is whether this claim can be sustained. It is the opinion of the court that, under the circumstances disclosed by the evidence, the claim cannot be sustained.

It is a settled rule of law in this state and Massachusetts that all great ponds,—that is, ponds containing more than 10 acres,—are owned by the state. This is a rule of law peculiar to this state and Massachusetts. It is said to have been derived from the Colonial Ordinance of 1641–47. The rule, as stated by Chief Justice Morton, in a recent Massachusetts case, is as follows:

"Under the ordinance, the state owns the great ponds as public property, held in trust for public uses. It has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum* and the right to control and regulate the public uses to which the ponds shall be applied. The littoral proprietors of land upon the ponds have no peculiar rights in the soil or in the waters, unless it be by grant from the legislature." *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466.

In the case cited, the reservoir company had constructed an expensive dam and had paid large sums of money for flowage rights, and had controlled the waters of the Watuppa pond for nearly sixty years. The legislature then authorized the city of Fall River to take water from the pond for domestic uses and the extinguishment of fires, and all other public uses of the city, without liability to pay any other damages than the state itself would be legally liable to pay. The peculiar wording of this statute in relation to damages was undoubtedly intended to test the authority of the legislature to confer upon towns and cities the right to take water from great ponds for domestic purposes without being liable for damages; and the court so treated it; and a majority of the court held that the authority existed. The majority opinion was by Chief Justice Morton. The minority opinion was by Mr. Justice Knowlton.

We have examined the opinions with care. The minority opinion rests apparently upon the assumption that all of the waters of our great public ponds and lakes are dedicated, primarily, to the use of mills, and that no town or city can take any portion of the waters for domestic purposes without being liable in damages therefor to the owners of the mills. The majority opinion recognizes the right of the people to have pure water for domestic use, and affirms the authority of the legislature to permit towns and cities to take water from great public ponds and lakes for the use of their inhabitants without being liable to pay damages to those who want the water for the use of mills.

NOTE.—As to great ponds belonging to the state, see also *Watuppa Reservoir Co. v. Fall River* (Mass.) 1 L. R. A. 466; *Proprietors of Mills v. Braintree Water Supply Co.* (Mass.) 4 L. R. A. 272; *Atty. Gen., Mann, v. Revere Copper Co.* (Mass.) 9 L. R. A. 38 L. R. A.

510: *Watuppa Reservoir Co. v. Fall River* (Mass.) 18 L. R. A. 255; *Fernald v. Knox Woolen Co.* (Me.) 7 L. R. A. 459; and *Concord Mfg. Co. v. Robertson* (N. H.) 18 L. R. A. 679.

We think the doctrine of the majority opinion is correct. It is sustained by reason as well as authority. Water for domestic use is a necessity. Man cannot exist without it. Water for the use of mills is a convenience only. And there is no conceivable reason why those who want it for domestic use should be compelled to buy it of those who want it for the use of mills.

In *Philadelphia v. Collins*, 68 Pa. 106, the jury were instructed that every individual residing upon the banks of a stream has a right to the use of the water to drink, and for the ordinary uses of domestic life; and that where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right; and the instruction was held to be correct.

The right to the use of water for domestic purposes is primary, and the right to its use as a mechanical power is secondary; and to the extent that the two rights conflict, its use as a mechanical power must be surrendered. *Keons v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

True, it is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law. And the inaccuracy of the statement has often been pointed out. The true rule is that there must be no unlawful or unreasonable diminution or diversion of the water. The diversion and consumption of water for domestic purposes is neither unlawful nor unreasonable. As said by Mr. Justice Dickerson in *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 578, "water, air, and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a reasonable use of each. . . . Reasonable use is the touchstone to which cases of this description must be subjected."

And in another case, Mr. Justice Rice said that this right to a reasonable amount of water for domestic purposes necessarily implies a right to diminish the volume of the water. *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

A gallon of water withdrawn from Moosehead lake will diminish the quantity that would otherwise flow down the Kennebec river. But, surely, no one will doubt the right of the people who live near that lake to take and use for domestic purposes a reasonable amount of its waters. Nor can anyone believe that such a use would be a wrong to the owners of any of the dams across the Kennebec river. The right of the people living in the vicinity of our great ponds and lakes to a reasonable amount of their waters for domestic purposes is sustained by the rules of the common law of this state, as well as by reason and the principles of natural justice, as the cases cited will show. And it is only of our great public ponds and lakes that we are now speaking. We are not declaring or attempting to define the rights appertaining to wells, springs, rivulets, or small ponds. It is only of great ponds and lakes, the titles to which are held by the state for the use of the public, that we are now speaking.

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And of these great public ponds and lakes, we affirm that by the rules of the common law of this state, the people are entitled to a reasonable portion of their waters for domestic purposes without being obliged to buy it of the owners of mill privileges. And we affirm, further, that, by virtue of the rule of property derived from the ordinance of 1641-47, as interpreted in this state as well as Massachusetts, the title to all great ponds,—that is, ponds containing more than 10 acres,—is in the state, and that the legislature may confer upon towns and cities the right to take water from such ponds for domestic purposes without making such towns and cities liable for the losses thereby sustained by the owners of mill privileges. Health is of more importance than wealth, and cleanliness is next to godliness; and we hold that the right of the people to an abundant supply of pure water, by which their health and cleanliness may be secured, is paramount to the right of mill-owners to have the water for propelling their machinery; and that, to the extent that the two rights conflict, the latter must yield. Of course, private property cannot be taken for public use without making compensation for it. But the waters of great ponds and lakes are not private property. They are owned by the state, and the state may dispose of them as it thinks proper.

Wilson pond is a great pond. Its supply of water is 15,000,000 of gallons daily. Of this quantity Auburn probably uses about a half a million of gallons daily. This is only about one thirtieth of the entire supply. It is a quantity comparatively so small that its withdrawal from the pond does not perceptibly lessen the size of the stream at the outlet. The quantity used by Auburn will probably be somewhat increased in the future. But there is no probability that the quantity used daily will ever exceed 1,000,000 of gallons. Auburn is a city large in territory; but the number of its inhabitants does not exceed 15,000; and a considerable portion of them do not and never can receive their supply of water from Wilson pond. But allowing that 10,000 of its inhabitants will at some future day receive their water from the pond, and that each one of these inhabitants will consume 100 gallons daily; then the quantity will be only 1,000,000 of gallons, leaving fourteen fifteenths of the water to flow on to the works of the Union Water Power Company as heretofore. Surely, the Union Water Power Company cannot complain that this is an unconscionable or unreasonable division of the water.

But we are asked to consider if the Union Water Power Company has not become entitled to the whole of the waters of Wilson pond by an adverse use. We do not think the use has been adverse. The company and its predecessors in title have used the water of the pond, or so much of it as has flowed out of the pond through its natural channel and become mingled with the waters of the Androscoggin river; but this has been a rightful use. It has had no element of adverseness in it. It has encroached upon no one's rights, and no one has had a right to suppress it. Such a use can never ripen into a prescriptive title. *Pratt v. Lamson*, 2 Allen, 275. And, besides, the authority of the state to control the waters of great ponds,

and determine the uses to which they may be applied, is a governmental power, and the governmental powers of the state are never lost by mere nonuse. In *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466, the reservoir company has had the entire control and use of the waters of the Watuppa ponds for nearly sixty years. But the court held that the legislature might, nevertheless, confer upon the city of Fall River the right to take water from the ponds for domestic purposes without being liable to pay damages.

The Watuppa case was embarrassed by the fact that both parties had charters from the legislature. The reservoir company had been chartered as early as 1826, and granted the right to construct a reservoir dam that would raise the water 2 feet higher than it had before been raised, and to draw off the water in such quantities and at such times and in such manner as it should judge proper. And under authority of this charter the corporation had expended large sums of money and had had the entire use and control of the waters of the pond for nearly sixty years when the authority to Fall River was granted to take water from the ponds for domestic purposes. And the reservoir company claimed that it had thereby become invested with the property rights in the entire waters of the ponds of which it could not be divested without compensation. Upon this question the court was divided, three judges holding that the reservoir company was entitled to damages and four judges that it was not.

We are embarrassed by no such question. In this case only one of the parties has a charter from the legislature, and that party is the city of Auburn. The Union Water Power Company is a self-created corporation, organized under the general law. It has no charter from the legislature. It has never asked for and has never obtained from the legislature any property rights or any special privileges in the waters of Wilson pond. It has no property rights in the waters of the pond which are taxable in the city of Auburn, and we think it has no such right in its waters as entitles it to damages from the city of Auburn. See *Auburn v. Union Water Power Co.* 90 Me. 60.

The state's ownership of great ponds, and the authority of the legislature to permit water to be taken from such ponds for domestic purposes without the payment of damages were affirmed in *Fry v. Salem & D. Aqueduct Co.* 111 Mass 27.

No reason is perceived why the same doctrine should not prevail in this state. The colonial ordinance of 1641-47 is in force in this state; and it is settled law that by virtue of it the title to all great ponds is vested in the state. The right of the people to a sufficient quantity of water for domestic purposes is incontrovertible. And when, by permission of the legislature, this supply is taken from ponds which are owned by the state, no reason is perceived why the takers should be required to pay damages to persons or corporations who do not own the water. If water is taken from wells, or springs, or small ponds, or small streams, which are owned by private persons or corporations, of course, compensation must be made. But, if taken from great ponds, which are

owned by the state, no reason is perceived why damages should be exacted. Water for use as a mechanical power is important, and should receive reasonable protection. But water for domestic use, and by which the health and cleanliness of the people, and protection against fires, are to be secured, is also important. And when water for both purposes is drawn from the same public fountain, no reason is perceived why either of the parties should be required to pay damages to the other.

Tested by the rules of the common law, which require a reasonable use, and, in case of conflict, a just and fair division of water, and the claim of the Union Water Power Company must fail. Tested by the rules of law derived from the colonial ordinance of 1641-47, and the result is the same. No property rights of the Union Water Power Company have been invaded by the city of Auburn. The water which the city of Auburn is using is a donation from the state. The claim of the Union Water Power Company that it is entitled to the entire waters of Wilson pond is not sustained by the evidence; and it is the opinion of the court that its claim to recover damages must be rejected.

Petition dismissed. No costs for either party.

Charles E. TREFETHEN *et al.*, *Appels.*

v.

E. V. LYNAM *et al.*

(90 Me. 376.)

1. **To the amount that a wife's premises are enhanced in value** by additions and improvements made upon them, with her consent, out of her husband's earnings, she is liable to his creditors.
2. **A debtor's wife receiving her husband's earnings may entirely consume them** in the suitable support of his family including herself, without becoming in any way answerable to his creditors, but as against them she cannot appropriate such earnings or income to make investments in her own name either for him or herself, or to keep down or pay off encumbrances on or otherwise improve her own property, or to pay the debts or increase the profits of her separate business.
3. **A wife who turns remittances from her husband into a business which she carried on** in partnership with a third person and out of which both families are supported has the burden of proving, as against the husband's creditors, that their rights have not been injured thereby, and that an equivalent sum was properly and actually consumed by the husband's family.
4. **Rent for a wife's homestead occupied by her with her husband and family** cannot, at least in the absence of any agreement therefor, be charged to the husband in determining the liability of the wife to his creditors for the husband's earnings which had been used to improve the premises.

NOTE.—As to the right of a creditor to the personal services of his debtor, see note to *Mayers v. Kaiser* (Wis.) 21 L. R. A. 623; also *Bogges v. Richards* (W. Va.) 20 L. R. A. 537.

(May 31, 1897.)

APPPEAL by complainants from a decree of the Superior Court for Cumberland County dismissing a proceeding by trustee process to enforce payment of a debt due by E. V. Lynam out of assets in the hands of Linda M. Lynam, his wife, and Robert E. Campbell. *Reversed.*

The facts are stated in the opinion.

Mr. Benjamin Thompson, for appellants:

The complainant having shown that the respondent, E. V. Lynam, erected the barn upon the wife's real estate after the date of the complainant's debt, and that the moneys sent to Mrs. Lynam were used in the general account, and applied in reducing the mortgages, it is submitted that the burden is upon the respondents to relieve themselves, and to show that they have expended the same for family expenses.

Toothaker v. Allen, 41 Me. 324; *Barker v. Osborne*, 71 Me. 69; *Haynes v. Thompson*, 80 Me. 125.

If a wife, without her husband's knowledge or assent, deposits his wages, placed in her hands for safe keeping, in a savings bank, and uses the deposit with money of her own in the purchase of land, the title to which she takes and holds in her own name, the husband has an equitable interest in the land, to reach and apply which in payment of his debt a creditor of the husband may maintain a bill in equity against him and his wife.

Breenihan v. Sheehan, 125 Mass. 11.

If Captain Lynam has expended money upon improvements of his wife's real estate, such as the erection of the barn, which was not absolutely necessary and proper for the shelter and maintenance of the family, and has either remitted his money to his wife, or Mr. Campbell, to be used in improvements on the real estate, so as to keep the same from the reach of these creditors, then the same is void as to the complainants, although there was no actual fraud on Mrs. Lynam's part.

Call v. Perkins, 65 Me. 489; *Sampson v. Alexander*, 66 Me. 182; *Merrill v. Jose*, 81 Me. 22; *Stratton v. Bailey*, 80 Me. 345; *Breenihan v. Sheehan*, 125 Mass. 11; *Spelman v. Aldrich*, 126 Mass. 113; *Ames v. Chew*, 5 Met. 320; *Re Wyatt* (Ky.) 2 Nat. Bankr. Reg. 288; *Dick v. Hamilton*, Deady, 822; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Wallace v. Penfield*, 103 U. S. 260, 27 L. ed. 147; *Payne v. Stanton*, 59 Mo. 158; *Schuyler v. Broughton*, 70 Cal. 282; *French v. Holmes*, 67 Me. 186.

The mere fact that a grantor is indebted at the time he makes a voluntary conveyance does not necessarily render such conveyance fraudulent against the existing creditors. On the other hand, since the prima facie presumption arises in such case, it is never necessary to show by affirmative evidence an actual intent to defraud, in order to render a voluntary conveyance fraudulent and void as against existing creditors.

Pom. Eq. Jur. § 972; *Parkman v. Welch*, 19 Pick. 281.

Transactions relating to the dealings between husband and wife will be carefully scanned when the rights of creditors are involved.

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Robinson v. Clark, 76 Me. 498; *Seitz v. Mitchell*, 94 U. S. 580, 24 L. ed. 179; *Gamber v. Gamber*, 18 Pa. 363; *Kenney v. Good*, 21 Pa. 349; *Walker v. Heamy*, 38 Pa. 410; *Parvin v. Capewell*, 45 Pa. 89; *Bradford's Appeal*, 29 Pa. 518; *Aurand v. Schaffer*, 43 Pa. 363; *Robinson v. Wallace*, 39 Pa. 129; *Coleman v. Burr*, 93 N. Y. 17, 45 Am. Rep. 160; *Spelman v. Aldrich*, 126 Mass. 113; *Walker v. Peck*, 39 W. Va. 325; *Wheeler v. Biggs* (Miss.) 15 So. 118; *Crook v. Tull*, 111 Mo. 233; *Stauffer v. Morgan*, 39 La. Ann. 632; *Burns v. Thompson*, 39 La. Ann. 877; *Clafin v. Pfeiffer*, 76 Tex. 469; *Smith v. Bailey*, 68 Tex. 553; *Duruty v. Musacchia*, 42 La. Ann. 857; *Lane v. Lane*, 76 Me. 521; *Lloyd v. Pugh*, L. R. 8 Ch. 88.

Mr. John Peters, Jr., for appellees:

The burden has always been on complainants to show some appreciable value contributed by Captain Lynam to the property, under such circumstances as to render it liable for his debts.

Stratton v. Bailey, 80 Me. 345; *Metcalf v. Metcalf*, 85 Me. 478.

A wife living by force of necessity practically apart from her husband, on her own homestead, is entitled to appropriate from her husband's remittances a fair sum for the premises occupied by herself and her husband's children.

The complainants must show an interest existing in Captain Lynam which he himself could enforce, in equity.

He acquired no such interest by voluntarily building a barn on his wife's land, nothing more appearing, nor by sending home a reasonable amount of money for family expenses, even if a part of this is saved by the wife (as claimed) and used to pay a portion of her separate indebtedness on real-estate mortgages.

A husband has a right to place improvements upon his wife's land in the absence of fraud, and the same cannot be taken for his debts.

Webster v. Hildreth, 33 Vt. 457, 78 Am. Dec. 632; *Robinson v. Huffman*, 15 B. Mon. 80, 61 Am. Dec. 177; *Eilers v. Conradt*, 89 Minn. 242; *Lewis v. Johns*, 24 Cal. 98, 85 Am. Dec. 49; *Phillips v. Hall*, 160 Pa. 60; *Smyth v. Reber* (N. J. Eq.) 18 Atl. 462; *Peck v. Brumagin*, 81 Cal. 440, 89 Am. Dec. 195, notes.

In all cases where a bill has been sustained on facts similar to those claimed by complainants, fraud has been conclusively made to appear, as in *Lynde v. McGregor*, 18 Allen, 182, 90 Am. Dec. 188.

In Indiana the court goes farther than this, and holds that participation by the wife in her husband's fraudulent design must be shown.

Lynde v. McGregor, 18 Allen, 182, 90 Am. Dec. 188.

Money and labor expended voluntarily by a husband upon his wife's land give him no right, title, or interest therein.

Holmes v. Waldron, 85 Me. 312; *Humphreys v. Newman*, 51 Me. 40; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Marable v. Jordan*, 5 Humph. 417, 42 Am. Dec. 441; *Pierce v. Pierce*, 25 Vt. 511.

Emery, J., delivered the opinion of the court:

From the documents and the testimony of

the various defendants themselves, the following facts appear to be practically undisputed:

In 1859 the defendant Linda M. Lynam (then Linda M. Clement) was the owner, by inheritance from her father, of a homestead at Seal Harbor, Mt. Desert, and was living upon it with her mother. In that year she married the defendant Capt. Eri V. Lynam, and the pair began married life upon this homestead, and their home has been upon it ever since. The family has consisted of Mr. and Mrs. Lynam, their children, and Mrs. Lynam's mother. In 1882 the defendant Robert E. Campbell married a daughter of the other two defendants, and lived with her upon the same homestead as a member of the family. Capt. Lynam's occupation was that of master mariner, and he was absent most of the time after 1874 upon foreign voyages.

In 1883 Mrs. Lynam and her son-in-law, Campbell, began the enterprise of building and running a summer hotel on her place. One hotel building was erected and furnished in 1884, and a second one in 1887. The money was raised by notes of Mrs. Lynam and her mother, Mrs. Clement, secured by a mortgage of the homestead. In this way money was borrowed as follows: In 1883, \$4,000, at 8 per cent; in 1884, \$6,600, at 8 per cent; in 1887, \$1,500, at 8 per cent—amounting to \$12,100. In addition to the above, \$2,500 were borrowed on note alone, at 7 per cent in 1887. The business was managed by Campbell, for himself and Mrs. Lynam, under the name of Lynam & Campbell. Mrs. Lynam and a minor daughter worked in and about the hotel during the season, at least. The interest on the loans, aggregating over \$1,000 annually, and occasionally small sums upon the principal, were paid from year to year, up to 1892. A \$1,000 payment was made in 1889, and another \$1,000 payment in 1893. In 1894 some of the property of Mrs. Lynam was sold to one Cooksey, and from the proceeds of that sale the various mortgages were finally paid that year.

During all this time Capt. Lynam was away at sea, coming home at infrequent intervals and for short stops only. From time to time he remitted sums of money to his wife, the different remittances varying in amount from \$50 to \$500. They were usually by draft or check. In making these remittances, Capt. Lynam gave no directions as to what should be done with the money. He seems to have left its disposition entirely to his wife's discretion. The remittances, with but few if any exceptions, were turned over by Mrs. Lynam to Mr. Campbell, and by him deposited in the bank to the credit of Lynam & Campbell,—in the same account with the hotel business. One draft of \$350 was sent direct to Mr. Campbell, who deposited it to the same account. The aggregate amount of these remittances is much in dispute. The respondents admit that they averaged \$700 yearly. The plaintiffs claim that they were nearer \$1,200 per year. There seems to be no exact account of the amount, and it is to be largely determined by inference from circumstances.

As stated above, nearly all the remittances, whatever the amount, were turned into the funds of Lynam & Campbell. Out of these

funds of Lynam & Campbell were paid the hotel expenses, the interest on the notes, the partial payments upon the principal, and also the family expenses of the Lynam and Campbell families, who were living together. No accounts were kept, and both Mrs. Lynam and Mr. Campbell are utterly unable to state the amount expended for either or both families. The two families comprised five persons,—Mrs. Lynam, her mother, and an unmarried minor daughter, with Mr. and Mrs. Campbell. Nor were any accounts kept of the hotel business, but both Mrs. Lynam and Mr. Campbell say there was little or no profit in it. Mrs. Lynam says there was a loss.

At a period about midway between the years 1874 and 1883, Capt. Lynam, with his wife's consent, built a stable on the homestead, expending thereon about \$800 of his own money. He does not claim to have built the stable with his own labor, and, as he was away at sea a greater part of the time after his marriage, it is a fair inference that the stable was built out of his money.

But all this while, and as early as 1874, Capt. Lynam was indebted to the plaintiffs in the sum of over \$1,500, with interest, which he has never paid any part of, and has had no property in his name with which to pay it. This indebtedness (now in the form of a judgment) does not seem to have been known to Mrs. Lynam or Mr. Campbell till 1890.

The plaintiffs now bring this bill in equity, in the nature of an equitable trustee process, under Rev. Stat. chap. 77, § 6, cl. 10, to reach and apply to their judgment the money of Capt. Lynam thus appropriated or used in the improvement of Mrs. Lynam's property and in her business enterprise. They claim that they have shown a direct appropriation of their debtor's money to the erection of the stable, which they say ought, in equity at least, to be appropriated to his debts. While they do not claim to have shown any direct appropriation of any specific sum of their debtor's money to the payments on the hotel erections, they do claim they have shown a general appropriation of nearly all his earnings by the business association of Lynam & Campbell, and their incorporation into the fund from which that concern paid the interest, and some parts at least of the principal of the hotel mortgages. They further claim that, having shown this, the burden is on the respondents to show that the debtor's money thus taken was in fact expended for his family's suitable maintenance, and that they have failed to do this, and hence should submit to its reappropriation for his debts.

The justice hearing the cause in the first instance did not sustain these claims of the plaintiffs, but dismissed the bill upon the following grounds, among others: (1) As to the stable, that it was built without any understanding between Capt. Lynam and his wife as to its ownership, and so became a part of the wife's realty, with no legal or equitable title thereto left in him; (2) that Mrs. Lynam was entitled to deduct from her husband's remittances a fair rental for her homestead occupied by their family; (3) that, making the above allowance for rent, it did not appear that any appreciable or ascertainable part of Capt. Lynam's remit-

tances was in fact applied to his wife's property or business. The justice seemed to put on the plaintiffs the burden of showing such specific application. He also seemed to intimate that there was or might be a surplus if the rent were excluded.

On account of the intimacy of the marriage relation, the husband and wife cannot ignore the creditors of either to the extent that two strangers might. A debtor's wife receiving her husband's earnings may entirely consume them in the suitable support of his family, including herself, without becoming in any way answerable to his creditors. She has no right, however, as against his prior creditors, to appropriate her husband's earnings or income to making investments in her own name, either for him or herself, or to keeping down or paying off encumbrances on, or otherwise improving, her own property, or to paying the debts or increasing the profits of her separate business. Nor can she rightfully retain, as against them, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions, he cannot acquire any property which shall be free from the claims of prior creditors, nor can she acquire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. These propositions are deducible from the following cases: *Coll v. Perkins*, 65 Me. 446; *Sampson v. Alexander*, 66 Me. 182; *Robinson v. Clark*, 76 Me. 494; *Lane v. Lane*, 76 Me. 526; *Stratton v. Briley*, 80 Me. 845; *Merrill v. Jose*, 81 Me. 22; *Berry v. Berry*, 84 Me. 541.

1. It is undisputed that Capt. Lynam, while in debt to the plaintiffs, and having no visible property of his own, directly expended, with his wife's consent, some \$300 of his own money in making a permanent, visible, appreciable addition to his wife's estate and to its value,—not merely keeping up the estate, or carrying it on, but adding to it. This addition (stable) became a part of the wife's realty, and Capt. Lynam himself, as found by the justice of the first instance, may have no right in it, or to reimbursement for it.

Under the principles above stated, however, the husband's right is not the test of his prior creditors' rights. As to them, neither husband nor wife can erect buildings on her land with his money, and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much, but she

should not retain any benefit or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained, would cause her no loss of her own property, but would simply transmit some part of the husband's property to his creditors,—a most equitable proceeding.

2. It is undisputed that Capt. and Mrs. Lynam and their family lived upon her homestead. It does not appear, however, that there was ever any agreement or understanding between them for the payment of rent by him to her therefor. Without expressing an opinion upon the effect of such an agreement if its existence were shown, it may be safely said that in the absence of that agreement the wife has no right to such rent from the husband. It is true the wife may, at her will, manage and dispose of her own property, including her homestead upon which the family live. She may lease it to other parties, and recover and retain the rent; but while she occupies it herself with her husband and family she cannot, at least in the absence of any agreement, require the husband to pay to her rent therefor. The relation between them as to such occupancy is that of husband and wife uniting to make a common home. The relation of landlord and tenant is not to be inferred or implied. The occupation is that of both. *Southworth v. Edmands*, 152 Mass. 208, 9 L. R. A. 118. There are doubtless numberless instances in this country where the husband and wife and family are living upon a homestead owned by the wife, yet no case has been found of a claim made in the courts by the wife against the husband or his estate for the rent, in the absence of an agreement. This circumstance is strong against the validity of such a claim.

If the wife cannot insist on such rent as against her husband or his estate, it follows that she cannot insist upon it as against his creditors. Her husband's indebtedness does not create for her a new right in his property.

3. A wife simply keeping her own and her husband's home and family need not account to her husband's creditors for any part of his income received by her, so long as it does not appear that she is using any part of it for her separate profit. In this case, however, it does affirmatively appear that the wife, with a business associate, was engaged in a business for her own profit, entirely apart from her husband, and that all or nearly all of her husband's remittances were, in the first instance, turned into this business, to the account of Lynam & Campbell. The support of the families of both was drawn indiscriminately from the funds of the business. This procedure was certainly unjust to her husband's creditors,—this subjecting their debtor's income, not solely to the support of himself and family, but to the risk of a business from which he was in no event to derive any profit or increase of estate. At least, it has put on the wife and her business partner the duty of showing affirmatively that such absorption of her husband's income into her property and business worked no wrong to his creditors; that an equivalent sum was properly and actually consumed by the husband's family. This they have not done. At the most, they only give a guess.

It is urged at this point that the justice of the first instance has found this to be the fact, and that his finding of fact is not to be reversed unless clearly wrong. We do not understand the justice to have found this specific fact. His finding was general, including both law and fact. He seemed to concede that the Lynam family expenses alone, not counting rent, might not have consumed the remittances. He made much account of the rent in arriving at his conclusion.

The lamentable tendency of so many debtors to transfer their means and earnings to their wives' possession, or to expend them upon their wives' property, not for the support of the family, but to store them away from the reach of their creditors, renders it necessary for the courts to scrutinize thoroughly, and even with suspicion, any such transaction, however innocent it may appear on the surface.

The wife must not be allowed to absorb the debtor husband's property under the cover of family support. *Robinson v. Clark*, 78 Me. 494; *Seitz v. Mitchell*, 94 U. S. 580, 24 L. ed. 179. Applying that scrutiny to this case, we are satisfied that at least \$1,500 of the debtor husband's earnings have been used in additions and improvements upon the wife's real estate, with her consent, by which her estate has been increased in value to that full amount.

The plaintiffs are entitled to judgment and execution for that amount and costs against the debtor husband and the defendant wife, to be applied to their former judgment against the husband. The defendant Campbell does not appear to have any interest in the property, and hence the bill should be dismissed as to him, but without costs.

Decree below reversed. New decree in accordance with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Timothy J. HARTNETT

PLUMBER'S SUPPLY ASSOCIATION OF
NEW ENGLAND.

(Mass.)

1. The exercise by a private corporation of franchises or privileges not conferred by law may be a serious usurpation and encroachment which, when it injures or puts in hazard the private rights of any person, will justify the exercise by the court of the powers given by Pub. Stat. chap. 180, §§ 17-25, on an information in the nature of a quo warranto.
2. Proceedings to compel persons to pay demands of members of a plumbers' association by threatening to expose their alleged delinquencies and inform certain dealers that they owed overdue accounts and thereby prevent them from obtaining credit in the business which they are carrying on are not germane to the purpose declared by a plumber's supply association "of promoting pleasant relations among its members," or "of establishing and maintaining a place for social meetings," or of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business."
3. The private rights or interests of a dealer in plumber's supplies are injured or put in hazard by proceedings of an incorporated plumbers' supply association which is not engaged in the trade, and with which he has no dealings or any relation by which its legitimate interests are affected by the question whether he shall have credit in the market, when it officiously and without right assumes to notify sellers of such goods that he has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit.

NOTE.—For a plumbers' association held lawful, see *Macaulay Bros. v. Tierney* (R. I.) 87 L. R. A. 455.

As to the annulment of the corporate existence of an organization doing an illegal business, see also *People v. Milk Exchange* (N. Y.) 27 L. R. A. 437, 88 L. R. A.

4. Written communications stating that a dealer has not paid his accounts and debaring dealers from selling to him upon credit, if not justified, are libelous.

(Allen, Knowlton, and Lathrop, JJ., dissent.)

(October 20, 1897.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench, after dismissing the proceeding, of a petition for leave to file an information in the nature of a quo warranto to dissolve defendant for having usurped certain franchises. *Dismissal reversed.*

The facts are stated in the opinion.

Mr. Sanford H. Dudley, for petitioner:

It will not be contended that the defendant corporation is other than a strictly private corporation, and the rule as to strict construction of its powers must therefore apply to it.

2 Kent, Com. *299; Aug. & A. Corp. § 161; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; *Davis v. Old Colony R. Co.* 181 Mass. 259, 41 Am. Rep. 231.

Defendant must confine itself strictly to the purposes and objects for which it was incorporated, and these are, (1) "promoting pleasant relations among its members;" (2), "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business."

Whatever its rights and powers, they are by the express terms of its charter "subject to limitations, duties, and restrictions which by law appertain thereto."

Pub. Stat. chap. 115, § 18; Sedgw. Stat. & Const. Law, 2d ed. 291, *cum notis*.

Defendant has usurped powers never con-

For boycott of a dealer by other persons engaged in the business, see *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* (Minn.) 21 L. R. A. 387, and *Jackson v. Staunfield* (Ind.) 23 L. R. A. 588.

templated or given by statute, and not given in its charter.

The acts and doings of defendant come very near the "bad debt cases" that have caused so much litigation in many parts of the country. This is not a lawful method of collecting a debt.

Beale v. Thompson, 149 Mass. 405; *Warner v. Clark*, 45 La. Ann. 868, 21 L. R. A. 502.

Where a merchant put his accounts into the hands of a "bad debt collector" who advertised the claim for sale, it was held a libel.

Green v. Minnes, 23 Ont. Rep. 177; *Muetze v. Tuteur*, 77 Wis. 286, 9 L. R. A. 86; *State v. Armstrong*, 106 Mo. 395, 13 L. R. A. 419; *State v. McCabe*, 185 Mo. 450, 84 L. R. A. 127.

A false, or malicious statement with just enough of truth in it to make it worse than false, when coming from one man may not seriously injure even a man in weak credit; but, if coming with all the force and dignity of an official statement of a corporation representing, it may be, all the representative concerns in his line of business, it is likely to crush any man no matter how strong his credit.

Cooley, Torts, 202.

The law guards most carefully the credit of all merchants and traders; any imputation of their solvency, any suggestion that they are in pecuniary difficulties, or are attempting to evade the operation of any bankruptcy act is therefore actionable *per se*.

Ogders, Libel & Slander, *80; *Kirwan v. Denman*, 2 Hud. & B. (I. R. K. B. Rep.) 628.

Courts will usually grant this information where the right, or the fact on which the right depends, is disputed and doubtful; where the right turns upon a point of new or doubtful law, or where there is no other remedy.

Ang. & A. Corp. § 740; *Atty. Gen. v. Sullivan*, 163 Mass. 446, 28 L. R. A. 455.

In the acts of 1851 and 1852 the legislature in terms gave the court power to issue the writ upon the relation of a private person.

Stat. 1851, chap. 233, § 55; Stat. 1852, chap. 312, § 42; *Hastings v. Amherst & B. R. Co.* 9 Cush. 596; *Boston & P. R. Corp. v. Midland R. Co.* 1 Gray, 340; *Goddard v. Smithett*, 8 Gray, 116; *Fall River Iron Works Co. v. Old Colony & F. River R. Co.* 5 Allen, 231; *Atty. Gen. v. Salem*, 103 Mass. 188; *Rice v. National Bank of the Commonwealth*, 126 Mass. 300; *Atty. Gen. v. Sullivan*, 163 Mass. 446, 28 L. R. A. 455.

Messrs. Elder, Wait, & Whitman, for respondent:

No one has a legal right to credit in the purchase of goods; and a refusal to give credit is not an actionable wrong, even if the refusal is in consequence of an agreement among dealers to refuse credit to a particular individual.

Macauley v. Tierney, 19 R. I. —, 37 L. R. A. 453; *Dele v. Winfree*, 6 Tex. Civ. App. 11.

No action is maintainable even though the refusal to sell be absolute.

Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337; *Cole v. Murphy*, 159 Pa. 420, 23 L. R. A. 135; *Buchanan v. Kerr*, 159 Pa. 438.

The petitioner does not allege that he does not owe, and in the absence of such allegation a complaint for conspiracy would be bad.

Schulten v. Bavarian Brewing Co. 96 Ky. 224.

The petitioner, if injured at all, is not injured 38 L. R. A.

by the exercise "of a franchise or privilege not conferred by law."

Proceedings somewhat similar to those of the respondent, though nowhere so carefully attentive to avoid injustice, have been sustained by the courts.

Macauley v. Tierney, 19 R. I. —, 37 L. R. A. 453; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337; *Cole v. Murphy*, 159 Pa. 420, 23 L. R. A. 135; *Buchanan v. Kerr*, 159 Pa. 438; *Dele v. Winfree*, 6 Tex. Civ. App. 11; *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Robertson v. Parks*, 76 Md. 118.

The facts of the present cause do not present a case within the purpose and intention of Pub. Stat. chap. 186, §§ 17-25.

That purpose is "to lend the aid of the government in an aggravated case of usurpation and encroachment on private rights by a corporation, by the exercise of a franchise not granted to them;" and the power is "to be exercised only upon extraordinary occasions."

Hastings v. Amherst & B. R. Co. 9 Cush. 596.

This remedy is not to be used for ordinary violations of private rights. The occasion must be extraordinary and urgent.

Hastings v. Amherst & B. R. Co. 9 Cush. 596; *Boston & P. R. Corp. v. Midland R. Co.* 1 Gray, 340; *Goddard v. Smithett*, 8 Gray, 116; *Fall River Iron Works Co. v. Old Colony & F. River R. Co.* 5 Allen, 231. Compare *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227.

The respondent is not guilty of any act of criminal conspiracy, or of conspiracy in restraint of trade.

Com. v. Hunt, 4 Met. 111; *Bowen v. Matheson*, 14 Allen, 499; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 237; *Snow v. Wheeler*, 113 Mass. 179.

Barker, J., delivered the opinion of the court:

The statute provisions under which this petition is brought were introduced by Stat. 1851, chap. 233, §§ 53-64, and have been continued in force without much change. See Stat. 1852, chap. 312, §§ 42-50; Gen. Stat. chap. 145, §§ 16-24; Pub. Stat. chap. 186, §§ 17-25. In plain and positive terms, they purport to give relief to any person whose private right or interest has been injured or is put in hazard by the exercise by any private corporation of a franchise or privilege not conferred by law. In the earliest cause in which they were considered, it was said that they conferred upon the court a manifestly high power, to be exercised only upon extraordinary occasions, and in aggravated cases of usurpation and encroachment. See *Hastings v. Amherst & B. R. Co.* 9 Cush. 596, 599. These views, however, were not repeated or referred to in the succeeding cases of *Lechmere Bank v. Boynton*, 11 Cush. 369; *Boston & P. R. Corp. v. Midland R. Co.* 1 Gray, 340, or *Goddard v. Smithett*, 8 Gray, 116. In the present condition of society, having regard to the actual power of corporations as compared with that of natural persons whose interest they affect, we think that the exercise by a private corporation of franchises or privileges not conferred by law may be a serious usurpation and encroachment, which, when it in-

jures or puts in hazard the private rights of any person, will justify the exercise by this court of the powers given it by the statutes under consideration. In such cases, this explicitly given remedy, like that of the writ of mandamus, should now be "regarded as an ordinary process in cases to which it is applicable." See *New England Mut. L. Ins. Co. v. Phillips*, 141 Mass. 535, 546.

The defendant corporation was chartered under Pub. Stat. chap. 115. The purposes for which it was formed are stated in its charter to be those of "promoting pleasant relations among its members; discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business; and establishing and maintaining a place for social meetings." Chapter 115 is entitled "Of Associations for Charitable, Educational, and Other Purposes," and authorizes corporations to be formed for the following purposes only: "For any educational, charitable, benevolent, or religious purpose; for the prosecution of any antiquarian, historical, literary, scientific, medical, artistic, monumental, or musical purposes; for supporting any missionary enterprise having for its object the dissemination of religious or educational instruction in foreign countries; for promoting temperance or morality in this commonwealth; for encouraging athletic exercise or yachting; for encouraging the raising of choice breeds of domestic animals and poultry; for the association and accommodation of societies of Free Masons, Odd Fellows, Knights of Pythias, or other charitable or social bodies of a like character and purpose; for the establishment and maintenance of places for reading rooms, libraries, or social meetings." Pub. Stat. chap. 115, § 2. The subsequent act authorizing the incorporation of labor or trade organizations (Stat. 1888, chap. 134) for the purpose of improving in any lawful manner the condition of employees in any lawful trade or employment has no bearing upon the present case. The franchises and privileges conferred upon the defendant by law are limited by the purposes enumerated in Pub. Stat. chap. 115, § 2. Business corporations are formed under Pub. Stat. chap. 106, or the other chapters relating to special businesses; and, for such corporations to obtain a charter, a capital stock is required, and there are other prerequisites to the granting of a charter than those required of corporations formed under Pub. Stat. chap. 115.

The report finds that the defendant corporation consists of about twenty firms engaged in selling plumbers' supplies. This means only that its members are persons who are interested in such firms. It takes proceedings against persons whom its members may represent to it as owing them overdue bills for plumber's supplies, sending notices to such persons and also notices to its members other than the creditor. The notice sent by the corporation to the person so alleged to owe an overdue account, after reciting that he has failed to settle the demand, informs him, on behalf of the corporation, that, unless he shall settle the claim within ten days, the members of the corporation will be notified, and that, in consequence, he may be unable to purchase

any goods from any of them except for cash before delivery; suggests that, if he has any reason why such notice should not be given, he should immediately present the same to the corporation; and concludes with the threat that inattention to this will bring about the consequences above indicated. The corporation keeps in a book the names of all persons represented to it by its members to be their delinquent debtors, and provides each of its members with a book for the purpose of having the names of such persons entered upon such a book in the possession of each member. After the notice has been sent by the corporation to the alleged debtor, if he does not settle the claim, or present to the corporation some reason for not doing so, the corporation sends to each of its members a formal statement that the alleged debtor's name has been entered on the books of the corporation, and that by its by-laws its members are debarred from selling goods to him except for cash before delivery, until he shall have settled. This statement orders the members of the corporation not to fail to enter the debtor's name in the book provided for that purpose, and states his name and address, the name of his creditor, and the amount of the debt.

That the defendant claims to take such proceedings under its corporate franchises appears from its by-laws, and from the forms which it prepares and uses and sends to its members, to be used in the proceedings. The by-laws make it the duty of all members to report to the secretary any information concerning failures or financial embarrassments in the trade, and "to sell only for cash paid before delivery to customers who have unjustly failed to meet their trade contracts and obligations, and so long as that failure continues." They provide that if a member is involved as defendant in any legal proceeding growing out of his membership, and caused by his obedience to and action under the rules and by-laws of the corporation, the costs and expenses incurred shall be paid out of its funds, if the member places his case in the hands of an attorney approved by its executive committee. There is also a provision that, in cases where the correctness of accounts between members and others is disputed, the creditor shall appoint one arbitrator, the debtor another, and that the two arbitrators shall choose a third, and also that the matter may be referred to its executive committee. The blank forms prepared and issued by the defendant to be used in proceedings against persons represented to it by its members to be their debtors are seven in number. The first is a notice to be sent by the member to the alleged debtor, stating that, unless his past-due account is attended to within ten days, the matter will be referred to the defendant. The second is a notice from the member to the secretary, that the first notice has been sent to the alleged debtor, and that he has not settled the account. The third is the notice from the corporation to the alleged debtor, threatening that, unless he settles the account within ten days, certain consequences will follow. The fourth is a notice to be sent by the member to the secretary that the person subjected to the proceedings has failed to respond to the notice sent him by the cor-

poration, and asking the secretary to notify every member of the facts, according to the by-laws. The fifth is the notice to be sent to the members by the secretary, informing them that the name of the person against whom the proceedings are pending has been entered on the book, and that members are debarred from selling goods to him, except for cash before delivery, until he has settled. The sixth is a notice of settlement to be sent by the member to the secretary, and the seventh is a notice to be sent by the secretary to the members that the person subjected to the proceedings has satisfactorily settled his account, and is again entitled to the same consideration as before. In short, these proceedings against the alleged debtors of its members, instituted by the corporation under the pretended sanction of its corporate franchises, are a method of supplanting the courts by the private machinery of the corporation,—of compelling such persons to pay what its members demand, by means of threatening to expose to certain dealers their alleged delinquencies, by actually informing such dealers that the persons owe over-due accounts, and by preventing such persons from obtaining credit from a number of dealers in goods needed in the business which such persons are carrying on. This private corporation assumes, in the exercise of what it claims to be the corporate privileges conferred by its charter, to require other persons to submit their controversies to arbitration, dictates the terms upon which trade shall be carried on by other persons, and requires other persons, under penalties practically severe, to submit to it their reasons for their conduct in matters with which it has no concern.

A majority of the court are of opinion that the defendant's charter confers upon it no such rights. Such proceedings are not germane to the purpose "of promoting pleasant relations among its members," or of "establishing and maintaining a place for social meetings." The only other purpose stated in the charter is that of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business." If this language is construed with that which declares the other purposes of the charter, and with our body of corporation statutes, it naturally means the improvement of the plumbers' supply business by the discussion and investigation of scientific and practical matters relating thereto, rather than a purpose to interfere with the actual conduct of the business in particular instances. Such interference would itself be a business enterprise, and would not fall within any of the purposes mentioned in Pub. Stat. chap. 115, § 2, for which alone corporations may be organized under that chapter. Assuming that a corporation might be formed to prosecute the business of collecting debts due to the persons who are members of the defendant corporation, and of protecting them from selling upon credit to irresponsible customers, such a corporation would be a business enterprise, and, to be chartered, must have a capital stock, and must comply with the provisions of Pub. Stat. chap. 106, in order to obtain a legal existence and have corporate rights and privileges.

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The right of instituting and conducting such proceedings as those which the defendant assumes to institute is therefore not conferred by law upon it, and their institution and prosecution by its officers in its behalf are corporate acts, constituting the usurpation of corporate powers and privileges, some of which are granted only to courts or other public tribunals, and others of which would never be granted by a legislature.

The remaining question is whether any private right or interest of the petitioner has been injured or put in hazard by the defendant's exercise of this usurped franchise or privilege. It is to be noticed that the hearing upon which the petition was ordered to be dismissed was the summary hearing provided for by Pub. Stat. chap. 186, § 19, at which, "if there appears probable cause to believe that the party complained of has exercised a franchise or privilege not conferred by law, and that thereby the private right or interest of the complainant has been injured or is put in hazard, leave shall be granted to file the information," and that judgment that the corporation be excluded from such franchise or privilege can be rendered only after hearing upon the information. *Id.* § 23. The report states that at the hearing there was not much dispute as to any questions of facts, and we infer that, as alleged in the petition, the petitioner is a plumber, having occasion to use his credit in conducting that business; that in the course of his business he became indebted to a dealer in plumbers' supplies, who was a member of the defendant corporation; that a portion of the balance claimed by his creditor to be due was in dispute; and that while a suit to recover such balance was pending, in which he had given security by a bond to dissolve the attachment, the corporation instituted proceedings against him, under its by-laws, and notified its members that his name had been entered upon its book, and that its members were debarred from selling goods to him, except for cash before delivery, until he should have settled with the member to whom he was so said to be indebted. The report further states that it did not seem to the presiding justice that any right of the petitioner was infringed by the defendant's mode of procedure, and the petition was dismissed, with costs. In the opinion of a majority of the court, this conclusion was wrong. Without examining all the ways in which the defendant's mode of procedure may have injured or put in hazard the petitioner's private rights or interests, we think that they were injured or put in hazard. The credit of a tradesman is an important and often his most considerable resource, and he has a right to rely upon and to use it in endeavoring to do business. No one has the right to attempt to destroy or to injure his credit, unless the person so attempting can show that his own legitimate interests require such action. Assuming that the legitimate interests of sellers of plumbers' supplies may justify such persons in informing each other that a customer of one of them has not paid for his purchases, and in agreeing with each other to sell him no goods except for cash paid before delivery, the defendant has no such justification for its interference with the petitioner's business. The defendant is a legal

person other than and distinct from its members. It is not a seller of plumbers' supplies, and has no interest in that market, and no legitimate concern with the question of who shall purchase in that market upon credit. When, without being engaged in the trade, or being in any relation by which its legitimate interests are affected by the question whether the petitioner shall have credit in that market, the defendant assumes to notify sellers of such goods that he has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit, the petitioner's right to an open market, and to proffer his credit without officious interference from persons who have no legitimate interest in the question whether he shall buy upon credit, is injured and put in hazard.

Again, one of the petitioner's private rights is that he shall not be libeled in his business or trade. Under the defendant's mode of procedure, the corporation having, as a distinct legal person, no interest in the trade, nor in the dispute between the purchaser and its member, there is no privilege to justify the communication to it or by it of the facts which it assumes to communicate. Such written communications tend to injure the purchaser in his business, and, if not justified, may be libels, which injure him in his private rights, or put them in hazard, within the meaning of the statute, besides being actionable torts. See *Odgers*,

Libel & Slander, 3d ed. 86, 87, and cases cited; *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741. The statements concerning the petitioner published by the defendant to its members were calculated to convey to them imputations upon the petitioner injurious to him in his business, and were not made in the discharge of any public or private duty, legal or moral, in the conduct of the defendant's own legitimate affairs, in matters in which its own legitimate interests were concerned. In the whole procedure, the defendant acts officiously and without right, having itself no interest in the matters about which it publishes statements calculated to injure in their business persons who are not its members, and with whom it has no business or other relations save those which it usurps. We think, therefore, that, upon the report, there appears probable cause to believe that the defendant has exercised a franchise or privilege not conferred by law, and that thereby the petitioner's private right or interest has been injured or is put in hazard, and that leave should be granted him to file an information.

This makes it necessary to reverse the decree dismissing the petition. So ordered.

Allen, Knowlton, and Lathrop, JJ., do not concur in the result reached by the majority of the court.

MICHIGAN SUPREME COURT.

James O. MURFIN

v.

DETROIT & ERIN PLANK ROAD
COMPANY, *Plff. in Err.*

(.....Mich.....)

Tolls for the use of a road by persons riding bicycles cannot be charged under How. Stat. § 3682, allowing a charge of 2 cents per mile for "any vehicle or carriage drawn by two animals" and 1 cent per mile for every vehicle or carriage "drawn by one animal," as well as for "every horse and rider or led horse."

(July 13, 1897.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged illegal stopping of plaintiff while traveling on defendant's road. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gray & Gray, for plaintiff in error:

So long as the turnpike is maintained, the highway authorities have no control of the road, nor duty to repair, nor responsibility for defective conditions.

Elliott, Roads & Streets, 57; *Indianapolis v. McClure*, 2 Ind. 147; *Joliet v. Verley*, 85 Ill.

NOTE.—As to the liability for tolls on bicycles, see also *Geiger v. Perkiomen & R. Turnp. Road* (Pa.) 23 L. R. A. 458.

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58, 85 Am. Dec. 349; *McCain v. State*, 62 Ala. 188; *Career v. Detroit & S. Pl. Road Co.* 61 Mich. 584.

The right to exact toll is derived from legislative grant, which usually prescribes the rates of toll.

A bicycle is included in the term "carriage" or "vehicle."

Myers v. Hinds (Mich.) 98 L. R. A. 856.

A bicycle driven by a man is a "vehicle drawn by one animal."

The legislature intended to prescribe toll for all vehicles and all animals naturally using the roadway, and not the sidewalk.

The bicycle is a new kind of vehicle, but as invention proceeds it is held that highways become subject to new styles of locomotion.

Macomber v. Nichols, 84 Mich. 212, 22 Am. Rep. 522; *Detroit City R. Co. v. Mills*, 85 Mich. 634.

It is a vehicle, however, and its natural place is on the street.

The use of the bicycle has largely reduced the travel by horse and carriage and in that sense has impaired the collection of tolls by the companies, and thus impaired the rights of the company within the rule of *Detroit & B. Pl. Road Co. v. Detroit Suburban R. Co.* 103 Mich. 585.

The legislature intended to tax all carriages, even those thereafter coming into common use, though propelled by other agency than a horse.

Career v. Detroit & S. Pl. Road Co. 61 Mich. 590; *Detroit & B. Pl. Road Co. v. Detroit Sub.*

urban R. Co. 103 Mich. 585; *Geiger v. Perkiomen & R. Turnp. Road*, 167 Pa. 582, 28 L. R. A. 454.

Messrs. Griffin, Clark, & Russell, for defendant in error:

The right to demand toll is almost universally granted by statutory enactments, and can be exercised only in strict compliance with the terms of the grant.

Angell, Highways, § 357.

If there be any ambiguity in the language of such grant, it will be construed rather in favor of the public rather than of the grantee.

Angell, Highways, § 357; *Barrett v. Stockton & D. R. Co.* 2 Mann. & G. 184.

Clauses in statutes conferring an exemption from the payment of toll are construed most liberally in favor of the immunity.

Angell, Highways, § 359; *Middlesex Turnp. Co. v. Freeman*, 14 Conn. 85; *Proprietors of Stourbridge Canal v. Wheeley*, 2 Barn. & Ad. 792.

The question of bicycle tolls has been presented to the higher courts only in the cases of:

Williams v. Ellis, L. R. 5 Q. B. Div. 175; *Geiger v. Perkiomen & R. Turnp. Road*, 167 Pa. 587, 28 L. R. A. 458.

Section 3592 is also a penal statute; and therefore cannot be extended by construction beyond the plain meaning of its terms.

Carver v. Detroit & S. Pl. Road Co. 61 Mich. 588; *Leoni Trp. v. Taylor*, 20 Mich. 148; *Perry v. Cheboygan*, 55 Mich. 250; *Detroit v. Putnam*, 45 Mich. 263; *Shaw v. Clark*, 49 Mich. 384, 48 Am. Rep. 474; *Wallace v. Finch*, 24 Mich. 255.

A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the laws should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established.

Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522.

Hooker, J., delivered the opinion of the court:

This is an action brought against a toll road company for stopping the plaintiff at defendant's toll gate and preventing him from proceeding to ride a bicycle upon its road without the payment of toll. The defendant appeals from a directed verdict in favor of the plaintiff.

The only question submitted is that of the right of the defendant to charge toll for the use of its road by persons riding bicycles.

The rights of the defendant are statutory, and its right to charge toll is to be determined by § 3562 of Howell's Statutes, viz.: "Whenever any such company shall have completed their road, or any 5 consecutive miles thereof, the directors thereof may erect toll gates and exact tolls from persons traveling on their road, for so much as may be completed, at a rate not exceeding 2 cents per mile, for any vehicle or carriage drawn by two animals, and 1 cent per mile for every sled or sleigh so drawn, and if drawn by more than two animals $\frac{1}{4}$ of a cent per mile for every additional animal; for every vehicle, sled, sleigh or carriage drawn by one

animal, 1 cent a mile; for every score of sheep or swine, half a cent a mile; for every score of neat cattle, 2 cents a mile; and for every horse and rider, or led horse, 1 cent a mile; such toll-gates so to be erected by such company, may be as many in number, and located at such points as such company may deem necessary."

If we could construe this statute as giving a right to collect tolls from all persons who travel the road, there would be but little difficulty in holding that bicycles, which we held to be vehicles in *Myers v. Hinds* (Mich.) 33 L. R. A. 356, are subject to toll, for we may take judicial notice that a good highway is as essential to their use as to that of any other vehicle. There is nothing in this act that gives the right to charge toll against pedestrians, and we have never heard it claimed that such charges were made. Nor have we known of toll being charged for wheelbarrows or cars or handsleds, or baby carriages propelled by human agency; though a good road is as essential to these as to bicycles. If this question arose with reference to a four-wheeled vehicle, propelled by steam or electricity, there would probably be little doubt of the right to charge and collect toll. It would seem to be covered by the case of *Detroit & B. Pl. Road Co. v. Detroit Suburban R. Co.* 103 Mich. 587, where it was held that the rights acquired under this act forbid the use of the highway for purposes inconsistent with the rights and franchises of the plank-road company. The use of two wheels instead of four, if propelled by a motor, as they are liable any day to be, would hardly suffice to distinguish them from the heavier and more cumbersome vehicle, and we hesitate to say that the courts could, with propriety, hold that a motor cycle could escape tolls under this statute, notwithstanding the fact that only vehicles drawn by animals are mentioned in the act.

We think, however, that a distinction may be made between vehicles propelled by man and those depending upon animal power or mechanical motors for propulsion, and that this would not do violence to the act, which has always been construed to permit the use of highways by persons who did not depend upon some means of conveyance besides their own powers of locomotion. The bicycle of to-day is propelled and managed by the feet and hands of the rider. It uses the traveled roadway only when it is the better part of the highway, and the pedestrian does the same. The projected electric railroad, involved in the case of *Detroit & B. Pl. Road Co. v. Detroit Suburban R. Co.* was not expected to use the roadway constructed by the plank road company, but one to be built for its exclusive use, and one adapted to no other kind of vehicle.

It seems reasonable to say, therefore, that the case cannot be allowed to turn simply on the question whether the defendant's roadway is likely to be used by the bicycle, as that is not the controlling factor in the case of the electric road which is forbidden, or the pedestrian who is not forbidden, to travel any part of the road without paying toll.

The bicycle is not subject to the payment of toll by the strict letter of the act. Neither is the motor cycle, yet we incline to the opinion that payment of toll by the driver of the latter is

within the spirit, while such payment by the user of the former is not, because of the apparent intention to confine the payment of toll to those who do not depend upon their own powers of locomotion for the propulsion of the vehicle used. This view seems to receive significant support in the fact that we find few cases where the question has arisen. The bicycle has been used as a road machine for a quarter of a century, and we cannot conceive of the users submitting to a general practice of charging toll without protest, that would have led to an adjudication of the question. Furthermore, we have never heard that it was the practice of the companies to charge toll, and we have reason to believe that this company is no exception, but that the cause is here to ascertain whether the company may safely provide exceptional facilities for wheelmen, with the expectation of collecting toll. But two cases where similar questions have arisen are cited by counsel. In *Geiger v. Perkiomen & R. Turnp. Road*, 167 Pa. 583, 28 L. R. A. 458, a bicycle was held subject to toll, as a two-wheeled carriage, under a statute which gave the right to collect toll from "all and every person and persons using the said road . . . and to stop any person driving any . . . sulky, chair, chaise, phaeton, cart, wagon, wain, sleigh, sled or other carriage of burthen or pleasure . . . for every other carriage of pleasure under whatever name it may go, the like sums according to the number of wheels and horses drawing the same." The court held that this was a carriage of burthen or pleasure, and what is more significant from the standpoint from which we view the case, is the view taken of the word "horses" as used in the statute. It is said that "the method of computation by wheels and horses is not the power to collect toll, which is expressly given; that is a mere limitation to the power; the demand must not exceed the sums specified for the animals and vehicles enumerated." This reasoning is at variance with our view, and it seems to us that it is at variance with immunity from tolls, on the part of the pedestrian, who, as is said of the bicyclist, in that case, "has the same right as owners of carriages, to insist that the highway shall be maintained in a reasonably safe condition of repair." A Pennsylvania statute is cited giving the bicyclist the right to use the highway, the same as any other vehicle, but we think it was declaratory of the common law merely, and if it were not it could hardly be held to affect the rights of a turnpike company, under a charter granted half a century before practical bicycles were invented.

This question arose in England under a statute which gave the right to collect tolls as follows:

"For every horse, mule, or other beast drawing any coach, sociable, chariot, berlin, landau, vis-a-vis, barouche, phaeton, curricule, calash, chaise, chair, gig, whiskv, caravan, hearse, litter, or other such carriage, the sum of 6d.

"For every horse, mule, or ass, laden or unladen, and not drawing, the sum of 2d.; and

"For every carriage of whatever description, and for whatever purpose, which should be drawn or impelled, or set or kept in motion by steam or any other power or agency than being

drawn by any horse or horses, or other beast or beasts of draught, any sum not exceeding 5s." *Williams v. Ellis*, L. R. 5 Q. B. Div. 176.

In a short opinion the court held that a bicycle is not a carriage within the meaning of the turnpike act; that carriages there referred to must be carriages *ejusdem generis*, with the carriages previously specified, which, as the act imports, were carriages propelled otherwise than by human agency. We should hesitate to say that the right to charge tolls was limited to conveyances *ejusdem generis*, with those drawn by animals which alone seem to be mentioned in our act. Indeed, the case cited from 108 Michigan may be plausibly said to have settled that question; but we see no reason for refusing to apply the doctrine to the broader class of vehicles, propelled by animals or some mechanical motor. It seems to us that this distinction will protect the plank road companies from a use of their road by substitutes for those vehicles which the law contemplated should be charged for, and at the same time protect the pedestrian in his increased power of locomotion by the aid of the wheel.

This view accords with that of the learned circuit judge who tried the cause, and his judgment is affirmed.

Moore, J., concurred. Long, Ch. J., and Grant and Montgomery, JJ., concurred in the result.

O. & W. THUM COMPANY

Appolonious A. TLOCZYNSKI, *Appel.*

(.....Mich.....)

1. An employee who has learned trade secrets from his employer under the agreement, express or implied, that he will not make use of them for his own benefit or communicate them to strangers, will be enjoined from breaking his agreement.
2. Public policy does not require the avoidance of a contract by an employee not to disclose secrets which must necessarily be imparted to him by his employer to enable him to do his work.

(September 14, 1897.)

A PPEAL by defendant from a decree of the Circuit Court for Kent County enjoining him from divulging certain trade secrets. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. L. Fitch and Frederick W. Stevens for appellant.

Messrs. Earle & Hyde, for appellee:

Complainant is entitled to the relief prayed for in this bill, whether there was an express

NOTE.—For property rights in secrets, see *Tode v. Gross* (N. Y.) 13 L. R. A. 652, and *note*; and *Dempsey v. Dobson* (ra.) 32 L. R. A. 761.

For contracts respecting secrets of trade as unlawful restraints of trade, see *note to Gamewell Fire Alarm Teleg. Co. v. Crane* (Mass.) 22 L. R. A. 674.

contract not to communicate the secrets or not.

Grand Rapids Booming Co. v. Jarvis, 30 Mich. 320; *Kuhn v. Detroit*, 70 Mich. 537; *Ayers v. Lawrence*, 59 N. Y. 192; *Bank of Toledo v. Toledo*, 1 Ohio St. 623; 2 Bl. Com. 2; *Law of Burial*, 4 Bradf. 516, Appx.; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 375, 56 Am. Rep. 173.

When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right.

2 Bl. Com. 406; *Macklin v. Richardson*, 2 Amb. 694; *Duke Queensberry v. Shelheare*, 2 Eden, 829; *Southey v. Sherwood*, 2 Meriv. 435; *Millar v. Taylor*, 4 Burr. 2380; *White v. Geroek*, 1 Chittv. 26; *Lord and Lady Perceval v. Phipps*, 2 Ves. & B. 23; *Wheaton v. Peters*, 83 U. S. 8 Pet. 657, 8 L. ed. 1079; *Bartlett v. Crittenden*, 5 McLean, 32.

Property, in its broader and more appropriate sense, is not alone the chattel or land itself, but the right to freely possess, use, and alienate the same.

Dexter v. Bayer, 7 Colo. 118; *Billings v. Breinig*, 45 Mich. 70; *Power v. Harlow*, 57 Mich. 111; *Dunlap v. Toledo, A. A. & G. T. R.* (2) 50 Mich. 474; *Slaughter-House Cases*, 83 U. S. 16 Wall. 127, 21 L. ed. 425; *Whitehill v. Jacobs*, 75 Wis. 479; *Kuhn v. Detroit*, 70 Mich. 537.

Trade secrets are property.

Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 18 Allen, 373, 90 Am. Dec. 203; *Jarvis v. Peck*, 10 Paige, 118; *Salomon v. Hertz*, 40 N. J. Eq. 400; *Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435; *Champlin v. Stoddart*, 30 Hun, 300.

Injunction will be granted to prevent breach of confidence, where there is no express contract.

Story, Eq. Jur. § 258; *Ringo v. Binns*, 35 U. S. 10 Pet. 269, 9 L. ed. 420; *Earl Cholmondeley v. Lord Clinton*, 19 Ves. Jr. 261; *Eritt v. Price*, 1 Sim. 483; *Yovatt v. Wingard*, 1 Jac. & W. 394; *Morison v. Moat*, 6 Eng. L. & Eq. 14; *Williams v. Williams*, 8 Meriv. 159; *Green v. Folgham*, 1 Sim. & Stu. 398; 10 Am. & Eng. Enc. Law, title, *Injunctions*, p. 949.

Injunction will always be granted to restrain a breach of trust.

High, Inj. § 24.

The disclosure of secrets which have come to one's knowledge during the course of a confidential employment will be restrained by injunction.

High, Inj. § 19; *Boitt v. Price*, 1 Sim. 483; *Morison v. Moat*, 6 Eng. L. & Eq. 14, 9 Hare, 241; *Prince Albert v. Strange*, 1 Macn. & G. 25; *Lewis v. Smith*, 1 Macn. & G. 417; *Williams v. Prince of Wales Life etc Assur. Co.* 23 Beav. 340; *Davies v. Clough*, 8 Sim. 262; *Goodale v. Goodale*, 16 Sim. 816; *Newbery v. James*, 2 Meriv. 446; *Williams v. Williams*, 8 Meriv. 157; *Earl Cholmondeley v. Lord Clinton*, 19 Ves. Jr. 261; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Leather Cloth Co. v. Lorrant*, L. R. 9 Eq. 345; *Yovatt v. Wingard*, 1 Jac. & W. 394; *Tipping v. Clarke*, 2 Hare, 393; *Wyatt v. Wil-* 88 L. R. A.

son, cited in 1 Macn. & G. 46; *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154; *Lumley v. Wagner*, 1 De G. M. & G. 609; *Lewis v. Smith*, 1 Macn. & G. 417; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Chadwick v. Correll*, 151 Mass. 193, 6 L. R. A. 889; *Champlin v. Stoddart*, 30 Hun, 300; *Salomon v. Hertz*, 40 N. J. Eq. 400.

One who invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, will be protected by injunction against persons who in violation of contract or duty, and in breach of confidence, undertake to apply it to their own use, or to disclose it to third persons.

Morison v. Moat, 9 Hare, 241, 6 Eng. L. & Eq. 14, 21 L. J. Ch. N. S. 248; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Leather Cloth Co. v. Lorrant*, L. R. 9 Eq. 345; 2 Kent, Com. 867, Holmes' note; *Beal v. Chase*, 31 Mich. 524; *Horner v. Ashford*, 3 Bing. 326.

That courts do not hesitate to grant injunctions in such cases is well settled by the adjudged cases.

Yovatt v. Wingard, 1 Jac. & W. 394; *Morison v. Moat*, 9 Hare, 249; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; 2 Story, Eq. Jur. § 952; *Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435.

If there were no evidence in this case of an express contract the law would imply one from the circumstances. The defendant was employed as the agent of Otto and William Thum and as agent of complainant, and under the familiar rules of agency he was an agent for continuous service.

Whart. Agency, § 40; *Ringo v. Binns*, 35 U. S. 10 Pet. 269, 9 L. ed. 420; *Tipping v. Clarke*, 2 Hare, 393; *Little v. Gallus*, 4 App. Div. 509; *Louis v. Smellie*, 73 L. T. N. S. 226.

The order of the court fastens an obligation upon defendant's conscience not to divulge such knowledge, and enforces the obligation, when necessary, by injunction.

High, Inj. § 19.

Any violation of an injunction, not committed in the presence of the court, is one that must necessarily raise a controversy between parties, and which, as a matter of fact, often raises a controversy as to the meaning of the injunction.

The injunction is granted just as every other decree of the court is granted, upon the theory and presumption that it will not be violated.

Caswell v. Gibbs, 33 Mich. 331; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Glidden v. Norrell*, 44 Mich. 202; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664.

Messrs. Butterfield & Keeney also for appellee.

Moore, J., delivered the opinion of the court:

The complainant is the successor of the firm of O. & W. Thum, who were manufacturers of sticky fly paper. It filed a bill of complaint to restrain defendant communicating to others the secret processes and methods, and the knowledge of secret machinery, which were learned by him while in the employ of O. & W. Thum. The court below granted an in-

junction, as prayed in the bill of complaint. Defendant appeals.

The testimony is voluminous, and very conflicting. We are satisfied, however, that it establishes, by a very clear preponderance, as follows: The defendant entered the employ of O. & W. Thum in 1887. They at that time were manufacturing sticky fly paper by machinery, and from formulæ known only to themselves. They at that time had but one man and one boy in their employ. The business was carried on in the attic of the house, and in a small building in the back yard. The processes and machinery that were regarded as secret, and of great value to the firm, were used only by the members of the firm. As the business grew, it became necessary to employ more persons, and among others employed was the defendant. Because of the increase in the business and the employment of more persons, other precautions were taken, as the necessity grew for taking them. The public were excluded from the premises. The employees at one machine were not allowed to inspect other machines used in the manufacture, and were not allowed to visit all portions of the premises. Very rigid and careful requirements were made and enforced to guard the formulæ, the processes of manufacture, and knowledge of the machinery used, so that no one could learn them, or either of them, to the detriment of the firm. The business of the firm steadily grew in magnitude, so that when defendant left its employ, in 1892, about \$100,000 was invested in the business, and a large number of persons were given employment. Shortly before this bill was filed, complainant received the following letter:

"Grand Rapids, Mich., Jan. 7, 1893.

The O. & W. Thum Co., City.

Mr. Wm. Thum—Dear Sir: It is about fifteen months since I left your shops, and during that time have been more or less troubled by outside people in regards to fly paper and its manipulations at your works; not so much so until lately, when there were representatives from two large firms, one from Ohio, which was represented by the president and their attorney, which I looked up in G. R. Dun's, who quote them at \$500,000, who were here for one week, and were directed by some people here in the city to me. They told me that they had sufficient artillery to put the paper on the market, but were a little short on cavalry in its workings; also told me that they were ready at any time to make arrangements,—that is, as soon as I say yes. I can show letters from the above firm and others. I have not said a single word of its manufacture since I left you, but do not think it's my place to keep mum unless your desire it. Awaiting your early reply,

I remain, yours truly,

A. A. Tloczynski.

It very soon became evident that defendant was negotiating with others to engage in the manufacture of the same product the complainants were making, and this bill was filed.

The terms of employment were not reduced to writing, and there is a sharp conflict of testimony between the defendant and O. & W. Thum as to the terms of his employment, so

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that it becomes necessary to consider carefully all the testimony in the case to arrive at the truth. One cannot read all the testimony, in the light of the facts and circumstances surrounding the condition of the business at the commencement of the defendant's employment, and its subsequent development and growth, without coming to the conclusion that the defendant and his employer regarded his relation to them as a confidential one, and that he should not disclose or make improper use of the secrets of the business. The conclusion is irresistible that defendant would not have been employed, and information which was imparted to him would not have been conveyed, if it had been understood that he might sever his relations with his employers at any time, and sell the valuable information which had been imparted to him whenever he could find a market. The inception, growth, and development of the business; the manner in which it was conducted; the care taken to exclude the public from means of obtaining knowledge of the processes; the fact that, when new machinery was to be constructed, part of it was got at one place, and part at another, so that no person outside of the members of the firm and their immediate employees should see a completed machine in operation; the fact that employees in one department of the manufactory were not allowed in other departments; and the care which was taken to prevent employees from obtaining knowledge of any branch of the business, except that in which the employee was immediately engaged, of all of which the defendant had knowledge,—all indicate conclusively that the business and processes were secret, and that no one knew that fact better than the defendant. We think it clearly established by the testimony that the employment was upon the agreement that defendant would not use the information imparted to him to the harm of his employer.

In our view, the only important question involved in the case is whether an employee, when his employment terminates, may make use of secrets confided to him by his employer, necessary to be confided to him in the conduct of the business, when it is understood and agreed that he shall not make use of the secret knowledge so imparted to the detriment of the employer, and, if he attempts so to do, may he be restrained by writ of injunction?

It is said by counsel that the remedy by injunction will not be granted in such a case as this, where, from the nature of the subject, there could be no decree for a specific performance; citing *Newbery v. James*, 2 Meriv. 446; *Williams v. Williams*, 8 Meriv. 157; *Kimberley v. Jennings*, 6 Sim. 340.

It is also said that a decree for a specific performance will not be granted where the court has not the means of seeing that its decree shall be carried out; citing *Voorthuis v. Friebe*, 25 Mich. 493, 12 Am. Rep. 291; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Bumpus v. Bumpus*, 53 Mich. 346. An examination of the Michigan cases cited shows that in those cases the court was asked to decree the performance of an affirmative act, where the agreement was of an indefinite and uncertain character, instead of being asked to enforce a definite agreement not to do

an act. As to the other cases, if they tend to sustain the contention of the defendant, they are contrary to the great weight of authority. Is it not true that, if one discovers a process of manufacture or an invention which is of use to individuals and the community, he has a property right in it, and that an agreement which must be respected may be made in relation to keeping the process of manufacture or the invention a secret between the discoverer or owner and an employee, which agreement is made one of the conditions of the employment? It has been said by a very able justice: "If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664." And, again, Mr. Justice Gray, who delivers the opinion, says: "In this court it is settled that a secret art is a legal subject of property, and that a bond for a conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person. *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 378, 374, 90 Am. Dec. 208. In *Jarvis v. Peck*, 10 Paige, 118, such a bond was held valid in equity." In *Salomon v. Hertz*, 40 N. J. Eq. 400, the court adopts the language of Justice Gray, and holds that there is a property in a secret process of manufacture. *Simmons Hardware Co. v. Weibel*, 1 S. D. 488, 11 L. R. A. 267.

A recent and instructive case is that of *Eastman Co. v. Reichenbach*, 47 N. Y. S. R. 435. "To briefly summarize, then, the established facts of this case, it appears that the plaintiff is the owner of valuable trade secrets, which were either discovered by one or more of the defendants or necessarily disclosed to them while occupying a confidential relation towards the plaintiff; that as to such trade secrets as were discovered by either Reichenbach or Passavant they have undertaken and agreed to give plaintiff the exclusive property in and control over the same; and that, in violation of this agreement, they are now proposing to make use of them, or some of them, in such a manner as to materially injure the plaintiff's business. With these facts established, the application of the legal principles which must govern the disposition of the case does not appear to be a very formidable undertaking. It may be safely assumed at the outset, I think, that whatever remedy plaintiff may have does not reside in a court of law. The very nature of the case, the peculiar character of the injury liable to be inflicted, and the incalculable damages which may possibly result, all show most conclusively that legal relief is totally inadequate for plaintiff's protection, and that its only resort must be to a court of equity. The learned counsel for defendants has contended, with all the adroitness and skill at his command, which is but another way of saying

that such contention has been put forth with all possible adroitness and skill, that this case is not one of which a court of equity can take jurisdiction, and several authorities, of both English and American courts are cited in support of this claim. I am constrained, however, to hold that the weight of authority is opposed to his view of the law. The question presented is an interesting one, and would justify a somewhat analytical review of the cases which bear upon either aspect of it, did time permit; but for the purposes of this adjudication it will be necessary to advert to such only as are deemed conclusive upon this court. In *Morison v. Moat*, 9 Hare, 241, which is an English case, it was held that an injunction would issue to restrain the use of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a party who acquired knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. An appeal was taken from the decision of the vice chancellor, and in 1852 the case was affirmed by the court of chancery, and it was there held that 'there is no doubt whatever that where a party who has a secret in trade employs persons under contract, either express or implied, or under duty, express or implied, those persons cannot gain knowledge of that secret and then set it up against their employers.' *Morison v. Moat*, 21 L. J. Ch. N. S. 248. In 1868 the supreme court of Massachusetts recognized and followed the authority of *Morison v. Moat*, and in the opinion of Gray, J., the law is thus stated: If a party 'invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect, against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.' *Peabody v. Norfolk*, 93 Mass. 452, 96 Am. Dec. 664. The language above quoted was cited with approval in *Salomon v. Hertz*, 40 N. J. Eq. 400, and it is almost identical with that employed by elementary writers of recognized standing in discussing the same question. Judge Story says: 'Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment, and it matters not in such cases whether the secrets be secrets of trade, or secrets of title, or any other secrets of the party important to his interests. 2 Story, Eq. Jur. §52. See also 1 High, Inj. 2d ed. p. 15. The same doctrine has obtained in this state for at least half a century, and has been enunciated by a line of decisions which, with a single exception, is unbroken. *Jarvis v. Peck*, 10 Paige, 118; *Hammer v. Barns*, 26 How. Pr. 174; *Champlin v. Stoddart*, 80 Hun, 300; *Tabor v. Hoffman*, 118 N. Y. 30. The *Champlin Case* was decided by the general term of this

department, Smith, P. J., writing the opinion, in the course of which he takes occasion to say that 'a secret of trade is fully recognized in equity as property . . . the disclosure of which will be restrained by injunction.' By a careful reading of the various decisions upon this subject, it will be seen that some are made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employee will not divulge any trade secrets imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets, thus acquired, is a breach of trust, and a violation of good morals, to prevent which a court of equity should intervene. It may also be observed in this connection that the word 'property,' as applied to trade secrets and inventions, has its limitations, for it is undoubtedly true that when an article manufactured by some secret process, which is not the subject of a patent, is thrown upon the market, the whole world is at liberty to discover, if it can by any fair means, what that process is, and, when discovery is thus made, to employ it in the manufacture of similar articles. In such a case, the inventor's or manufacturer's property in his process is gone; but the authorities all hold that, while knowledge obtained in this manner is perfectly legitimate, that which is obtained by means of any breach of confidence cannot be sanctioned; and this distinction is quite forcibly presented in a recent decision of the court of appeals, to which the attention of this court has been directed by the supplemental brief of defendant's counsel. Judge Landon, in his opinion, speaking of the plaintiff's claim, says: 'His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret, or the publication of a letter, which may prove injurious to business or character.' *Bristol v. Equitable L. Assur. Soc.* 182 N. Y. 264-267. But without multiplying citations or prolonging consideration of the legal aspect of this case, it may be said by way of conclusion that the principle contended for by the plaintiff is not only abundantly supported by authority, but is likewise founded in good common sense, and is peculiarly applicable to the case in hand. Here is a party which, by the expenditure of vast sums of money, and the exercise of much skill and ingenuity, has built up a large and prosperous business, the capital of which consists largely in certain inventions and discoveries made by its officers, servants, and agents. The world at large knows nothing of these inventions and discoveries, because they are locked within the brains of those who conceived them. The defendants, who have been largely instrumental in perfecting them, while under both an express and implied contract to give the plaintiff the benefit of their inventive genius, propose now to disregard their legal and moral obligations by creating a new establishment where these inventions and discoveries may be employed to plaintiff's serious injury. This is not legitimate competition, which it is always the policy of the law to foster and encourage, but

it is *contra bonos mores*, and constitutes a breach of trust which a court of law, and much less a court of equity, should not tolerate." *Fralich v. Despar*, 165 Pa. 24.

It is argued in this case that there is no express contract shown, and that an implied contract is not such a one as will be enforced. We think the testimony discloses very clearly an express agreement between the employer and the employed, but, if it may be stated that the only agreement is an implied one, growing out of oral statements taken in connection with the facts and circumstances surrounding the business, the parties, and their acts, still, if it is clearly established by all that was said and done that the secrets confided to the defendant were not to be disclosed by him to others, and were not to be used by him except when he was in the employment of those who imparted to him the secret, or their legal representatives, and that was one of the conditions of his employment, we do not think it would make any difference in the principle involved. The knowledge came to him in the course of a confidential employment, relying upon his using the knowledge only for the benefit of the employer. It is said by an eminent writer: "On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." 1 Story, Eq. Jur. § 523. The same authority, when discussing the subject of in what cases injunction will be issued, says: "Upon similar grounds of irreparable mischief courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment. And it matters not in such cases whether the secrets be secrets of trade, or secrets of title, or any other secrets of the party important to his interests." Thus a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach of faith or contract on the part of the persons communicating it. 2 Story, Eq. Jur. § 953, and many cases there cited. 10 Am. & Eng. Enc. Law, p. 949; High, Inj. § 19; *Davies v. Clough*, 8 Sim. 262; *Williams v. Prince of Wales Life etc. Assur. Co.* 23 Beav. 388; *Morison v. Moat*, 9 Hare, 241; *Yovatt v. Winyard*, 1 Jac. & W. 394; *Tipping v. Clarke*, 2 Hare, 398; *Penbody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Champlin v. Stoddart*, 80 Hun, 300; *Silamon v. Herts*, 40 N. J. Eq. 400.

The case of *Little v. Gallus*, 4 App. Div. 569, is against the contention of the defendant. In that case the plaintiff was a maker of typewriter ribbons by secret processes and formulæ. The defendants entered his employ when they were minors. The court says: "It seems, therefore, too plain for controversy that the plaintiff was the owner of a process or invention which possessed great value and which he had secured at the cost of much time, trouble, and expense; that the defendants Gallus and Bostwick, occupying a confidential relation toward the plaintiff, gained a knowledge of the processes and formulæ employed by

him in conducting his business; that they well understood the nature of the business, their relations to it, and the care which was used to keep the same secret; and that notwithstanding the knowledge thus obtained, and in violation of the faith and confidence reposed in them, they surreptitiously made memoranda of these formulae, and are now using the same, as well as all other knowledge obtained while in the plaintiff's service, to start and operate a rival establishment. The only question, therefore, to be determined upon this state of facts, is whether or not they shall be permitted to carry out their intentions. It is contended by the plaintiff that his case is brought directly within the rule laid down in that of *Eastman Kodak Co. v. Reichenbach*, 79 Hun, 188, recently decided by the general term in the fifth department. And the defendants, while conceding that the law of the case is there correctly stated, insist that the facts do not warrant its application here. We find ourselves unable to concur in the view thus taken and which was carefully elaborated upon the argument by the learned counsel for the defendants. The facts of this case differ somewhat from those of the *Reichenbach Case*, in that there was no written agreement entered into between these parties by which the employees undertook to give to their employers exclusive right in, or control over, any inventions discovered by, or disclosed to, the former; but we are unable to see how this strengthens the defendants' contention. In the case cited there happens to be an express contract, but nevertheless it is asserted in the opinion of the court, and such is unquestionably the correct rule, that the law raises an implied contract that an employee who occupies a confidential relation towards his employer will not divulge any trade secrets imparted to him or discovered by him in the course of his employment; and we do not see why the defendants, Gallus and Bostwick, are not under just as strong an obligation to observe and keep sacred the trust reposed in them as they would be had they reduced the contract which the law implies to writing; nor does the fact that they entered the plaintiff's service while minors and at first performed duties comparatively unimportant in their character relieve them from a faithful observance of their obligation. Gallus, at least, was ultimately advanced to a position of great responsibility, and both of them had attained their majority before attempting to take improper advantage of the knowledge imparted to them while in the plaintiff's employ, and their present experiments are not in the direction of legitimate competition, but involve a breach of trust which we think the court should prevent." *Tabor v. Hoffman*, 118 N. Y. 81; *Tuck v. Priester*, L. R. 19 Q. B. Div. 619; *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 845.

It is the contention of the defendant that the contract sought to be enforced is void as against public policy because it is in restraint of trade, citing *Richardson v. Ruhl*, 77 Mich. 632, 6 L. R. A. 457; *Western Wooden Ware Assn. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503. These cases are not in point. They are cases where the purpose of the contract was to create a monopoly by providing by contract that established industries should cease to do business, which, of course, is unlawful; but that is not the purpose of the contract under consideration. Here processes and machinery have been invented which the owners believe would be of great value to them if they could be used upon a large scale. To use them upon a large scale required the employment of a number of persons, to some of whom some of the secrets of the business and the machinery must be disclosed. If these secrets were disclosed to others, who might use them to establish a business of like character, they would cease to be valuable to the owner. Is there anything unreasonable in enforcing an agreement that such secrets shall not be disclosed by the employee? It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, for the public has no right to the secret. See *Taylor v. Blanchard*, 18 Allen, 372, 90 Am. Dec. 203, and cases cited; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345. We cannot see how it can be against public interest to allow an employer to make such conditions of employment with his employees as will give him the fullest protection to his property right in his process or invention, and at the same time enable him to employ a great many employees in its production. To enable one to do this would be a benefit to the public in many ways. It would secure employment to more persons than would otherwise be employed, and a larger output would be made of a useful article. The evidence discloses that it does not require a man of special skill to do the work done by defendant when in the employ of the predecessors in business of the complainants. To restrain him from making use of what he has not discovered is not an injustice to him, and does not abridge his right to work along those lines which would not be harmful to those to whom he has sustained a position of confidence. It is to the advantage of both parties that such a contract should be allowed. By means of it the defendant secured employment which he could not have secured without it, and at the same time his employers were secured against competition which might be ruinous. *Beal v. Chase*, 31 Mich. 531.

The decree of the court below is affirmed, with costs.

The other Justices concur.

Edmund HALL, Plff. in Err.,
v.

Charles ALFORD et al.

(.....Mich.....)

Marsh surrounding an island in a river
where at times the water is 10 or 12 inches deep, and at other times the land is dry, while at some seasons of the year it is covered with rushes as high as a man's head, is not navigable water and strangers cannot, against the will of the owner, go upon it in boats and hunt wild fowl.

(September 14, 1897.)

NOTE—As to the dedication of marshy lands on the Great Lakes as a public hunting ground, see *People v. Silberwood* (Mich.) 32 L. R. A. 694.

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendants in an action brought to recover damages for alleged trespass on plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs Oscar M. Springer and H. H. Hatch, for plaintiff in error:

The fee of the land under the water of the Detroit river as far as the middle thread is in the riparian owner.

Grand Rapids Ice & C. Co. v. South Grand Rapids Ice & C. Co. 102 Mich. 227, 25 L. R. A. 815; *Clark v. Campau*, 19 Mich. 328; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 498; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *Jones v. Lee*, 77 Mich. 35; *Turner v. Holland*, 65 Mich. 458; *Webber v. Pere Marquette Boom Co.* 63 Mich. 626.

If the courts disturb the rule, their action will act retrospectively and will unseat great investments of capital that have been made upon the faith of the rule.

Lincoln v. Davis, 53 Mich. 875, 51 Am. Rep. 116.

Riparian rights, unless expressly limited, extend to the middle of the navigable channel, and cover any shallows or middle ground not shown in the government surveys, but lying between such channel and the shore; and it makes no difference that the deed conveying the premises to which the rights attach describes them according to a city plat instead of the government survey.

Fletcher v. Thunder Bay River Boom Co. 51 Mich. 277; *Barkus v. Detroit*, 49 Mich. 110, 43 Am. Rep. 447; *Richardson v. Prentiss*, 48 Mich. 88; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 183; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403; *Marwell v. Bay City Bridge Co.* 41 Mich. 453; *Atty. Gen. v. Reort Booming Co.* 84 Mich. 462; *Watson v. Peters*, 26 Mich. 508; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *People v. Silverwood* (Mich.) 83 L. R. A. 694; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. (Mich.) 155.

The owner of land under water has the exclusive right to hunt and take wild fowl on the water over the land.

Sterling v. Jackson, 69 Mich. 488; *Lincoln v. Davis*, 53 Mich. 875, 51 Am. Rep. 116.

Mr. W. F. Atkinson, with **Messrs. Ari E. Woodruff** and **George W. Coomer**, for defendant in error:

Treating the river as an ordinary highway, if a trespass is relied on in it, the declaration should in some way apprise defendant that the trespass complained of was in the highway, etc.

Wolf v. Holton, 61 Mich. 550.

Up to the time the patent was issued Horse Island, with all the riparian rights (whatever they were) belonged to the United States government, and the government could sell the island and retain the rights under the water if it saw fit to do so.

Watson v. Peters, 26 Mich. 517.

The rights of the purchaser under a patent end at the water's edge.

St. Paul & P. R. Co. v. Schurmeir, 74 U. S. 7 Wall. 272, 19 L. ed. 74.

88 L. R. A.

Long, Ch. J., delivered the opinion of the court:

This action was in trespass, commenced in justice court, where judgment was given for defendants. On the trial in the circuit the court directed the verdict in favor of the defendants. The declaration was in writing, and substantially avers that the defendants on the 15th day of April, 1895, "with force and arms the close of said plaintiff, situate in the town of Brownstown, said county, and known and described as being 'Horse Island,' being situate directly east of sections one and twelve in township 5 south, of range 10 east, with the adjacent shore, broke and entered, with their feet in walking, shooting at game on said plaintiff's land, and within a short distance of the same a marsh flowed by water yet adjacent to the main shore of which his said lands above described are a part; and while in the act of so shooting game aforesaid trod down with their feet in so walking and hunting game, and with their boats and decoys crowded onto the grounds, anchored, trod down and trampled upon and destroyed the grass of said plaintiff there growing, and other injuries to him then and there did," etc. The plea was the general issue, with notice that no trespass was committed. The plaintiff gave evidence tending to show that he was the owner in fee of the island. There was offered and received in evidence a patent from the United States to Benjamin Hall, Jr., the land being described therein as "Horse Island, being situate directly east of sections 1 and 12 in township 5 south, 10 east, as per plat approved April 2, 1885." Also a deed from Benjamin Hall, Jr., and wife to plaintiff, describing the same premises. Plaintiff further showed that he was in possession of the property at the time of the trespass complained of, and that he and his grantor had been in possession for many years. This island is situate in the Detroit river, the center of the river being east of the island and the main shore west of it. On April 15, 1895, the defendants came in a boat to a place near the north end of the island and about 60 feet from it, and about 216 feet from the channel bank, threw out their decoys, and commenced shooting ducks. They were warned off by plaintiff's agent, but refused to go. At the place where the boat was anchored the water was about 10 or 12 inches deep on that day. It was shown that at some times in the season this place was not covered with water at all, but at the time in question the water from the upland of the island to that point was from 6 to 12 inches deep, growing gradually deeper as the channel bank was approached. This land between the island and the channel bank is a shallow flat, and during some seasons of the year is covered with weeds, rushes, and grass as high as a man's head. This marsh extends all around the island, though there is a slight current passing through it. Plaintiff on the trial asked for nominal damages, which request was refused.

It is well settled in this state that the fee to the land under the waters of the rivers, as far as the middle thread, is in the riparian owner. In *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 498, the cases upon the subject are collected and the question discussed at such length

that it is needless to cite or discuss them here. Among other things, it was there said: "Under the settled law of this state, the defendant is the owner, by virtue of his riparian rights, of the soil of the river bed to the middle of the stream." In that case Mr. Justice Morse quoted with approval from the case of *Janesville v. Carpenier*, 77 Wis. 288, 8 L. R. A. 808, as follows: "That . . . the owner in fee of this ground has the right to use and enjoy it to the center of the river in any manner not injurious to others and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aquæ*, subject to the public easement if it be navigable in fact, and with due regard to the rights of the riparian proprietors. He may construct docks, landing places, piers, and wharves out to navigable waters if the river is navigable in fact, and if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired, even for public use, 'without compensation' or 'without due process of law,' and it cannot be taken at all for anyone's private use." Judge Morse added: "The law of this state is in complete accord and harmony with that of our sister state of Wisconsin in respect to riparian rights." In *Webber v. Pere Marquette Boom Co.* 62 Mich. 626, it was said: "It is the settled rule in this state that the title of the riparian owner extends to the middle line of the lake or stream of the inland waters" (citing many cases). And again: "This has become a rule of property in this state, and the Supreme Court [of the United States] recognizes the right of each state to determine the doctrine for itself." *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

It is not claimed in the present case that the public can be hindered or in any manner interrupted in its use of the Detroit river for the purpose of navigation; but it is contended that the defendants were not using the river for any such purpose, and that the place where the boat was anchored was not susceptible of any such uses or purposes. Under the rule laid down in *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 498, the plaintiff here would have the undoubted right to construct wharves or piers out over this low land to deep water. It is contended, however, by counsel for defendants, that in its then condition the defendants had the right to pass over it in their boat, and for so doing they cannot be counted as trespassers; that, it being covered by the waters of the Detroit river, the public has the right of navigation, and any member of the public may go and come freely either for business or pleasure anywhere within the navigable waters; and that this place was within the navigable waters. On the other hand, it is contended by counsel for plaintiff that those waters at the point where the boat of defendants was an-

chored are not navigable within the meaning of the term "navigable waters," as the courts now construe that term; and that, even if they could be construed as such waters, the defendants were not using them for that purpose. It is not contended that the defendants had injured the grass growing there, but that the trespass consisted in anchoring the boat, and shooting the ducks while so anchored.

Can these waters be considered as navigable? In *Grand Rapids v. Powers*, 89 Mich. 94, 14 L. R. A. 808, it was said: "Whatever may be the power of the legislature in waters, 'strictly navigable' to fix an arbitrary line beyond which riparian owners cannot go, or to delegate to a municipality that power, I am satisfied that no such right exists in the waters of Grand river at the rapids, or certainly in that part of the waters which are not now navigable for any purpose. The rights of the riparian owner, under our laws, are subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless."—citing: *Middleton v. Flat River Boom Co.* 27 Mich. 583; *Grand Rapids Boom Co. v. Jarvis*, 80 Mich. 308. See also *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *East Harbor Sportsman's Club v. Kelling* (Ohio) 4 Det. L. N. No. 18. It must be conceded that this part of the Detroit river where the defendants were is not navigable. Whatever rights they may have had to anchor their boat in the deep water of the river and there hunt wild fowl, we are of the opinion that they had no right to go upon the waters which were not navigable and there anchor and hunt wild fowl. It was the property of the plaintiff, and he had the same right to control it as though it were upland. As was said in *Sterling v. Jackson*, 69 Mich. 488: "Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land but by consent of the owner. It will be conceded that the owner of lands in this state has the exclusive right of hunting and sporting upon his own soil." And again it was there said: "The defendant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position, which, considered in the abstract, is quite forcible, and, if applied to waters where there is no private ownership of the soil thereunder, would be unanswerable. But, so far

as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incidental to such navigation. He could seek the shelter of the bay in a storm, and cast his anchor therein; but he had no right to construct a 'hide,' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license." In that case the waters were actually navigable, and yet it was held a trespass to erect a "hide" and shoot ducks for the reason that the ownership of the soil was in the plaintiff, and the defendant by that act was not using the waters for the purpose of navigation. In the present case, the waters where the defendants were, were confessedly not navigable for any useful purpose. It is true they went there in a boat. They could have done this possibly by poling their boat up a narrow rivulet into the land to the center of the island, if such rivulet had existed, and with as much force contend that being there in a boat, they could hunt wild fowl. Most certainly the learned circuit judge

was in error, if we are to adhere to the doctrine enunciated in *Sterling v. Jackson*, 89 Mich. 488. In that case the court compared the right of the public to navigate public waters to its right to pass over a highway on land. It was said: "It does not follow that, because a person is where he has a right to be, he cannot be held liable in trespass. A person has the right to drive his cattle along the public highway, but he has no right to depasture the grass with his cattle in the highway adjoining the land of another person. Also a person has a right to travel along a public highway, but this gives him no right to dig a pit, or remove the soil, or incumber it in front of lands belonging to others. . . . The defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it, but he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as the owner of the soil. The public had a right to use it as a public highway, but every other beneficial use and enjoyment belonged to the owner of the soil."

The court under the facts shown upon this record should have directed the verdict in favor of the plaintiff for nominal damages.

Judgment is reversed, and a new trial ordered.

The other Justices concur.

MISSOURI SUPREME COURT (Division 1).

STATE of Missouri, *ex rel.* Edward
C. CROW, Attorney General,

v.
F. P. HOSTETTER.

(187 Mo. 636.)

1. A vacancy in office caused by the death of a county clerk within fifteen days

NOTE.—*Right of woman to hold office.*

- I. *Distinction between the right to hold elective office and right to hold appointive office.*
- II. *Right to hold judicial office.*
 - a. *Office of judge.*
 - b. *Office of justice of the peace.*
 - c. *Office of arbitrator.*
- III. *Right to hold legislative office.*
- IV. *Right to hold administrative office.*
 - a. *When functions exercisable by deputy; generally.*
 - b. *When functions exercisable in person.*
 1. *Sheriff.*
 2. *Overseer of the poor.*
 3. *Sexton of the parish.*
 4. *Commissioner of sewers, fish commissioner, forester, etc.*
 5. *Director of the work-house, matron, medical superintendent of the hospital, member of the board of health, etc.*
 6. *Superintendent of public instruction, school director, inspector, etc.*
 7. *Pension agent, postmaster, etc.*
 8. *Clerk of the county court.*
 9. *Master in chancery.*
 10. *Grand juror.*
 11. *Notary public.*
- V. *Conclusion.*

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before a general election should be filled at that election under Rev. Stat. § 1964, read in connection with § 4766, as amended by Laws 1893, p. 155.

2. *The use of the masculine pronoun in Const. art. 8, § 12, and in the statutes relating to the qualifications of a county clerk (§ 1965), does not restrict the right to hold such office to males, since other provisions of the Constitution expressly provide that certain officers must be*

I. *Distinction between the right to hold elective office and right to hold appointive office.*

The court of appeals of Kentucky reasoned upon the theory that the Constitution of the state, by using words importing the masculine gender, thereby intended that only male citizens were eligible to the elective office. The court, however, admitted that woman was within the constitutional requirements of a citizen, but, following the doctrine that the Constitution, having denied woman the right to vote, had also denied her the greater right, that of holding the office voted for, it held in the case of *Atchison v. Lucas* (1885) 88 Ky. 451, that a woman could not hold the office of jailer. [As to women having been jailers in England, see *post*, IV. a]. This doctrine is not, however, always followed. See *infra*.

In *Warwick v. State* (1874) 25 Ohio St. 21, the supreme court of Ohio calls attention to the fact that § 4 of art. 15 of the state Constitution states that "no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector." The court then says that the word "office" in such Constitution does not apply to officers in private corporations or churches, or to the minor or subordinate officers in colleges, academies, and schools, such as professors and teachers and the like. Nor does it apply to all subordinate officers in the military or legislative department, to

males, while an express provision that the clerk should be a male citizen, which previously existed in the statute, has been dropped.

3. A woman is eligible to election as a county clerk under Const. art. 8, § 12, providing that no person shall be chosen to an office "who is not a citizen of the United States, and who shall not have resided in this state one year."

(February 20, 1897.)

INFORMATION in the nature of quo warranto to determine by what right defendant claimed to hold the office of county clerk of St. Clair County. *Judgment of ouster.*

The facts are stated in the opinion.

Messrs. Graves & Clark and Francisco Brothers, with Mr. Edward C. Crow, Attorney General, for plaintiff:

Upon the admitted facts the defendant Hostetter became and was a usurper immediately after the general election, November 3, 1896.

The provisions of the law creating the office, as to filling vacancies therein, governs as against the general statute upon the same subject.

State, Easterling, v. Rankin, 33 Neb. 286.

Where the time of tenure is fixed, and no provision for holding over is found, then the tenure ceases on the day fixed in the statute creating the tenure, and the right to hold ceases upon that day.

the private secretary of the governor or numerous other such officers, and that the constitutional inhibition should therefore receive a restricted rather than an enlarged interpretation. Upon the question at issue, the court then decided that the word "office" applied alone to the probate judge and not his deputy, and therefore that it was competent for a probate judge to appoint a woman as deputy clerk.

In the case of *Jeffries v. Harrington* (1887) 11 Colo. 191, the supreme court of Colorado applied the Ohio doctrine to the construction of § 6 of art. 7 of the Constitution of Colorado, which also provides that "no person except a qualified elector shall be elected or appointed to any civil or military office in this state," and holds that the word "office" as therein used did not include the deputy clerkship.

The supreme court of Michigan likewise, in the case of *Wilson v. Newton*, 87 Mich. 493, held that as the office of county clerk was only ministerial, the officer might appoint a woman or any person whom he saw fit as deputy, for whose acts he and his sureties would be responsible. As to right of woman to hold the office of clerk of the county court, see *infra*, IV. b. 8.

Further, as to the doctrine that a woman is qualified to hold a ministerial office generally when not qualified to hold an office requiring greater qualifications, see *infra*, IV.

II. Right to hold judicial office.

a. Office of judge.

Kyd on Awards, p. 41, says that according to the idea of Justinian, a woman could not intermeddle with the office of a judge for the reason that it was contrary to the proper character of her sex, and cites *a. Cod. l. 2, t. 56, § 6*.

However, in Campbell's "Lives of the Lord Chancellors of England, vol. I. pp. 134-141, regarding the life of Queen Eleanor, Lady Keeper of the Great Seal, in the absence of King Henry, in the year 1233, we are told, among other things, that the Queen was to act with the advice of Richard, Earl of Cornwall the King's brother and others of the council, and that she held the office nearly a whole year performing the duties, as well judicial as ministerial." And Campbell further says: "I am thus bound to include her in the list of the chancellors and keepers of the Great Seal, whose lives I have undertaken to delineate."

The sittings referred to however, were interrupted by the *accouchement* of the judge when she was delivered of a daughter.

We are informed by Coke upon Littleton, 326a, [Note 290], that Anne, Countess of Pembroke, Dorset, and Montgomery, who had the office of hereditary sheriff, exercised it in person and that at the assizes at Appleby she sat with the judges on the bench; but it is considered by 4 Craik's Romance of the Peerage, 162, to be very improbable that she habitually discharged the duties of the office. L. R. A.

office in person as she could not have done so without violating the well-settled law.

It was afterwards enacted "that no sheriff, constable, or other bailiff of the King shall hold pleas of the Crown." 8 Bacon, Abr. 688.

The office of sheriff was partly judicial and partly ministerial, and the ministerial duties, such as that of a sheriff's attendance upon the judges, might be performed by a deputy,—as to which see, further, *infra*, IV. a.

Coke upon Littleton, 326a, note, states that while woman could not occupy the throne of France, such inability did not prevent her from succeeding to other dignity, and that it is shown "that Mahaut, Countess of Artois, assisted, not only at the trial of Robert of Flanders, but at the ceremony of the coronation of Philip the Long."

b. Office of justice of the peace.

In Massachusetts the justices of the supreme judicial court were of the opinion that a woman, either married or single, could not be appointed to exercise the judicial office of justice of the peace, and that the whole frame and purport of the Constitution of the state, and the universal understanding and unbroken practical construction for the greater part of a century afterwards all support this conclusion. Opinions of the Justices, 107 Mass. 604.

In Maine, at a later date (1874), upon a question proposed by the executive council, the opinion of the justices of the judicial court was to the effect that by the Constitution the whole political power of the state is vested in its male citizens. "Whenever in any of its provisions, reference is made to sex, it is to duties to be done and performed by male members of the community. Nothing in the language of the Constitution or in the debates of the convention, by which it was formed, indicates any purpose whatever of any surrender of political power by those who had previously enjoyed it or a transfer of the same to those who had never possessed it," and that, "having regard, then, to the rules of the common law as to the rights of women married and unmarried, as then existing; to the history of the past; to the universal and unbroken practical construction given to the Constitution of this state, and to that of the commonwealth of Massachusetts upon which that of this state was modeled,—we are led to the inevitable conclusion that it was never in the contemplation or intention of those forming our Constitution that the offices thereby created should be filled by those who could take no part in its original formation, and to whom no political power was intrusted for the organization of the government then about to be established under its provisions, or for its continued existence and preservation when established." And the opinion was thereupon rendered that a woman could not be legally appointed and qualified as a justice of the peace. The opinion went

State, Childs, v. O'Leary, 64 Minn. 207.

If Mrs. Wheeler is ineligible or has not been legally elected, that is a question to be determined in a direct proceeding against her, if she enters and takes possession of the office.

Com. v. Kempsmith, 18 Pa. Co. Ct. 667; *Slevens v. Carter*, 27 Or. 553, 31 L. R. A. 342; *State, Atty. Gen., v. Johnson*, 35 Fla. 26; *State, Butler, v. Callahan*, 4 N. D. 481; *Cameron v. Parker*, 2 Okla. 277; *Huffman v. Mills*, 39 Kan. 577; *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355; *Queen v. Morton* (1892) 1 Q. B. 39.

While as to some officers the Constitution says, the person to be eligible must "be a male citizen of the United States" (Mo. Const. art. 5, § 19) yet there is nothing concerning clerk of

county court, except the general inhibition, which does not bar a woman.

Mo. Const. art. 8, § 12; art. 6, § 89; art. 14.

Nor was or is she barred from an office of this kind by the common law.

Comyns' Digest of the Laws of England, title *Officer*, B, 2, and cases cited; Chitty, Prerogatives of the Crown, 84; *Opinion of the Justices*, 115 Mass. 602; Bacon, Abr. title *Office and Officers*, 1; *Anonymous*, 2 Ld. Raym. 1014; *King v. Stubbs*, 2 T. R. 395; Throop, Pub. Off. §§ 68 et seq.; *Wright v. Noell*, 16 Kan. 601; *Re Leach*, 134 Ind. 665, 21 L. R. A. 701; *Russell v. Gupitill*, 13 Wash. 360; *Warwick v. State*, 25 Ohio St. 21; *Jeffries v. Harrington*, 11 Colo. 191; *Re Hall*, 50 Conn. 181, 47 Am. Rep. 625; *Margaret Richardson's Case*, 3 Pa. Dist. R. 299;

further, however, to the effect that "while the offices created by the Constitution are to be filled exclusively by the male members of the state, we have no doubt that the legislature may create new ministerial offices, not enumerated therein, and, if they deem expedient, may authorize the performance of the duties of the offices so created by persons of either sex." And it was declared that the legislature might authorize the appointment of married or unmarried women to administer oaths, take acknowledgment of deeds, or solemnize marriage. *Opinions of the Justices*, 63 Me. 596. [Three out of eight justices dissenting.]

a. Office of arbitrator.

In the case of *Evans v. Ives*, 15 Phila. 635, upon the question whether or not woman could sit as an arbitrator, and after considering the many cases in which celebrated women had held government offices in the history of the world, the court said: "Without referring in any manner to Eve, the first arbitrator appointed in this world to decide the controversy about eating the forbidden fruit, or to the manner Deborah judged Israel, we are clearly of the opinion that under the act of 1836, a woman, married or single, may be appointed arbitrator, and may act as such, and make a valid award.

In *Duchess of Suffolk's Case*, 8 Edw. IV. 1, it appears that the Duchess of Suffolk was arbitrator, but no question seems to have been raised as to her eligibility as to administrative offices connected with courts. See *infra*, IV. b, 7, 8, 9, 10.

The office of master in chancery in Illinois seems to have so close a similarity to administrative offices, although some judicial functions belong to it, that it is classed with that of notary public among administrative offices. See *infra*, IV. b, 9.

III. Right to hold legislative office.

In the case of *Chorlton v. Lings*, L. R. 4 C. P. 374, 38 L. J. C. P. N. S. 1, Justice Willes took occasion to say that while Kemble in his "Saxons in England" shows that the Queen and other women, who as he believes were ecclesiastics of rank and wealth, did sign charters, yet he deems that not sufficient evidence from which to draw the conclusion that women could regularly take part in the public councils of the Anglo-Saxons.

The case of *De Souza v. Cobden* [1891] 1 Q. B. 687, is one in which a single woman had been elected a member of the London County Council. The proceeding against her was for a penalty for having acted without being qualified, and it was not necessary for the court to decide the question of her eligibility, but Lord Esher called attention to the fact that "by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well-recognized custom to the contrary has become established, as in the case of

overseers of the poor [see *infra*, IV. b, 7]; and, of course, if women are especially mentioned in an act of Parliament, they will be qualified;" and he was of the opinion that the statute being silent in that regard, it did not intend that woman should be elected to act as a member of the London county council.

But the same question was expressly decided in *Heresford-Hope v. Lady Sandhurst*, L. R. 23 Q. B. Div. 79, 58 L. J. Q. B. N. S. 316, 61 L. T. N. S. 150, 37 Week. Rep. 543. Although the statute expressly provided that for purposes connected with the right to vote under the municipal corporations act words of masculine gender should include women, and another statutory provision is that any persons who have the power to vote may be chosen councillors.

In this case Lord Esher, M. R., refers to the somewhat extensive opinion, as to the status of women and the offices they had filled, by Willes, J., in *Chorlton v. Lings*, L. R. 4 C. P. 374, 38 L. J. C. P. N. S. 1, which was a case relating to women's right to vote, and says: "What I deduce from his judgment is, that for such somewhat obscure offices as those, exercised often in a remote part of the country, where nobody else could have been found who could exercise them, women had been admitted into them by way of exception."

The specific requirement of qualifications for holding a legislative office may be such as to disqualify females, as, for example, to be a member of the legislature in Kansas one must be, at the time of election, a qualified voter and resident of the county or district for which he is chosen. Woman not being a qualified voter in Kansas, she is disqualified from becoming a member of the state legislature as shown by the *dictum* in *Wright v. Noell*, 16 Kan. 601.

IV. Right to hold administrative office.

a. When functions exercisable by deputy; generally.

It was at an early date held in England that a woman might hold a hereditary office although it were of an executive or an administrative character, if it were possible for her to exercise the functions thereof by deputy, and in some cases it was held that because such an office could descend to her by inheritance, it could be given to her by express grant.

We learn that as early as 1673 a woman, in the person of Lady Broughton, held the office of keeper of the Gate house prison. *Rex v. Lady Broughton*, 3 Keb. 32, also *Westminster v. Broughton*, 3 Keb. 151.

On the authority of the Lady Broughton Case, it was held in *Anonymous*, 3 Salk. 2, that the keeper of the workhouse at Chelmsford, being a woman, was not disqualified on account of her sex. The court said: "She may be capable of executing the

Wilson v. Newton, 87 Mich. 493; *Von Dorn v. Mengedoh*, 41 Neb. 525; *Foltz v. Hoge*, 54 Cal. 23; *Findlay v. Thorn*, 1 How. Pr. N. S. 76; Nathaniel C. Moak in 41 Alb. L. J. p. 244.

At common law infants and women were placed upon the same footing in many respects as to eligibility to office. Our courts, both Federal and state, have recognized both infants and women, where there are no express inhibitions in the Constitution or laws.

United States v. Bizby, 10 Bias. 520; *Moore v. Graves*, 3 N. H. 408; *Golding's Petition*, 57 N. H. 146, 21 Am. Rep. 66.

"The office of county clerk is wholly ministerial," and hence falls in that class of cases which women and even infants could hold at the common law.

Wilson v. Newton, 87 Mich. 493; *Warwick v. State*, 25 Ohio St. 21; *Jeffries v. Harrington*, 11 Colo. 191.

Statutes are construed in the light of previous statutes upon the same subject. Taking the previous statutes upon the qualifications of clerks of courts of record there is no doubt of the legislative intent to remove the inhibition contained in the statutes of 1855 and 1865.

Gray v. Cumberland County Comrs. 83 Me. 429; *Snyder v. Compton*, 87 Tex. 374; *Gunter v. State*, 83 Ala. 96; *United States v. Lacher*, 184 U. S. 624, 38 L. ed. 1080.

The word "person" as used in the Constitution and statute includes women as well as men. *Von Dorn v. Mengedoh*, 41 Neb. 525; *Opinion of the Justices*, 136 Mass. 578.

office either by herself or deputy, as the Lady Braughton did."

For the reason that Lady Braughton had been keeper of the Gate house prison, as shown by 8 Keb. 32, it was held in Hilary, Term, 2 Anne, Reported Anonymous, 2 Ld. Raym. 1014, that the appointment of a woman as governor of a workhouse was good, and she could act by deputy.

A woman was permitted to hold the office of custodian of a castle, we are informed by Lady Russell's Case, Cro. Jac. 17, 5 Comyns' Dig. 189. It is said for the reason that she could exercise its functions by deputy.

Likewise a woman was permitted to hold the office of forester, as shown by 4 Coke Inst. 311, 5 Comyns' Dig. 189, the courts saying that she could attend by deputy who should be sworn.

By the Duke of Buckingham's Case, 3 Dyer, 285b, we see that the hereditary office of constable of England descended to his two daughters, which office, it was held, they might exercise by deputy, and that after the marriage of the elder her husband should alone exercise its function if the King did not refuse such services.

It was said in *Callis on Sewers*, p. 253, that "it was adjudged in B. R. 5 Car. I. that the office of marshal of that court will descend to a *feme*, and that she might execute it by her deputy. Citing Herne's Reading, 4 [ed. 1685]."

So, in case of the Lord Great Chamberlain of England, 2 Bro. P. C. (2d ed.) 146, it is said that the office of Great Chamberlain of England is hereditary, and that on the death of the incumbent, seized in fee thereof, who left two sisters, the office belonged to both and they could exercise it by deputy subject to the King's approval of the deputy.

It was also deemed competent for a woman to hold the office of marshal of England by grant for the reason that such office could descend to her by inheritance. 5 Comyns' Dig. 189.

But in Kentucky, as stated *supra*, L., it is held that a woman cannot be a jailor.

b. When functions exercisable in person.

1. Sheriff.

It is stated in Coke on Littleton, 326a, note, that in England, "the celebrated Anne, Countess of Pembroke, Dorset, and Montgomery, held the office of hereditary sheriff of Westmoreland, and exercised in person," but as indicated *supra*, [I. a.], she may have exercised the ministerial functions of her office by deputy.

For eligibility of woman to be a jailor, see *supra*, L. and IV. a.

2. Overseer of the poor.

In *King v. Stubbs*, 2 T. R. 386, it was held that a woman was eligible to the office of overseer of the poor. This was under Stat. 43 Elizabeth which required that overseers of the poor should be sub-

stantial "house holders." It was held that there was nothing in the nature of the office to make a woman incompetent.

3. Sexton of the parish.

Case of *Olive v. Ingram*, 2 Strange, 1114, 7 Mod. 263, 273, 274, is doubly interesting for the reason that it not only held that woman is capable of holding the office and exercising the functions of sexton of the parish, but that woman being the owner of property was a qualified voter for the purpose of electing such officer.

4. Commissioner of sewers, fish commissioner, forester, etc.

In seeking to determine whether the Countess of Warwick was a "compatible commissioner" within Statute 23 Henry VIII., chap. V., Robert Callis, Esq., in the fourth lecture on such statute delivered by himself at Gray's Inn, London, in August, 1622, said that "although it is uncouth in our law to have woman justices and commissioners, and to sit in places of judicature, yet by the authorities ensuing, you shall find this a point worth insisting upon, both in human and in divine learning; for in Genesis, chapter the first, after the creation of all other creatures being finished, the heaven adorned and the earth replenished, God said: 'Let us make man in our own image, after our likeness; and let him have dominion over the fish of the sea, and over all the earth, and every creeping thing that creepeth upon the earth. So God created man in His own image, in the image of God created He him, male and female created He them; and said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of heaven, and over every living thing that moveth upon the earth.' This was the first commission that ever was granted; and it passed under the Divine immediate seal of the Almighty, and extended over the whole world. And by the virtue of the word '*dominamini*,' in the plural number, God coupled the woman in commission with the man."

The learned lecturer further shows that while woman was created a commissioner over fishes, and over birds and beasts, that such commission extended over neither man nor woman; but after citing divers cases of Divine authority to sustain that doctrine, he called attention to many instances in ancient and modern history, some of which have been already stated herein, and on the strength of such authority he stated that his opinion was that a woman might be commissioner of sewers in London. Countess of Warwick's Case, Callis on Sewers, 250, 252; Cited also in 13 Vin. Abr. 159.

5. Director of the work-house, matron, medical superintendent of the hospital, member of the board of health, etc.

In the case of *State, Atty. Gen., v. Wilson*, 29 Ohio

A woman is a citizen of the United States and of the state the same as a man.

Webster, Citizenship, 75; U. S. Const. 14th Amend.; Pomeroy, Municipal Law, pt. 2, chap. 2, p. 425; 1 Abbott, Law Dict. ed. of 1879, 224; *United States v. Kellar*, 11 Biss. 814; *Ware v. Wisner*, 50 Fed. Rep. 810; *Comitis v. Parker*, 56 Fed. Rep. 558, 23 L. R. A. 148; *Hatch v. Ferguson*, 57 Fed. Rep. 959; *Belcher v. Parren*, 69 Cal. 73; *United States v. Anthony*, 11 Blatchf. 200; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *Spencer v. Board of Registration*, 1 MacArth. 169, 29 Am. Rep. 532; *Wright v. Noell*, 16 Kan. 601; *State, McCampbell, v. Howard County Ct.* 90 Mo. 593.

The pronouns "he" and "his" include women

as well as men, so that there is no statutory inhibition by the use thereof.

State v. Jones, 102 Mo. 305; *Re Thomas*, 16 Colo. 441, 18 L. R. A. 538; *Richardson's Case*, 8 Pa. Dist. R. 299, 41 Alb. L. J. 244.

The word "citizen" as used in the Constitution and statute must be taken in its ordinary sense and meaning.

Martin v. Hunter, 14 U. S. 1 Wheat. 304-326, 4 L. ed. 97-102; *Clark v. Utica*, 18 Barb. 453; Mo. Rev. Stat. 1889, § 6570; *Henry & C. Co. v. Evans*, 97 Mo. 47, 8 L. R. A. 332; Mo. Rev. Stat. 1889, § 6568; *Warren v. Barber Asphalt Paving Co.* 115 Mo. 572.

The court cannot go behind the election returns,—that is, the returns as cast up and announced by the canvassing board, composed

St. 347, it was held that a woman was not eligible to the office of medical superintendent of a hospital for the insane, for the reason that such place is an "office" within the Constitution of the state of Ohio requiring that a person holding an "office" shall be a duly qualified elector.

And in *State, Rupp, v. Rust*, 4 Ohio, C. C. 329, for the same reason it was held that females could not be members of the board of work-house directors, but in rendering such a decision, the courts said further that there were many positions in such institutions that might be held by woman, such as matron, clerk, caretaker, advisers, and other like positions; and concluded by saying that the law might be so amended as to provide therefore; or that the board having the legal control, might delegate to woman many of the duties and functions which the law attempted to confer upon the members of the board of directors.

In Massachusetts, however, the justices of the supreme judicial court were of the opinion that the Statute of 1879, chap. 291, § 2, providing that the governor, with the advice and consent of the council, might appoint nine persons to constitute the state board of health, lunacy, and charity, included woman within the meaning of the word "persons," and therefore that woman might be so appointed a member of the state Board of Health. Opinions of the Justices, 136 Mass. 578.

6. Superintendent of public instruction, school director, inspector, etc.

In *Peabody v. Boston School Committee*, 115 Mass. 383, where the board refused to receive a woman as member on the ground of her sex, the court refused to interfere on the ground that it had no power to do so, but the legislature then passed an act prohibiting their exclusion.

A case which has had general force as authority on subject of the right of woman to hold offices generally, as well as authority in the particular line of its decision, is that of the Opinion of the Justices, 115 Mass. 602. The justices were of the opinion that if the Constitution of the state prevented a woman from being a member of the school committee it must be by force of some express provision thereof, or else by a necessary implication arising from the nature of the office itself, or from the law of Massachusetts as existing when the Constitution was adopted and in the light of which it must be read. Reasoning from this premise, they were of the opinion that inasmuch as the Constitution contains nothing relating to school committees, the office is created and regulated by statute; and the Constitution confers upon the general court full power and authority to name and settle annually, or provide by fixed laws for naming and settling all civil officers within the commonwealth, the election and constitution of whom are not in the Constitution otherwise provided for; and as the 88 L. R. A.

common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character (see *supra*, IV.), the duties attached to it were such that a woman might be a member of a school committee for the reason that the duties thereof, which consisted of general charge and superintendence of schools, including the employment of teachers and selection of text-books, the regulation of the attendance of pupils, and the preparing of school registers and returns, were of such a nature that they could be well and efficiently performed by woman.

Following the Massachusetts doctrine, the supreme court of Kansas, in the case of *Wright v. Noell*, 16 Kan. 601, reasoned philosophically upon the theory that "all political power is inherent in the people," and all power not delegated by the Constitution remains with them," and considers that while the Constitution has restricted those who may vote to males, that it has not restricted those who may hold office to males except as to members of the legislature, each of whom must be at the time of his election a qualified voter, and resident in the county or district for which he is chosen, and inasmuch as there was no express disqualification of females, and no affirmative statement of required qualification which did exclude them, and as there was nothing in the language of the section creating the office, nor in the duties imposed by law upon the officer, which would imply the necessary or intended exclusion of either sex, that woman is eligible in Kansas to the office of county superintendent of schools.

The supreme court of Iowa, in *Huff v. Cook*, 44 Iowa, 638, likewise followed the Massachusetts doctrine, and held that though the Constitution of Iowa resembled the Constitution of the state of Massachusetts in this respect, and that as such Constitution had been construed as above indicated, (see Opinion of Justices, 115 Mass. 602, *supra*), there being no provision of the Constitution prohibiting a woman from holding the office of county superintendent of schools, that a woman's right to hold and exercise the duties of such an office was within the control of the legislature, and therefore that a legislative provision "that no person shall be deemed ineligible, by reason of sex, to any school office in the state of Iowa," or that "no person who may have been or shall be elected or appointed to the office of county superintendent of common schools or school director in the state of Iowa shall be deprived of office by reason of sex," was constitutional and of full force and effect.

In Minnesota a woman is eligible to the office of county superintendent of schools for the reason that § 7, art. 7, of the Constitution of the state provides that "every person who, by the provisions of this article, shall be entitled to vote at any election, shall be eligible to any office which now is, or hereafter shall be, elective by the people in the dis-

of defendant, as county clerk, and two judges of the county court. The legality of votes of voters cannot be questioned.

State, Ewing, v. Francis, 88 Mo. 557; *State, Atty. Gen., v. Vail*, 53 Mo. 111; *State, Atty. Gen., v. Mason*, 77 Mo. 190; *State, O'Connell, v. St. Louis Public Schools*, 112 Mo. 217; *Ex parte Arnold*, 123 Mo. 262, 33 L. R. A. 386.

It devolves upon the defendant to thoroughly demonstrate to the court his right and authority to hold such office.

State, Bruck, v. Giovanoni, 59 Mo. App. 41; *State, Harris, v. McCann*, 88 Mo. 384.

The returns of the election officers, whose legal duty it was to count and cast up the ballots, and of the canvassing board, whose duty it was to cast up the vote so returned, are conclusive.

Merritt v. Hinton, 55 Ark. 12; *Gumm v. Hubbard*, 97 Mo. 311; *State, Ewing, v. Francis*, 88 Mo. 557.

A nomination could be made, and the nominee's name properly placed on the official ballot, after the time for filing nominations had expired, in case of a vacancy occurring in an office, which would not otherwise have been filled at the ensuing election.

Re Clay's Nomination, 2 Pa. Dist. R. 19; *People, Kehoe, v. Fitchie*, 76 Hun, 81; *People, Bradley, v. Shaw*, 133 N. Y. 493, 16 L. R. A. 606.

If the ballot was sent out and treated as the official ballot, the election cannot be questioned.

Montgomery v. O'Dell, 67 Hun, 169.

trict. . . . except as otherwise provided in this Constitution or the Constitution and laws of the United States;" and for the reason that in 1875, by an amendment of the Constitution of the state it was provided that "the legislature may, notwithstanding anything in this article, provide by law that any woman, at the age of twenty-one years and upward, may vote at any election held for the purpose of choosing any officers of schools, or upon any measure relating to schools, and may also provide that any such woman shall be eligible to hold any office pertaining solely to the management of schools;" and for the further reason that the court deemed the duties of county superintendent of schools, as prescribed by Gen. Stat. 1878, chap. 36, §§ 5-74, inclusive, to pertain solely to the "management of schools." The constitutional permission and the legislative enactment so construed make woman eligible to such office. *State, Hahn, v. Gordon*, 33 Minn. 345.

In the case of *State, Crosby, v. Cones*, 15 Neb. 444, it was held that inasmuch as the statute expressly provided that woman might vote at school-district meetings, she was qualified to hold the office of school trustee, and the constitutional requirements for electors did not apply to school elections. In arriving at this decision, the court also followed the reasoning of the Opinion of the Justices, 115 Mass. 602.

The statute of Michigan (How. Stat. § 782) makes females eligible to the office of school inspector; but the supreme court in the case of *Donough v. Dewey*, 82 Mich. 309, declined to pass upon the constitutionality of the statute for the reason that such decision was not necessary to the determination of the case.

In Washington, a woman is eligible to the office of county superintendent of schools upon the authority of Gen. Stat. § 856, which says that whenever the word "he" or "his" occurs in this act, referring to either members of the board of education, county superintendents, city superintendents, teachers, or other school officers, it shall be understood to mean also "she" or "her." *Russell v. Gup-till*, 13 Wash. 360.

The Constitution of the state of Oregon requires that to be eligible to a "county office" in the state, one must be a qualified elector of the county, from which it necessarily follows, as decided in *State, Carter, v. Stevens* (1896) 29 Or. 464, that a woman is not eligible to the office of county superintendent of schools, and further that any act of the legislature attempting to make them so is unconstitutional in the face of such specific inhibition.

In Missouri, likewise, by force of § 8086 of the Revised Statutes requiring a school director to be a qualified voter of district, a woman is ineligible to the office of a school director. *State, Ing, v. Mo-spaden* (Mo.) 39 S. W. 81.

38 L. R. A.

7. Pension agent, postmaster, etc.

In *Re Hall* (1882) 50 Conn. 131, 47 Am. Rep. 625, the question regarding the right of woman to practice law arose for decision. (On this subject see *note to Re Leach* (Ind.) 21 L. R. A. 701.) In arriving at a conclusion the court called attention to the fact that under the act of Congress of 1825, the Postmaster General was deemed to have power to appoint women as postmasters. The language of the act is: "The Postmaster General shall establish postoffices and appoint postmasters." Woman is not included except in the general term "postmasters," a term which seems to imply a male person, and woman was not referred to till the revision of 1874, which recognizes the fact that women had already been appointed, for it provides that the "bond of any married woman who may be appointed postmaster shall be binding on her and her sureties."

The court further called attention to the fact that the act of Congress on the subject of pension agents, authorized "the President, by and with the advice and consent of the Senate, to appoint all pension agents, who shall hold their offices for the term of four years, and shall give bond," etc., and that at the last session of Congress (A. D. 1881-2) a married woman in Chicago was appointed for a third-term pension agent of the state of Illinois, and that the public papers stated that there was not a single vote against her confirmation in the Senate, and that public opinion everywhere approved of such appointment.

8. Clerk of the county court.

In *STATE, CROW, v. HOSTETTER*, a woman is held to be eligible in Missouri to the elective office of clerk of the county court for the reason that she is a "citizen" within the requirements of the law, and that the late amended Constitution in prescribing such requirements omits the words "free white male," citizen which occurred in the former Constitution thereby evincing an intention to admit females to the office, especially when such provision is construed together with other provisions of the Constitution expressly inhibiting any but male citizens to the office, and the word "his," as used in the Constitution in reference to officers, not being deemed to be restrictive for the reason of its long user in such manner to indicate both sexes.

In Michigan, likewise, in the case of *Wilson v. Newton*, 87 Mich. 493, the supreme court was of the opinion that only an elector could be chosen to the office of county clerk, but it was not necessary to decide the question.

As to appointment as deputy clerk, see *supra*, I.

9. Master in chancery.

In the act of the general assembly of Illinois, approved March 23, 1872, the 1st section thereof is in

The voters have the right to write in such name, whether nominated or not. It is their constitutional and legal right, and such ballots are legal and valid.

Bowers v. Smith, 111 Mo. 45, 16 L. R. A. 754; *State, Brown, v. McMillan*, 108 Mo. 163; *Montgomery v. O'Dell*, 67 Hun, 176; *People, Bradley, v. Shaw*, 183 N. Y. 493, 16 L. R. A. 606; *Chateau v. Jacob*, 88 Mich. 170; *Sanner v. Patton*, 155 Ill. 553.

Even if the name of the officer had not been upon the ballot, the constitutional and sovereign right of the voter to choose the officer is not lost, but the voter may write both the style of the office and the party he desires to vote for, and such party will be legally elected if receiving the greater number of votes.

People, Goring, v. Wappingers Falls, 144 N. Y. 616, Affirming 83 Hun, 130.

Messrs. Johnson & Lucas, for defendant: No election can be held in this state except under the Australian ballot act.

Rev. Stat. 1889, chap. 60, art. 3, and amendments thereto; Acts 1891, pp. 133-136; Acts 1893, pp. 153-156.

An election not provided for by law is void; "no case has been known where a volunteer election has been held valid, even though the term of the incumbent had expired."

State, McHenry, v. Jenkins, 43 Mo. 261; *Kimberlin v. State*, 130 Ind. 120.

these words: "That no person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex; provided, that this act shall not be construed to affect the eligibility of any person to an elective office." It was then concluded in the case of *Schuchardt v. People*, 90 Ill. 501, 39 Am. Rep. 34, that the word "occupation," is a generic term embracing "office," "avocation," "engagement," "calling," "trade," etc., and that such word was, as used in the act, intended to include within its meaning a public office, and held that under the act a woman was eligible to the office of master in chancery.

Under Illinois statutes, a master in chancery can take depositions, administer oaths, compel attendance of witnesses, take acknowledgments of deeds and other instruments, and in the absence of the judge order the issuing of writs of habeas corpus, ne exeat, and injunction, and in general perform all the duties appertaining to the office by law of the state.

10. Grand juror.

The Code of Washington territory, providing that all electors and "householders" shall be competent grand jurors, it was held in the case of *Rosenkrantz v. Territory*, 2 Wash. Terr. 267, that a married woman could properly be a grand juror. Justice Turner, however, dissented and was of the opinion that a married woman was not the head of a family, and therefore not within the meaning of the term "householder."

This decision was followed in *Schilling v. Territory*, 2 Wash. Terr. 233; *Hayes v. Territory*, 2 Wash. Terr. 236; and *Walker v. Territory*, 2 Wash. Terr. 236.

But all these were expressly overruled by *Harland v. Territory*, 3 Wash. Terr. 131, in an opinion written by Judge Turner who had dissented in the *Rosenkrantz* case and whose views were now adopted by the majority of the court, to the effect that a married woman could not be a grand juror. But one ground of the decision was that the title of the act under which women claimed to be qualified 38 L. R. A.

Where a statute introduces a new rule of general application, it was intended as a substitute for, and to displace, an earlier one of equally general application.

Endlich, Interpretation of Statutes, § 201.

And to work an implied repeal in all cases in which a general revision of the old law is made by the legislature, with an intent to substitute the new legislation for the old.

Endlich, Interpretation of Statutes, §§ 182, 202.

The eligibility of the claimant may be inquired into in quo warranto proceedings.

State v. Gardner, 43 Ala. 243; *State, Kemper, v. Beecher*, 15 Ohio, 723; *People v. Curtis*, 1 Idaho, 753.

The office is void as to the officer himself, though valid as to strangers.

Harbaugh v. Winsor, 88 Mo. 331; *State, Vail, v. Draper*, 48 Mo. 217; *State, Horstman, v. Gasconade County Ct.* 25 Mo. App. 450; *State, Bland, v. Rodman*, 43 Mo. 260.

No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States and who shall not have resided in this state one year next preceding his election or appointment.

Mo. Const. art. 8, § 12.

The framers of our Constitution had in mind the filling of public offices by male citizens when this section was drawn.

to sit as grand jurors was so defective as to make the statute entirely void.

This case is followed in *Rumsey v. Territory*, 3 Wash. Terr. 332a, so far as it holds the act void for defective title, but the main question as to the right of married women to be considered householders is left undecided. The result of all these decisions is that the decision in the *Rosenkrantz* case is overruled but nothing is decided on the subject in that jurisdiction except the fact that the statute under which the question arose was void for defective title.

11. Notary public.

Because of the doctrine laid down in the Opinion of the Justices, 107 Mass. 604, cited *supra*, II, a woman cannot be appointed a notary public in Massachusetts for the reason that there is no clause in the Constitution of the state which, when read with reference to the history and nature of the office, and the long-continued and constant practice of the government and usage elsewhere, can be construed as authorizing the governor, by and with the consent of the council, to appoint a woman as a notary public. It is true there is nothing in the terms of the Constitution which prohibits woman from being appointed; but it is considered that, when read in view of what must have been the intention of the Constitution as warranted by previous custom, is that a woman cannot be so appointed. Opinion of the Justices, 165 Mass. 599, 32 L. R. A. 350; Opinion of the Justices, 150 Mass. 583, 6 L. R. A. 842.

The Constitution of Colorado, § 6, art. 7, prohibits the election or appointment to any civil or military office in the state of any person except a qualified elector. It being held that the term "qualified elector" in the Constitution is used in its broadest sense meaning a person qualified to vote generally, the legislature has not power to provide by bill for the appointment of woman as notary public. *Re House Bill No. 136*, 9 Colo. 623.

In Tennessee, under a statute providing that "all males of the age of twenty-one years," etc., "are qualified to hold office," the supreme court held in

Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; *State, Wingate, v. Woodson*, 41 Mo. 227; *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 240; 19 Am. & Eng. Enc. Law, p. 408; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111; *State v. Pagels*, 92 Mo. 809; *State, Peters, v. Davidson*, 92 Tenn. 531, 20 L. R. A. 311.

Both in the use of the words "citizen" and "he" a legislative intent to limit the position to a qualified elector is manifest.

Black, Interpretation of Laws, § 25, p. 35, § 68, p. 154.

Statutes are to be read in the light of the common law and construed with reference thereto.

Black, Interpretation of Laws, § 95, p. 232; *Gabriel v. Mullen*, 111 Mo. 119; *Venable v. Wabash Western R. Co.* 113 Mo. 103, 18 L. R. A. 68.

Where words used are clear and unambiguous there is no room left for construction.

State, Missouri Mut. L. Ins. Co. v. King, 44 Mo. 285; *State, Martin, v. Wofford*, 121 Mo. 61.

The unauthorized act of placing the name of the claimant on the ballot vitiated the same. This name was not placed on the ballot by defendant, but by some person without any authority of law so to do.

Lankford v. Gehhart, 180 Mo. 621.

the case of *State, Peters, v. Davidson*, 92 Tenn. 531, 20 L. R. A. 311, that a general provision of the statute that words importing the masculine gender include the feminine would not warrant the construction that a woman was eligible to the office of notary public, in the absence of an enabling act or of a constitutional provision.

But when a woman has been appointed to the office of notary public, her right can only be inquired into in a suit or proceeding brought against her for that purpose. *Von Dorn v. Mengedocht*, 41 Neb. 525. In this case the court holds that the statute authorizing the appointment of as many "persons" as the governor may deem necessary as notaries authorizes him to appoint women.

In *Findlay v. Thorn*, 1 How. Pr. N. S. 76, the court refused to decide whether a woman was eligible to the office of notary public or not, for the reason that the issue was not directly, but only collaterally, raised.

See also Opinion of The Justices, 62 Me. 500.

V. Conclusion.

It may be said to be the general doctrine now held both in England and America that women are ineligible to any important office except when made so by enactment. It is usually said that this is the common law of the subject. But it is somewhat startling to find that there is not a decision earlier than the present generation against their right. In the absence of any adjudication against them, the theory that they are incompetent at common law must be based on the fact that they did not actually hold office except in rare instances and that these instances were usually treated by the judges and law writers as exceptional. But there is quite an array of cases in which they did hold office and their right to do so was upheld.

Aside from the notable fact that in England, as in many other countries, women have often occupied the throne and have sometimes shown great capacity as rulers, it appears that at least one English Queen has performed judicial duties, and that at least one woman holding the office of sheriff performed judicial duties in the exercise of that office. Another woman is shown by the reports to 38 L. R. A.

No legal election could have been held under the law in the case at bar.

The election so held was void on account of the violation of all the mandatory provisions of our statute.

When the majority of the voters vote for an ineligible candidate the election is a nullity.

Paine, Elections, §§ 558-560; 6 Am. & Eng. Enc. Law, p. 377.

Election of disqualified person gives him no right to hold the office or claim a certificate of election, and mandamus to issue must be refused.

State, Snyder, v. Newman, 91 Mo. 445; *State, Thomas, v. Williams*, 99 Mo. 291; *State, Weed, v. Meek*, 129 Mo. 488.

Barclay, P. J., delivered the opinion of the court:

This is an original action in this court to ascertain by what warrant defendant holds the office of clerk of the county court of St. Clair county. The proceeding was instituted by an information of the attorney general in his official capacity. The information contains a full recital of the facts. They have been admitted by the demurrer which defendant has filed. Counsel in this court, with commendable fairness, have waived formalities that might have caused delay, and have submitted

have rendered an award as arbitrator at an early day, and as her competency does not seem to have been questioned there is nothing to show that this was deemed extraordinary. Other offices held by women are described in various cases as keeper of prison, keeper of workhouse, governor of workhouse, custodian of castle, overseer of the poor, sexton of the parish, forrester, commissioner of sewers, constable of England, marshal of England, great chamberlain of England, and marshal of the court of King's bench.

The simplest statement of the common-law situation is that while women did not generally hold office, and the question of their competency was not well settled, they did in fact hold various offices, some of which were of great importance; that some, but not all, of these were hereditary and the duties thereof were often performed by deputy; and that in every instance in which a woman's right to any office was questioned prior to the present generation she was held to be competent, although the court often took occasion to say that women were not competent to hold all offices.

In addition to the fact that some of the offices they held were hereditary, and that they sometimes exercised their functions by deputy, it is doubtless true that some of the offices were somewhat obscure, and were exercised, in the words of Lord Esher, "in a remote part of the country where nobody else could have been found who could exercise them." In view of all these facts the conclusion as to the common law of the subject is that women did not generally hold office, but that they did do so in quite a variety of instances, and that in every contest of a woman's right to any particular office her right was sustained. The authorities on the subject which are directly against women are all very recent, although the recent authorities are by no means unanimous against them, and there is a marked tendency in modern statutes to enlarge the rights of women in this respect.

As to the right of women to vote, see *note* to *Coffin v. Thompson* (Mich.) 21 L. R. A. 662.

As to right of women to practice law, see *note* to *Re Leach* (Ind.) 21 L. R. A. 701. R. B.

the cause for prompt decision upon briefs that have been of great help towards the speedy determination of the controversy. In the view taken by this division of the court, the following are the decisive facts: Mr. Wheeler was elected clerk of the county court at the general election of 1894 for a term ending in January, 1899. He died October 24, 1896. Two days later the defendant, Mr. Hostetter, was commissioned by the governor to fill the vacancy. He qualified, and entered on the duties of the office, before the general election of November 3, 1896. He now holds the office by virtue of that appointment. At the general election mentioned Mrs. Maggie B. Wheeler and Mr. Hostetter received votes in St. Clair county for the office in question. On the 26th day of October, 1896, Mrs. Wheeler had been declared nominated for said office by the Republican party of said county. Her said nomination had been certified and acknowledged, and the certificate had been duly filed in the office of the clerk of the county court. Her name accordingly appeared (in advance of the election) upon the printed official ballot, as prepared for use at the election. The official ballot contained no other printed name as nominee for said office. The county tickets of the other political parties all showed blanks under the name of the office of clerk of the county court. At the close of the election it was found that Mrs. Wheeler had 1,938 votes for the office, while Mr. Hostetter had received 92. He so certified as county clerk. In due time Mrs. Wheeler received her commission from the governor, and thereupon duly qualified, having complied with all the required forms of law, notwithstanding which the defendant still holds possession of the office. The object of this proceeding is to test his right to do so, from and after January 4, 1897, the date on which Mrs. Wheeler took the last formal step towards qualifying to enter upon the duties of the office. There are two general grounds on which defendant seeks to justify the position he has assumed.

1. Defendant first contends that there was, in legal effect, no vacancy to be filled at the election of 1896. The substance of the argument on that point is that the existing ballot law makes no provision for a nomination to fill such a vacancy occurring within fifteen days of the general election; and hence that no election to fill the vacancy could properly be held in the circumstances of this case, but we consider § 1964, a complete answer to that contention, when read in connection with § 4766, as amended in 1893 (Laws 1893, p. 155):

"Sec. 1964, Vacancy, How Filled.—When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed." A special provision governing the filling of a vacancy in a particular office should be obeyed, even as

against a later law on the same general topic, unless the court finds ground to conclude that the later general law was intended to repeal or limit the more particular provision of the prior law. But the terms of § 4766, as amended in 1893, show no intent to repeal any part of § 1964, touching the conduct of an election to fill such a vacancy. The word "vacancy" as it is found in the last proviso of § 4766, no doubt means, as the learned counsel for defendant contend, a vacancy in some nomination. But where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which someone to fill the office for the unexpired term should be chosen, and no one has been nominated to said office, there is a vacancy in the nominations within the meaning of the election law. The omission to make a nomination for an office to be filled at the ensuing election constitutes a vacancy on the ticket, and it is the plain duty of the officers who prepare the official ballots to cause the name of any such office to be printed on the ballot, whether any nomination thereto has or has not been formally certified. Under § 4766 of the election law, such a "vacancy" certainly may be supplied at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law. But even if we should concede that the vacancy caused by the death of Mr. Wheeler happened too late to permit of placing a formal printed nomination on the ballot, under the present ballot law the people would nevertheless have the right to express their choice by writing on the ballot the name of any qualified person whom they desired to designate for any office which the law (§ 1964) permitted to be then filled by election. The electors are not restricted to the names or offices printed on the official ballot. *People, Bradley v. Shaw* (1892) 133 N. Y. 493, 16 L. R. A. 806; *People, Goring v. Wappinger's Falls* (1895) 144 N. Y. 617; *Sanmer v. Patton* (1895) 155 Ill. 553; *Cole v. Tucker* (1895) 164 Mass. 486, 29 L. R. A. 668. We hence conclude that the election of a county clerk was properly held at the general election in St. Clair county in November last.

2. The question, then, remains whether Mrs. Wheeler is ineligible. Some objections of a technical nature are raised by the plaintiff against any consideration of that question on this occasion. But we pass them by, because we find it unnecessary to decide them, since we have reached the conclusion that Mrs. Wheeler is eligible. The qualifications required of incumbents of certain offices in Missouri are prescribed by the Constitution. For instance, the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public schools must be "male" citizens, as must also be the members of the general assembly. Const. 1875, art. 4, §§ 4, 6; Id. art. 5, §§ 5, 15, 19. Every circuit judge must be a "qualified voter," which requirement is, in effect, the same as the word "male" imposes (as used in reference to the state officers above named). Const. art. 6, § 26; Id. art. 8, § 2. The following general command of the organic law applies to all offices (including, of course, that in view in this case): "No person shall be

elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment." Article 8, § 12. There is no provision of the Constitution or of the statute law of Missouri expressly requiring the clerk of the county court to be a male. But it is argued that the intent to so declare appears from the use of the word "his" in the section of the Constitution just quoted, referring to all offices. If this view is sound, then the special caution observed in the Constitution by the section requiring the state officers above mentioned to be males was wholly useless, as the general section last cited would imply that requirement. A construction of the Constitution which renders meaningless any of its provisions should not be adopted. It is part of the general law of the state (and was before the time of the present Constitution) that where persons are referred to by words importing the masculine gender, females as well as males should be deemed included thereby, unless a contrary intent appears by the context or otherwise. Rev. Stat. 1855, p. 1024, § 10; Rev. Stat. 1889, §§ 6568, 6569. The mere use of the word "his" in the Constitution, in referring to the qualification of officers, we do not regard as evidencing a purpose to limit all office holding to the male sex, or as depriving the people of St. Clair county of the right to select a woman as clerk of their county court.

The section of the Constitution last above quoted was a new enactment in the organic law of 1875. In view of the care with which the electoral franchise was limited to males by the terms of the 2d section of the same article of the Constitution, the omission of similar language, in negatively defining certain qualifications of office holding, has a significance which tends towards the conclusion we have reached in this case. The Constitution we think, remits to the legislature the subject of proper qualifications to be possessed by the holders of such an office as is here in question. Article 6, § 39. Turning to the statute law, we find this provision in regard to the qualifications of clerks of the county court, *viz.*:

"Sec. 1965. Qualifications of a clerk.—No person shall be appointed or elected clerk of any court, unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk."

The above section, and several other neighboring sections, concerning clerks, exhibit the words "he" and "his" in treating of these offices. But we do not regard that fact, as of moment when we recall the general rule for construction of laws, above alluded to (§ 6568). Women in Missouri have been licensed as attorneys at law by the supreme court. They have for years been recognized as eligible to office as notaries public. A woman now holds the responsible office of state librarian by appointment of the supreme court. Yet all of the laws under which such action has been taken display similar language to that in the

law regarding clerks of courts from which the learned counsel for defendant seek to draw the inference that only males are eligible as such clerks. Rev. Stat. 1889, §§ 605, 607, 608, 7109, 7110, 8198, 8199, 8202. The particular qualifications pointed out by § 1965 (except those of citizenship and age) are far less vital and important than that of sex. If the law-makers had regarded sex as determining eligibility, it seems to us that they would have expressed themselves plainly to that effect, as they did in former years. They have so expressed themselves in other statutes; as, for instance, in the school law, which requires directors in certain cities to have the qualifications of voters. Rev. Stat. 1889, § 8086. We have held that, as males alone can be voters, under the Constitution of 1875, a woman is not eligible to be a school director under the section cited. *State, Ing, v. McSpaden* (1897; Mo.) 39 S. W. 81.

The fact that in the law governing clerks of courts no similar requirement appears is a clear pointer to the conclusion that no such qualification was intended to be demanded. Moreover, the change which the legislature has made in the language of the law on this very subject has much meaning in solving the question before this division. In 1855 the present § 1965 had the form shown in the copy below. It so remained until 1879, when it was amended by dropping the words we have noted by italics, *viz.*: "No person shall be appointed or elected clerk of any court, unless he be a *free white male* citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months, before the election; and every clerk shall, after his election, reside in the county for which he is clerk. Rev. Stat. 1855, p. 336, § 10. The dropping of the word "male" in describing the qualifications for such offices, has value as a guide to the legislative purpose in enacting the present law on this subject. Can there be any doubt as to the intended effect of such a change of the statute on the particular question before us? It is always allowable, in interpreting statutes, to consider the prior law as compared with the present in endeavoring to reach the true intent of the legislature, which, when found, is the spirit of the law that the courts should enforce. That women may be citizens of the United States and of Missouri is a proposition that requires no discussion at this day. *Minor v. Happersett* (1874) 88 U. S. 21 Wall. 162, 22 L. ed. 627; *State, McCampbell, v. Howard County Ct.* (1887) 90 Mo. 593. Mrs. Wheeler is a citizen of the United States, and of this state. She is over the age of twenty-one years. She has resided in Missouri one year next preceding her election, and she possesses all the other qualifications named in § 1965. It is conceded that she is in all respects qualified, barring the supposed objection on account of her sex. The office of clerk of a court is a ministerial office. It admits of the use of a deputy, and its duties are certainly not of such a nature as to be incompatible of discharge by a woman. In view of the condition of the positive law of Missouri above described, we do not consider it neces-

sary to enter into a discussion of the eligibility of women to office at the common law or in other states of the Union. We regard the question at bar as one depending on the force and intent of the law of this state, organic and statutory. We hold that under that law there is no express or implied barrier to the election of a woman to such an office as that in question in this case, and that her fellow citizens may call her to discharge its duties if they see fit. Mrs. Wheeler is qualified to hold the office and Mr. Hostetter is not entitled to retain it on the facts disclosed.

Hence the demurrer will be overruled, and judgment of ouster will be entered against defendant unless he plead further within ten days.

Macfarlane, Robinson, and Brace,
JJ., concur.

(Division 2.)

STATE of Missouri, *ex rel.* KANSAS
CITY, *Resp't.*,

v.
EAST FIFTH STREET RAILWAY
CAMPANY et al., App'ts.

(.....Mo.....)

1. The state may oust a street-railway company from its franchise to operate a railway in streets by quo warranto proceedings brought on relation of the city although the franchises were derived directly from the city under ordinances passed in the exercise of charter power conferred on the city by the state, which thus made the grant through the agency of the city.
2. A city is not estopped from enforcing the forfeiture of a street-railway franchise for nonuser merely because of its interference with the street-railway company's rights in some respects, unless that was such as to justify or excuse the nonoperation of the road.
3. A city cannot contract away or in any way abridge the sovereign power of the state to proceed against a street-railway company by quo warranto for forfeiture of its franchises, or even to do so on the relation of the city.
4. Entire failure to operate a street railway for three years when the ordinance under which the franchise was exercised required cars to run sixteen hours every day in the year constitutes a nonuser which forfeits the franchise.
5. An estoppel *in pais* cannot be relied upon unless pleaded.
6. A contract that nonuser of street-railway tracks for any specified time shall not operate as a forfeiture of the franchise cannot be made by a city, either by ordinance or otherwise, since this would involve an authority to grant the right of the use of streets for private purposes.

(July 6, 1897.)

A PPEAL by defendants from a judgment of the Circuit Court for Jackson County in

NOTE.—On the question involved in the above case, see note to *Galveston & W. R. Co. v. Galveston (Tex.)* 86 L. R. A. 83.
88 L. R. A.

favor of relator in a quo warranto proceeding to oust defendants from the exercise of their corporate franchises. *Affirmed.*

The facts are stated in the opinion.

Messrs. Johnson & Lucas for appellants.

Messrs. H. C. McDougal and C. O. Tichenor, for respondent:

The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body, as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises.

Memphis & L. R. R. Co. v. Berry, 112 U. S. 619, 28 L. ed. 841.

The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked.

Morgan v. Louisiana, 93 U. S. 223, 23 L. ed. 861.

A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security.

California v. Central P. R. Co. 137 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153; *Ashland v. Wheeler*, 88 Wis. 615; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244; *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Wheat v. Alexandria*, 88 Va. 743; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 119; *Williams v. Citizens' R. Co.* 130 Ind. 71, 15 L. R. A. 64; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. Rep. 153; *State, Kansas, v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 331; *Homestead Street R. Co. v. Pittsburg & H. Electric Street R. Co.* 166 Pa. 162, 27 L. R. A. 333; *Detroit Citizens' Street R. Co. v. Detroit*, 22 U. S. App. 570, 26 L. R. A. 667, 64 Fed. Rep. 628; *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255.

The rights of street railways in the streets are franchises.

State, Kansas, v. Corrigan Consol. Street R. Co. 85 Mo. 282, 55 Am. Rep. 361; *Hotelman v. Kansas City Horse R. Co.* 79 Mo. 643; *St. Louis R. Co. v. Southern R. Co.* 105 Mo. 599; Const. art. 12, § 20.

These franchises must be of a public character as the city has no authority to grant its streets for a private use, and for private gain alone.

St. Louis R. Co. v. Southern R. Co. 105 Mo.

581; *State, St. Louis Underground Service Co., v. Murphy*, 134 Mo. 548, 34 L. R. A. 369.

These franchises come from the state.

St. Louis v. Boffinger, 19 Mo. 136; *Taylor v. Carondelet*, 22 Mo. 105; *St. Louis R. Co. v. Southern R. Co.* 105 Mo. 592; *Northern Transp. Co. v. Chicago*, 99 U. S. 641, 25 L. ed. 338; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 120.

Equity is not the remedy to enforce a forfeiture of a franchise.

Pom. Eq. Jur. § 459; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 24 L. R. A. 776, 58 Fed. Rep. 644; *High, Extr. Legal Rem.* § 660; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 240, 6 Am. Rep. 227, *Union National Bank v. Matthews*, 98 U. S. 638, 25 L. ed. 190; *Neiser v. Thomas*, 99 Mo. 224.

In some states a remedy is given in equity by statute.

Atty. Gen. v. Leaf, 9 Humph. 758; *High, Extr. Legal Rem.* § 647; *Reed v. Cumberland & O. Canal Corp.* 65 Me. 134; *Cheshire v. People, Harper*, 116 Ill. 493; *Irvine v. Lumbermen's Bank*, 2 Watts & S. 190.

The statute (Rev. Stat. chap. 182) expressly provides that if any person usurps or unlawfully holds any franchise, the attorney general or prosecuting attorney shall exhibit to the circuit court an information in the nature of a quo warranto "at the relation of any person desiring to prosecute the same."

Com. v. Allegheny Bridge Co. 20 Pa. 185; *State, Kempf v. Boal*, 46 Mo. 531; *State, Lee, v. Jenkins*, 25 Mo. App. 484; *Hovelman v. Kansas City Horse R. Co.* 79 Mo. 632; *Hill v. Hill Coal Min. Co.* 119 Mo. 81; *Kayser v. Rich Bremen*, 16 Mo. 90; *State, Brown, v. Westport*, 116 Mo. 582; *State, Patterson, v. McReynolds*, 61 Mo. 212.

The statute as to quo warranto is highly remedial.

Com., Claghorn, v. Cullen, 18 Pa. 145, 53 Am. Dec. 450; *State, Douglass, v. Scott*, 17 Mo. 524; *State, Weed, v. Meek*, 129 Mo. 431.

The law does not compel plaintiff to show abandonment.

Roanoke Invest. Co. v. Kansas City & S. E. R. Co. 108 Mo. 64.

A corporation may forfeit its charter or franchises for wilful misuser or nonuser thereof.

Beach, Priv. Corp. § 45; *Morawetz, Priv. Corp.* § 1018; *Com. v. Commercial Bank*, 28 Pa. 389; *Atty. Gen. v. Petersburg & R. R. Co.* 6 Ired. L. 461; *Mumma v. Potomac Co.* 38 U. S. 8 Pet. 287, 8 L. ed. 949; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 51, 8 L. ed. 653; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 580, 28 L. ed. 1087; *People v. Broadway R. Co.* 126 N. Y. 44.

The city could not give the right to lay its tracks on its streets to a company under a positive agreement that it need not operate its road.

State, St. Louis Underground Service Co., v. Murphy, 134 Mo. 548, 34 L. R. A. 369.

Burgess, J., delivered the opinion of the court:

This is a proceeding by the state at the relation of Kansas City, Missouri, by Marcy K. Brown, prosecuting attorney of Jackson county, Missouri, by quo warranto to oust defendants of their corporate franchises granted 38 L. R. A.

to them by said by ordinances to construct, maintain, and operate a street railway on certain streets in said city upon the ground of their failure to comply with said ordinance, and the consequent forfeiture of their franchise rights under said ordinance. The petition alleges: That the relator was, on the 9th day of May, 1889, and ever since has been, a municipal corporation under the laws of the state of Missouri, having full power and control over its streets. That defendants are corporations under the laws of this state, except defendant Thornton, who is trustee in a deed of trust executed by the East Fifth Street Railway Company on the 1st day of November, 1890, on the franchises hereinafter described. That by certain ordinances passed by said city the right was given, and accepted by said defendant railway company, to construct, maintain, and operate a street railway on certain of its streets. That by reason of said ordinances the defendant railway company claims the right to maintain and operate a street railway over certain streets named in said ordinance, and had in fact laid its tracks on said streets; but that said railway company had failed for eighteen months prior to November 12, 1892, to run cars over said streets, and had never complied with the provisions of said ordinances, although notice was given by relator to said company to run cars over said streets, but that it refused, and still refuses, so to do. That said railway company has failed and neglected for more than eighteen months prior to November 12, 1892, to keep in repair its tracks and roadbed, and permitted its tracks to become a nuisance, and has abandoned the rights granted in said ordinances. The answer admits the acceptance of the ordinances by the railway company, and alleges that said ordinances constitute valid and subsisting contracts between said city and defendant railway company. The answer also admits that defendant railway company and defendant trust company are now and were during the dates mentioned in said information, corporations organized under the laws of the state of Missouri, and that the deed of trust mentioned in the information has not been released or satisfied, and that defendants, by reason of said ordinances, claim the right to run, maintain, and operate a street railway over the streets named in said ordinances. It then alleges that § 17 of ordinance No. 42,389 requires an action for forfeiture to be brought within six months after cause of forfeiture has arisen, and that causes are alleged in the information to have arisen eighteen months prior to the filing of the information; that defendant railway company was unlawfully prevented by the police of the city of Kansas from constructing its railway on Fifth street from Grand avenue to Main street, and was harassed by litigation, whereby its credit was impaired, and its financial operations so embarrassed that it was unable to procure funds necessary to complete its railway, and was compelled to mortgage the same in its uncompleted condition to pay the loss sustained by reason of the acts of the city of Kansas, and to cease, temporarily, the operation of its cars, but intends to resume such operation at the earliest moment the financial condition of the public and itself will permit. It appears from the record that in December, 1881, by an ordi-

nance of Kansas City, a franchise was granted to certain persons named in said ordinance, to construct and operate a street railway on certain streets in that city. The franchise was to continue for twenty years. The company was to keep the tracks in repair and the spaces between the tracks and for 18 inches on the outside well paved. Cars were to be regularly run for not less than sixteen hours per day "during each and every day of the entire year." With the consent of the grantees of the franchise, a subsequent order was passed, whereby the franchise was extended for thirty years from September 1, 1835, and the starting point fixed at Fifth street and Grand avenue, instead of Fifth and Main streets. In June, 1888, another ordinance was passed by said city, which recites in its preamble the following: "Whereas, the East Fifth Street Railway Company is the successor and owner of all franchises and ordinances above granted." This ordinance then, among other things, regulates the paving of spaces between the tracks, and the keeping of them in good condition and repair. Section 12 of this ordinance provides for the equipment of the road, and the running of the cars, and gave defendant the right to collect a fare of 5 cents for each passenger. By a still later ordinance, passed also in June, 1888, defendant was granted a franchise to extend its road to the eastern limits of the city. It had the right to operate its cars on this portion of its route by endless cable or noiseless steam power, with smokeless fuel. Section 17 of this ordinance reads as follows: "If the said railway company shall at any time fail, neglect, or refuse to obey and comply with any one of the provisions of this ordinance, then said company shall forfeit all rights, powers, and privileges by this ordinance granted and conferred, and this ordinance shall be null and void. Such forfeiture and such annulling of this ordinance may be had by proceedings instituted by the city of Kansas, in its own name, and against said company, in a court of record in Jackson county, Missouri, and on proof of such failure, neglect, or refusal on the part of said company; provided, that if any such proceedings be not commenced within six months after such failure, refusal, or neglect of said company to comply with any one of the provisions of this ordinance, then as to such failure, refusal, or neglect the city shall be deemed to waive the effect thereof under this section of this ordinance." From the date of the original ordinance—December, 1881—to the time of the trial in the court below, the road was only operated for two or three months, and then by electric cars. The company then suspended operating the road from eighteen months to two years, after which they ran some steam cars from one year and a half to two years. For about three years before the time of the trial of this cause, they ran no cars at all, and did nothing towards the operation of the road. Some time prior to the bringing of this proceeding, they sold their cars to some company in Texas, and paid the proceeds upon a mortgage upon the road, upon which was due about \$110,000. The company is insolvent, but some of its officers testified that they expect to run it again. They seemed to have no idea when the company will operate the road again. The evi-

88 L. R. A.

dence on the part of defendant railway company showed that defendant was prevented by the Kansas City police force from laying its tracks on Fifth street between Grand Avenue and Main street; that the company was harassed by litigation by the city and property owners, which greatly depreciated the value of its property. It also tended to show that said company had not abandoned its rights under said ordinances. No notice was ever given by Kansas City to defendant railway company to run its cars. Nor was the information filed for more than six months after the alleged grounds for forfeiture arose. At the conclusion of the evidence, the court, at the request of the relator, gave the following declaration of law: "The court declares the law to be that, if defendant has ceased to operate its road, that it has sold its rolling stock and has none with which to operate its road, and that it has no means with which to purchase more stock, and is heavily in debt, then judgment must go for relator." The court gave judgment of ouster against the defendants. From said judgment defendants appeal.

1. Defendants' contention is that quo warranto is not the proper remedy in this case; that the state has no interest in this controversy; that the "franchise" granted by it, and the only one that it is interested in, is not the subject-matter of this litigation; that the questions involved are of a personal nature, between the relator on the one hand, and the defendant railway company on the other; the relator alleging failure to comply with the terms and conditions of a contract between it and defendant, and the defendant denying noncompliance and pleading estoppel,—a question that can be fully settled by a court of chancery in an action brought by the relator against the defendant. Upon the other hand, it is claimed that there is a difference between the charter and a franchise independent of it, and that this proceeding is based upon that distinction. In the case of *Memphis & L. R. Co. v. Berry*, 112 U. S. 619, 28 L. ed. 841, the court says: "The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the incorporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises." It may be said that corporate existence is as much a franchise as the franchises of the corporation. The former is not property in the ordinary acceptation of the term, cannot be transferred by ordinary conveyance or by sale under execution, unless the statutes of the state so provide; while corporate franchises are property, can be transferred by voluntary conveyance or by sale, under execution against the corporation. *New Orleans, S. F. & L. R. Co. v. Delamare*, 114 U. S. 501, 29 L. ed. 244. In the case in hand the privilege of laying its tracks on the designated streets, to run cars thereon, and to charge and receive fares from persons riding on its cars, were franchises of the defendant rail-

way company, without which the charter would be of no value. Such privileges were not mere licenses. A different view, however, seems to have been taken in the case of *People, Maybury, v. Mutual Gaslight Co.* 38 Mich. 154, in which it was ruled that the right to lay pipes in the streets of a city is not a state franchise, but a local easement, resting only on a contract or license, the violation of which does not concern the state, and is open to legal remedy. A similar view seems also to have been taken by the supreme court of Illinois in the case of *Beleville v. Citizens' Horse R. Co.* 152 Ill. 171, 26 L. R. A. 681. But these cases we think not in line with the great weight of authority. Thus Mr. Justice Field in speaking of franchise in *Morgan v. Louisiana*, 93 U. S. 223, 23 L. ed. 861, says: "But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction." A franchise is of public concern, which cannot be exercised by individuals at pleasure, but is of legislative origin, and from that source it must derive its power and authority to acquire rights and privileges for the public good. "It is an executed contract on the part of the state, the consideration for which is the benefit which the public will derive from its use and exercise." *Ashland v. Wheeler*, 88 Wis. 615; *California v. California*, P. R. Co. 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Wheat v. Alexandria*, 88 Va. 742; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 119; *Baltimore Trust & G. Co. v. Baltimore*, 64 Fed. Rep. 158. This court has recognized the rights of street railways in the streets of a municipality as franchises, and as vested rights which might be mortgaged to the company to whom the franchise belonged. *Horelman v. Kansas City Horse R. Co.* 79 Mo. 643. While the franchises involved in this controversy were derived directly from the city by the East Fifth Street Railway Company, under ordinances passed under the grant of power contained in the city charter, that power was conferred upon the city by the general assembly, so that the power came indirectly from the state; and in granting it the state acted through the city as its agent. *Northern Transp. Co. v. Chicago*, 99 U. S. 641, 25 L. ed. 338; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 119. The power of the city to grant the franchises in question is unquestionable.

We do not think, however, that the fact that the franchises in question are, in a sense, contractual in their nature is a barrier to the pros-

ecution of this suit if the facts alleged and proved be sufficient to oust defendant company of its franchises, notwithstanding § 17, *supra*, of the ordinance passed in June, 1888, provides that in case of failure, neglect, or refusal by the defendant railway company to obey and comply with any of the provisions of said ordinance said company shall forfeit all rights, powers, and privileges conferred thereby; and that such forfeiture may be had by proceedings instituted by said city in its own name against said company in a court of record in Jackson county, Missouri. The sovereign power of the state to proceed against defendant company by quo warranto for forfeiture of its franchises even at the relation of the city could not be contracted away, or in any way abridged, by the city. At most, such a provision in the ordinance only provided the city another remedy. *Fath v. Tower Grove & L. R. Co.* 105 Mo. 545, 18 L. R. A. 74; *Washington & B. Turnp. Road v. State*, 19 Md. 239. Moreover a proceeding in equity is not the proper remedy to enforce the forfeiture of a franchise. Pomeroy in his work on Equity Jurisprudence (2d ed. § 459), says: "It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture." The same rule is announced in *High on Extraordinary Remedies* (2d ed. § 660), in which it is said: "The dissolution of a corporation and the revocation of its franchises are generally considered matters of legal rather than of equitable cognizance; and, unless a court of chancery is especially empowered to divest a corporation of its franchises, the more appropriate remedy for this purpose is by information in the nature of a quo warranto." *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188. In *Horelman v. Kansas City Horse R. Co.* 79 Mo. 643, this court said: "It is the settled rule that the acts of a corporation can be assailed for abuse or excess of its corporate powers only in a direct proceeding brought by the state for that purpose." The city granted the franchises in the interest of the public, and we see no reason why she should not be relator in this proceeding to have the franchises forfeited in the interest of the public also, if the facts and circumstances in proof justify such a result.

The question then arises, Was the nonuser of the franchises by defendant company under the circumstances disclosed by the record sufficient to justify the court in declaring their forfeiture? In considering this question it may be said that the insolvency of the corporation is of no importance except in so far as it may have a bearing upon the question of abandonment of its franchises by defendant, for, if defendant continued to discharge its duties to the public, it makes no difference whether it was solvent or not. Were it otherwise, very many corporations might be ousted of their franchises at any time, to the great detriment of the members thereof, as well also as the general public for whose benefit public corporations

and franchises are presumed to be granted. The sale, however, by the defendant company of all of its rolling stock, and its failure to operate its road for so long a time, and then not in accordance with the terms of the ordinance, tended very strongly to show an abandonment by defendant of its franchises. But whether there was an abandonment by defendant of its franchises or not, the evidence clearly shows that the ordinances granting the railroad company the franchises were never complied with. Electric cars were run for about three months, and then steam cars, which it had no right to run, except upon the eastern extension of the road. It ran steam cars for about eighteen months, and for three years next preceding the trial it did not operate its road at all, while under the ordinances, its cars were to be regularly run not less than sixteen hours per day during every day in the year. In the case of *Roanoke Investment Co. v. Kansas City & S. E. R. Co.* 103 Mo. 50, it is said: "But while it is true that mere nonuser will not amount to an abandonment, it is well settled that an easement acquired by grant, or its equivalent, may be lost by abandonment. To constitute an abandonment of an easement acquired by grant, acts must be shown of such an unequivocal nature as to indicate a clear intention to abandon. *Curran v. Louisville*, 88 Ky. 628; *Dyer v. Sanford*, 9 Met. 895, 43 Am. Dec. 399; *Hoyford v. Spokesfield*, 100 Mass. 491. It is said, however, that abandonment will be more readily inferred when the easement was granted for public purposes than when it was created for private use." In 1 Beach on Private Corporations (§ 45), it is said: "It is conceded that a corporation may forfeit its charter or franchises for wilful misuser or nonuser thereof. For it is a tacit condition annexed to the creation of every corporation, that it shall be subject to dissolution by forfeiture of its franchise for wilful misuser or nonuser in regard to matters which go to the essence of the contract between it and the state." On the same subject Morawetz on Private Corporations says (§ 1018): "It has accordingly been held in various cases, that, if a corporation has assumed the performance of duties for the benefit of the public generally, it cannot neglect the performance of these duties without incurring a forfeiture of its franchises. Thus it is the duty of a corporation chartered to build a turnpike road to maintain its road in repair as a thoroughfare for the public use. . . . The same rule undoubtedly applies to other corporations of a similar character, such as ferry and bridge companies, canal companies, gas companies," etc. The generally accepted doctrine is that the omission of an express duty imposed by the charter of a corporation is cause for its forfeiture, and in such circumstances the sovereign who granted the charter may insist on resuming the grant for breach of the duty imposed. *Com. v. Commercial Bank*, 28 Pa. 889; *Atty. Gen. v. Petersburg & R. R. Co.* 6 Ired. L. 456; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287. And where there has been a wilful misuser or nonuser by a corporation, it is subject to dissolution by forfeiture of its franchises. *Mumma v. Polomac Co.* 83 U. S. 8 Pet. 281. 8 L. ed. 945; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 51, 8 L. ed. 653; 88 L. R. A.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084; *People v. Broadway R. Co.* 126 N. Y. 29. "The rule in regard to acts of misuser and nonuser is that they must relate to matters of the essence of the contract between the sovereign and the corporation, and we see no reason why that rule should not be applied in the present case. Where duties are imposed upon a corporation from motives of public policy, a total neglect of the duty justifies a judgment of forfeiture." *State, Atty. Gen., v. Wood*, 18 Mo. App. 139; *Harris v. Mississippi Valley & S. I. R. Co.* 51 Miss. 602. One of the duties imposed upon defendant by ordinance, which it accepted, and in which the public had an interest, was to run its cars sixteen hours every day in the year, with which there was no compliance on its part, but a total neglect of its duty; hence nonuser. It was held in *State, Whitecotton, v. Hannibal & R. O. Gravel Road Co.* 87 Mo. App. 496, that quo warranto would lie where a corporation is charged with misuser or nonuser of its franchises.

2. But it is insisted by defendant that relator is estopped to maintain this action upon the grounds: First, that by its military force it prevented the company, and still prevents it, from completing its contract, and entering on the enjoyment of its grant; second, that the city, by its common council, passed an ordinance repealing, or attempting so to do, the grant made to defendant; third, that relator compelled the defendant to tear up its turntable, and by reason thereof necessitated and required the defendant to change its equipment, and to dispose of the equipment purchased by it, and then in use; fourth, that relator, by litigation instituted before defendant ceased to operate the road, rendered impossible the operation of the road on the part of defendant, and is, by reason thereof, estopped from taking advantage of its own wrong. With respect to the first proposition, W. J. Smith, president of defendant company, testified that, even if the city had allowed the company to lay a track from Main to Walnut streets, it would not have done the company any good until they got some right of way from the Metropolitan from Walnut to Grand avenue, which it never succeeded in doing. It seems that Fifth street between Walnut and Grand avenue, upon which there were at the time two parallel tracks owned by the Metropolitan Street-Railway Company, is only 30 feet between the curbs, and that there was no room for another track; hence, unless the defendant company could in some way have acquired the right to use the Metropolitan tracks, that part of the route from Main to Walnut, even had it been constructed, would have availed nothing; therefore no justification or excuse for not operating the road. Nor do we see how the fact that the city may have passed an ordinance repealing, or attempting to so do, the grant made to defendant could have afforded it any excuse for noncompliance with the ordinances. It is well settled that estoppel *in pais* must be pleaded, and, as the answer contains no allegation to the effect that the city compelled defendant to tear up its turntable, that question cannot be considered by this court. The records of the suits mentioned in the fourth proposition are not copied into the

bill of exceptions, so that it is impossible to tell anything about the issues involved in them, or what possible effect they may have had upon defendant's failure to operate the road. The only litigation mentioned in the answer seems to have been by the city, and the evidence shows that it resulted in favor of defendant. But even the record in this suit is not in the bill of exceptions.

8. A further contention is that the record shows that the relator waived all the causes of forfeiture complained of. This contention is based upon § 17 of the ordinance *supra*, which in case of forfeiture by defendant of its franchises for failure to comply with the provisions of said section, provides that such forfeiture may be had by proceedings instituted by said city in its own name in a court of record in Jackson county, Missouri, and that if any proceedings be not commenced within six months after such forfeiture has accrued, the city shall be deemed to waive the effect of such forfeiture. The streets of Kansas City are for the use of the general public, and its officers had no right to contract with defendant by ordinance or otherwise that nonuser of its tracks by the corporation for the period of six months, or any other length of time, should not operate as a forfeiture of its franchises. To do so would be to recognize the authority of the city to grant the right of the use of its streets for private purposes, which it clearly has no right to do. To lay railroad tracks in the streets of the city, and then not use them, would not be a public use; and it is only in that sense that a city has a right to grant the use of its streets to any person or corporation for the purpose of operating cars thereon. To grant the use of its streets for a private use would be a misappropriation of the streets, and without authority on the part of the city. If the city had the right to provide by ordinance against the forfeiture of the franchises of defendant on account of the nonuser of its tracks for a period of six months, it had the same right to provide against its forfeiture for an indefinite period, and thereby convert the use which was and could only be public to a private use. *State, St. Louis Underground Service Co., v. Murphy*, 134 Mo. 548, 34 L. R. A. 369. In the case of *Washington & B. Turnp. Road v. State*, 19 Md. 239, it was said: "The consequence of the argument that an inability to keep the road in good order, owing to want of means, relieves the company from the duties imposed upon it by its charter, would be that the state would be obliged to permit the existence of roads impassable, and even dangerous. Such, it may safely be as-

serted, is without support from authority. In fact, the conclusion would seem to be inevitable, that if (as is conceded) the state can authorize the construction of a railroad anywhere within her jurisdiction, such authority is absolute, and can impose upon her no restriction, no loss of any other of her sovereign rights and powers, and cannot operate to close the doors of her own courts against her, when she wishes to inquire into the delinquencies of a corporation created by her, and responsible to her. [Citing cases.] . . . The rule is, that, as against the state, no waiver can be presumed, unless a clear intention to waive the forfeiture, with a full knowledge of the facts, can be gathered from the legislation relied on to prove such intention. . . . Moreover, to maintain that such an act is a waiver of any cause of forfeiture happening up to that time, and then to argue that the charter cannot be vacated, because the road is now (as the plea states) in as good order as it was then, is to make the condition of the road at that time, and not the charter, the standard of the obligations of the appellants for all time. Such, of course, cannot be the true measure of their liability. It is to the charter, and the charter alone, that we must look for the character and extent of their rights and duties. Nor would it by any means follow that, because the state did not choose, in 1893, to enforce a forfeiture, she designed to declare that so long as the road was maintained as it then was, the company should be unmolested. The fourth plea insists that the conduct of the state up to 1858 amounts to a waiver; that is, that the silence of the state, her failure to authorize proceedings against the company, is to be held equivalent to a declaration that no cause of forfeiture had occurred. This, obviously, does not come up to the terms of the rule we have stated above. . . . And to hold the silence of the state from 1839 up to 1858 to be a conclusive argument against her present right to revoke franchises when the conditions are forfeited on which those franchises were granted, would be to make the long-continued clemency and forbearance of the state, the means of destroying her rights and restricting her powers." Moreover, the city had no power or authority by ordinance or otherwise to take away from its sovereign right to proceed by its public officer, the prosecuting attorney of the county, against the defendant by quo warranto for ouster of its franchises upon the ground of their forfeiture.

The judgment is affirmed.

Gantt, P. J., and Sherwood, J., concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* William P. NISBETT, Jr., *Rept.*,

v.

Michael J. TOOLE, Sheriff, *Appt.*

(.....Minn.....)

- *1. The governor of a state has the power to revoke his warrant for the surrender of an alleged fugitive from justice at any time before he is taken out of the state.
2. In a proceeding in habeas corpus on behalf of the alleged fugitive, if it appears that the warrant has been revoked, he must be discharged, and the grounds of such revocation cannot be inquired into.

(June 23, 1897.)

APPEAL by defendant from an order of the District Court for St. Louis County discharging relator from the custody of defendant to which he had been committed under extradition proceedings. *Affirmed.*

The facts are stated in the opinion.

Messrs. Draper, Davis, & Hollister and C. C. McCarthy for appellant.
Mr. Frank F. Price, contra.

Mitchell, J., delivered the opinion of the court:

Upon the requisition of the governor of Illinois for the extradition of the relator as a fugitive from justice, the governor of Minnesota issued his warrant directed to all the peace officers of the state, and particularly to the sheriff of Itasca county, commanding them to arrest and detain the relator, and deliver him to the agent of the state of Illinois. Under the warrant the sheriff of Itasca county arrested the relator, but upon habeas corpus he was, by the court commissioner of that county, subsequently ordered discharged from custody. From that order the sheriff appealed to this court pursuant to the provision of Gen. Laws 1895, chap. 927. It now appears from an affidavit and "supplemental pleadings," filed in behalf of the relator, the allegations of which are not traversed by the sheriff, that since this appeal was taken the governor of Minnesota, upon a rehearing of the matter, made and issued an order directed to the sheriff of Itasca county annulling and revoking the warrant for the arrest of the relator, and directing the sheriff to make due return to him of that and all former orders, and that in pursuance of such order the sheriff has returned the warrant to the governor. The question that confronts us at the outset is whether the governor had the power to revoke his warrant, for, if he had, there is now no warrant in existence upon which the relator can be arrested or detained in custody. In that case he would necessarily have to be discharged, and it would be useless to review the action of the court commissioner. It is a mat-

ter of common knowledge that the governors of states have been and are in the habit of recalling and revoking such warrants whenever they become satisfied that they were improperly issued. The exercise of the assumed power to do this is so frequent, and of such long continuance, that it has become what may be not improperly called the common law of the country on the subject. The existence of this power has been so generally conceded that the question has not often come before the courts, but whenever it has they have invariably held that the governor of a state has this power. The question was, so far as we can ascertain, first judicially considered in Massachusetts by Justice Bigelow in 1837, and the power of a governor to revoke a warrant of rendition upheld, although, when the case was subsequently brought before the full court, the question was not decided. *Wyeth v. Richardson*, 10 Gray, 240. See also *Re Carroll*, 11 Chicago Legal News, 14. The only case we can find in which the question has been passed upon by the highest court of a state is *Work v. Cornington*, 84 Ohio St. 64, 32 Am. Rep. 845, in which, after an exhaustive review of executive and judicial precedents, the court held that, if a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it; and where a warrant has been revoked, no inquiry will be made in a proceeding on habeas corpus on behalf of the alleged fugitive as to the grounds of such revocation; also that this power is not limited to cases where the papers presented are insufficient or defective on their face. The views of the text-writers are of the same effect. Spear, *Extradition*, p. 440; Moore, *Extradition*, § 620. The principal argument of counsel against the existence of the power of the governor to revoke a warrant once issued is that under the Constitution of the United States, in the case of interstate extradition, the duty of the governor to issue a warrant on the production of the requisition in due form is imperative and ministerial, and not discretionary and judicial. We do not feel called upon to go into any extended discussion of the general subject of interstate rendition, and with the limited time at our command for investigation we are not prepared to do so. We will merely say that it is unquestionably true that when a case is presented which is clearly one contemplated by the Federal Constitution, the governor has no discretion, but it is his imperative duty to issue the warrant. That duty, however, is one of imperfect obligation, for, if the governor refuses to perform it, we know of no power, state or Federal, to compel him to do so. But we are not prepared to assent to the proposition that, in determining whether a case contemplated by the Constitution is presented, the governor upon whom the demand is made is vested with no discretion, even where the papers are on their face sufficient and in due form. We all know as a matter of fact that governors do exercise a discretion in such cases, and if they are satisfied that the demand is made for some ulterior and improper purpose—as, for example, the collection of a pri-

*Headnotes by MITCHELL, J.

NOTE.—On the general question what papers are necessary to obtain the surrender of a fugitive from another state, see note to *Ex parte Hart* (C. C. App. 4th C.) 23 L. R. A. 801.

vate debt—they refuse to issue a warrant. If a governor may exercise such a discretion in regard to issuing the warrant, we do not see why he may not exercise the same discretion in regard to revoking it; and, if he does revoke it, his reasons for so doing can no more be inquired into than his reasons for refusing to issue it in the first instance. The existence of the power to revoke would seem necessary, in order to prevent great abuses and wrongs. A warrant is, of necessity, almost always issued *ex parte*, and the governor is liable to be imposed upon by those demanding it, or, for some other cause, to issue it improvidently. It would seem that in such cases the same officer who had the exclusive power to issue the warrant should have the power to remedy the wrong by revoking it. Of course, to be effective for any purpose, the warrant must be revoked before the alleged fugitive is taken out of the state.

Ordered, that the relator be discharged from custody.

STATE of Minnesota, *ex rel.* RAILROAD & WAREHOUSE COMMISSION, *Respt.*,
v.

ADAMS EXPRESS COMPANY, *Appt.*

(..... Minn.)

1. That part of Gen. Stat. 1894, § 399, which provides that the courts may direct the manner in which notice may be given to the common carrier proceeded against, is not violative of the constitutional provision which forbids the delegation of legislative powers to the judiciary. Nor have legislative powers been delegated in § 5979, which provides that the court or judge allowing a writ of mandamus shall direct the manner of serving the same.
2. The provision in Gen. Stat. 1894, § 399, which authorizes the court to direct service to be made upon the agents or servants of the carrier, is not open to the objection that by such service an attempt is made to obtain jurisdiction over the carrier without due process of law.
3. At common law the courts have always possessed the right and authority to direct the manner of service of writs of mandamus, and with respect to service upon private corporations the rule has been that service should be made on the head officer or upon the select body or person within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty.
4. No reason exists why the rule above stated should not be applicable when service is to be made upon a joint-stock association.
5. In the case at bar an alternative writ of mandamus was issued, on the relation of the state railroad and warehouse commission, to compel the Adams Express Company, a nonresident, joint-stock association engaged in business in this state as a common carrier, to

*Headnotes by COLLINS, J.

NOTE.—As to the distinction between joint-stock companies and corporations, see *People, Platt, v. Wemple* (N. Y.) 6 L. R. A. 308; *People, Locke, v. Coleman* (N. Y.) 18 L. R. A. 183; also *State v. State Bd. of Assessors* (N. J. L.) 27 L. R. A. 684.
33 L. R. A.

print and keep for public inspection schedules showing the classification, rates, fares, and charges for the transportation of property of all kinds and classes in force and charged by it in the state, and to file a copy of such schedule with the commission. When allowing the writ, the court directed that service be made upon one J. W. Owen, general agent of the company. Service was actually made upon Owen, but on the return day it was shown that he was not a general agent, but simply the local agent at St. Paul. No claim was made that the company had a general manager or general agent in this state, or any officer or agent superior to Owen; and it clearly appeared that all of the officers named in the articles of association, and all of the shareholders, were nonresidents of the state, and not within its borders. *Held*, that the service was sufficient to confer jurisdiction upon the court issuing the writ to proceed with the hearing.

(November 20, 1896.)

A PPEAL by defendant from an order of the District Court for Ramsey County in favor of relator in a proceeding to compel defendant to exhibit schedules of rates to be charged by it as a common carrier. *Affirmed*.

The facts are stated in the opinion.

Messrs. F. F. Davis and H. M. Farnam, for appellant:

Chapter 79 of the General Laws of 1891, which is the amendatory act, is unconstitutional and in contravention of § 27 of art. 4 of the Constitution of the state of Minnesota, which provides that no law shall embrace more than one subject, which subject shall be expressed in its title.

State, Stuart, v. Kinsella, 14 Minn. 524; *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 85; *Re Paul*, 94 N. Y. 497; *Re Sackett Street*, 74 N. Y. 95; *People, Schenectady Astronomical Observatory, v. Allen*, 42 N. Y. 404; *People, Failing, v. Palatine Highway Comrs.* 53 Barb. 70; *Fishkill v. Fishkill & B. Pl. Road Co.* 22 Barb. 684; *People, Drake, v. Mahaney*, 18 Mich. 494; *Cutlip v. Calhoun County Sheriff*, 8 W. Va. 588; *Prothro v. Orr*, 12 Ga. 43; *Hingle v. State*, 24 Ind. 28.

Under the pretext of amending a section, no subject entirely foreign to the subject-matter of the section to be amended can be introduced.

People v. Gadway, 61 Mich. 285; *Miller v. Hurford*, 11 Neb. 381; *People, Stewart, v. Young Men's Father Matthew T. A. Benev. Soc.* 41 Mich. 67.

The words "association" and "corporation" as used and recognized in legislative enactments and judicial decisions, are clearly not synonymous, but distinct.

Chapman v. Barney, 129 U. S. 677, 33 L. ed. 800.

A joint-stock company or association has been defined to be a copartnership with a capital or joint stock divisible into transferable shares and the name denotes a union of persons owning together a capital stock which they have devoted to a common purpose under an organization analogous to that of a corporation. *Lindley, Partn.* 844; *Addison, Contr.* 805.

Joint stock companies or associations are nothing more than ordinary partnerships, unless they are expressly sanctioned by some special or general act of the legislature.

Dennis v. Kennedy, 19 Barb. 517; *Wells v.*

Gates, 18 Barb. 554; *Lafond v. Deems*, 52 How. Pr. 41; *Townsend v. Goovey*, 19 Wend. 424, 33 Am. Dec. 514; *Cross v. Jackson*, 5 Hill, 478; *Van Aernam v. Bleistein*, 102 N. Y. 860; *People v. Coleman*, 183 N. Y. 279, 16 L. R. A. 188; *Robbins v. Butler*, 24 Ill. 426; *Manning v. Gasharie*, 27 Ind. 399; *Babb v. Reed*, 5 Rawle, 151; *Hess v. Werts*, 4 Serg. & R. 356; *Hedge's Appeal*, 63 Pa. 274; *Grisewood's Case*, 4 De G. & J. 544; *Hoadley v. Middlesex County Comrs.*, 105 Mass. 519; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Whitman v. Porter*, 107 Mass. 522; *Gleason v. McKay*, 184 Mass. 419; *Bullard v. Kinney*, 10 Cal. 60; *McGreary v. Chandler*, 58 Me. 587; *Pettis v. Atkins*, 60 Ill. 454; *Henry v. Jackson*, 87 Vt. 431; *Taft v. Ward*, 106 Mass. 518.

A corporation can only be created by the action of law and authority of the government.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518-536, 4 L. ed. 629-659; *Thompson v. Waters*, 25 Mich. 214, 13 Am. Rep. 243; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Head v. Providence Ins. Co.* 6 U. S. 2 Cranch, 128-167, 2 L. ed. 229-242; *Brice, Ultra Vires*, 1; Ang. & A. Corp. § 1; La. Civ. Code, § 418; Cal. Civ. Code, § 288; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 295, 17 L. ed. 180, 182; *Thomas v. Dakin*, 23 Wend. 78; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Typpecanos County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 97.

The agreement of parties can never create a corporation.

Hoey v. Coleman, 46 Fed. Rep. 221; *Sanford v. Gregg*, 58 Fed. Rep. 620; *Gregg v. Sanford*, 28 U. S. App. 818, 65 Fed. Rep. 151; *Whitman v. Huddell*, 30 Fed. Rep. 81; *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800; *Dinsmore v. Philadelphia & R. R. Co.* 2 W. N. C. 275; *People, Winchester v. Coleman*, 133 N. Y. 279, 16 L. R. A. 183; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Morawetz, Priv. Corp.* § 8.

The organization of the respondent in the state of New York was simply a union of individuals and individual interests as a copartnership in a common enterprise. The appellant simply does business in the state of Minnesota like any individual, enjoys no franchises or peculiar privileges from the state, operates and conducts its business as individual citizens operate and conduct theirs, and up to the present time has so existed and done business without state interference.

People, Bank of Watertown, v. Watertown Assessors, 1 Hill, 616; *Stowe v. Flagg*, 72 Ill. 397; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21.

The similarity in operation or the exercise of functions which corporations peculiarly claim cannot clothe an organization with corporate capacity without the fundamental and primary creating law.

Johnson v. Corser, 84 Minn. 355; *Finnegan v. Noerenberg*, 52 Minn. 289, 18 L. R. A. 778; *Williams v. Bank of Michigan*, 7 Wend. 542; *Wells v. Gates*, 18 Barb. 557.

The proceeding in this case is one *in personam*. It is aimed at the appellant to compel it to do something. No substituted service can avail the relators, no matter whether such

substituted service be attempted by attachment, garnishment publication, or service upon a representative.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Chauncey v. Wass*, 35 Minn. 25; *Lydiard v. Chute*, 45 Minn. 277; *Cloyd v. Trotter*, 118 Ill. 391; *Bardwell v. Collins*, 44 Minn. 97, 9 L. R. A. 152; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 18 L. ed. 648; *Grover & B. Sewing Mach. v. Radcliffe*, 187 U. S. 294, 34 L. ed. 671; *Providence Rubber Co. v. Goodyear*, 76 U. S. 9 Wall. 810, 19 L. ed. 589; *Thompson v. Whitman*, 85 U. S. 18 Wall. 464, 21 L. ed. 900; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931; *Fairfax v. Alexandria*, 28 Gratt. 16; *Settemier v. Sullivan*, 97 U. S. 477, 24 L. ed. 1111; *Hart v. Sansom*, 110 U. S. 151-155, 28 L. ed. 101-103; *Roswell v. Otis*, 50 U. S. 9 How. 336, 18 L. ed. 164; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Gray v. Haves*, 8 Cal. 562; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Bias v. Vance*, 32 Miss. 198; *Stow v. Chapin*, 21 N. Y. S. R. 38; *Robbins v. Martin*, 43 La. Ann. 489; *Schibasy v. Westenhols*, L. R. 6 Q. B. 155; *The City of Mecca*, L. R. 6 P. Div. 106; *Litchfield v. Burroell*, 5 How. Pr. 341; *Story, Const. L.* § 539.

Messrs. H. W. Childs and George B. Edgerton, for respondent:

The respondent is a common carrier.

Gen. Laws 1895, chap. 153; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *Sweet v. Barney*, 23 N. Y. 385; *Russell v. Livingston*, 19 Barb. 346; 7 Am. & Eng. Enc. Law, pp. 541 *et seq.*, and cases cited.

Express companies are subject to the fullest extent to the railroad and warehouse commission law.

Gen. Laws 1887, chap. 10.

The district court acquired jurisdiction by service upon the agent Owens.

Gen. Stat. 1894, § 399.

Joint-stock associations are deemed by the authorities as partaking of the character of corporations.

1 Morawetz, Priv. Corp. § 6; 11 Am. & Eng. Enc. Law, p. 1039.

It is clearly within the power of the legislature to prescribe how jurisdiction may be acquired.

7 Am. & Eng. Enc. Law, p. 578.

Jurisdiction is the power conferred on a court by Constitution or statute to take cognizance of the subject-matter of a litigation and the parties brought before it.

Brown, Jurisdiction of Courts, § 1.

Collins, J., delivered the opinion of the court:

This was a proceeding, by an alternative writ of mandamus, to compel the Adams Express Company, doing business as a common carrier in this state, to print, and keep for public inspection, schedules showing the classification, rates, fares, and charges for the transportation of property of all kinds and classes in force and charged by it in this state, and to file a copy of such schedules with the railroad and warehouse commission. The writ was issued on the relation of the commission, relying on

the provisions of Laws 1895, chap. 152, and the several laws therein referred to; and, when allowed by the court, it was ordered that service be made by delivering to, and leaving a copy of the writ of the petition and of the order for service with, J. W. Owen, general agent of the company. On the return day the company appeared specially, and moved to quash the writ on the ground that the court had not acquired jurisdiction over the company; such motion being based on all of the proceedings, and two affidavits, from which it appeared that Owen, on whom service had been made, was the local agent at St. Paul, and not the general agent, and that the company was not a corporation, but a joint stock association, organized in the state of New York, composed of a large number of shareholding members, all nonresidents. The motion being denied, the company appeals.

In directing that service be made in a certain specified way, the court below observed the requirements of Gen. Stat. 1894, § 5979, which provides that the court or judge, by an indorsement on the writ of mandamus, shall allow the same, designate the return day, and direct the manner of serving a copy of the writ, of the allowance thereof, and of any order or direction of the court, indorsed on the writ. It is also provided, by § 399, that whenever a common carrier refuses or neglects to obey any lawful order or requirement of the commission, made under the provisions of the statute under which it acts, an application may be made to the court, alleging such disobedience, and the court is given power to hear and determine the matter on short notice to the carrier; such notice to be served on the carrier, his or its officers or agents, or servants, in such manner as the court shall direct. That the regulation of the business conducted by common carriers is one over which the legislature has full power to act, and that ample authority can by law be conferred upon the railroad and warehouse commission to call on any carrier doing business within our borders, whether a natural or artificial person, resident or nonresident, for such information as is absolutely essential for the proper conduct of the carrier and the protection of the public, ought not to be questioned. Counsel does not contend to the contrary at this time, but his claim is that service of the writ made in the manner designated by the court, and as such service was attempted to be made in this instance, is insufficient to confer any jurisdiction over the company, a joint-stock association,—a copartnership,—as is claimed, none of its shareholders having been served, or having voluntarily appeared. It is urged in support of this contention that when the legislature attempted to confer upon the courts the power to determine the manner, or upon whom, writs of mandamus shall be served (§ 5979, *supra*), or the manner, or upon whom, the notice prescribed in § 399, *supra*, shall be served, it delegated its powers to the judiciary, and the latter branch of the government, when acting, assumes a power purely legislative, forbidden by the Constitution, or, if this position is not sustainable, that any statute which empowers or permits a court to direct that service of a writ or order based on an alleged disobedience or violation of

a public duty by a common carrier may be made upon its agents or servants authorizes jurisdiction over such carrier to be obtained without due process of law,—also a violation of a constitutional right. If the claim last mentioned is well founded, a nonresident corporation, association, copartnership, or individual, engaged in business in this state as a common carrier, would seem to be beyond the reach of process of the courts, or orders emanating from the commission, unless an officer of the corporation, or a member of the association or of the partnership, or the single individual so engaged in business, should accidentally be found within our territorial limits, and personal service be thus obtained.

In substance, § 5979, regulating the service of the writ of mandamus, has been the statute of the state and its predecessor, the territory, since the enactment of Rev. Stat. 1851, chap. 88, § 8. A change in the phraseology was made, and the proviso added, by Gen. Laws 1875, chap. 68, § 2. So far as we know, the power of the legislature to authorize the courts to direct the manner in which service of a writ of mandamus should be made, or the authority of the court to make an order as to the manner of service, has not been questioned heretofore in any of the courts of this state. At common law the rule respecting the service of this writ upon a private corporation was that it should be made upon the head officer of the corporation, or upon that select body or person within the corporation whose province it was to put in motion the machinery necessary to secure performance of the duty commanded. The recent strictness of the common law also required that such service should be made within the jurisdiction of that sovereignty by which the corporation was created, but this strictness was long ago relaxed so as to permit service to be made within the jurisdiction wherein the corporation had engaged in business in all litigation connected with that business. And such is now the rule independently of statute, and no reasons exist why this relaxation should not be extended to the service of prerogative writs. *State. Mercer County Chosen Freeholders, v. Pennsylvania R. Co.* 42 N. J. L. 490. And there is no reason why service upon joint-stock associations should not be made in the same manner as service upon corporations. It may be, technically speaking, that such an association is nothing more than a copartnership formed between the shareholders, but this is immaterial. It is merely a question of definition, and they have been called "quasi corporations of a private character." 1 Morawetz, *Priv. Corp.* § 6. They are associations having some of the features of common-law partnerships, and many of the features of private corporations, as will be obvious upon an examination of defendant's articles of association, introduced upon the hearing below. We are not only confident that in authorizing the court to exercise the power of directing the manner in which service shall be made, as it has in both sections (399 and 5979), there has been no delegation of legislative powers, but that the courts, in the absence of a statute expressly regulating the subject, have always possessed the right and authority to direct the manner in which pre-

rogative writs shall be served, and, in case of corporations, upon whom they should be served. Of course, we are not to be understood as saying that this power could be exercised arbitrarily and unreasonably. It must be within the rule of the common law as to service, heretofore stated. And, if service is made upon a corporation in accordance with that rule, such service is due process of law; for the real question is, Has the proper officer or representative of the corporate body received such a notice as will give it or him an opportunity to be heard? The error of defendant's counsel is in assuming that the proceedings adopted for the regulation of common carriers are to be classed with those usually arising in courts of justice, and that all steps taken must be in strict accordance with those which end in ordinary judgments, and also in assuming that, because defendant is a joint-stock association, it is wholly unlike a corporation. Certainly as to the service of orders issued by the commission, and of prerogative writs issued by the courts, no substantial distinction can be pointed out. Each has its officers, its board of directors, its general manager, and its general and local agents. If, at common law, service could properly be made upon the head officer or upon the person within the corporation who would be expected to obey the command, and be valid, why could not service be made upon a general or local agent of this nonresident association, and be valid, provided it is fairly to be inferred from the record that he came within the description? We have here an association of nonresidents, who have voluntarily assumed a position in the transaction of business which involves duties to the public. The duty in the present case grows out of the management of their business as a common carrier in this state, and is a public duty, which the association seeks to evade by asserting that the person upon whom service has been made is nothing more than a local agent in the city

of St. Paul. Nor has the association been candid enough to suggest that it has any general manager or agent within the state upon whom service might be made with greater probability of reaching the association, or better prospect of obtaining jurisdiction. It would seem remarkable if, under such circumstances, the courts must be declared powerless to enforce the fulfilment of the important obligations which this and every other nonresident common carrier owes to the public. In the absence of any showing that defendant association has a general manager or general agent in this state, or any officer or agent superior to the one on whom this writ was served, we are justified in assuming that he was the person whose province it was to obey the command, to cause the schedules to be printed, and to file with the commission a copy of the same. As local agent at St. Paul, he undoubtedly had in his possession the schedules required, for he could not well transact business without them. If so, applying, by analogy, to a joint stock association the common law rule as to service of a writ of mandamus upon a corporation, we regard the service in question as sufficient for the court to proceed. What the remedy will be if the rule is made absolute, and a peremptory writ issued, we are not required to express any opinion.

Counsel for the state have contended that this service could be upheld under Gen. Stat. 1894, § 5200, while counsel for defendant insists that this statute is unconstitutional. The present law is the original act as amended (Gen. Laws 1891, chap. 79), and the amendatory act is attacked upon the ground that the subject is not expressed in the title. We need not determine this point, for, if the amendatory act does come within the constitutional inhibition, service was properly made under either of the sections heretofore commented on.

Order affirmed and case remanded.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire
v.
Ernest GERRY.

(.....N. H.....)

1. The attempt to give police courts concurrent jurisdiction with the supreme court in any criminal case where the fine does not exceed \$300 and the term of imprisonment does not exceed one year, although the offenses thus punishable were not within the jurisdiction of a justice of the peace in 1784, renders Laws 1895, chap. 117, unconstitutional, because it impairs the constitutional right of trial by jury and of a presentment or indictment before prosecution in cases in which such rights existed when the state Constitution was adopted.

NOTE.—For jury trial on appeal to satisfy the constitutional right to jury, see *Miller v. Com.* (Va.) 15 L. R. A. 441, and *note*; also *Brown v. Epps* (Va.) 27 L. R. A. 676.

88 L. R. A.

2. A jury trial upon appeal does not answer the constitutional guaranty of a right to be tried by jury.

3. The court cannot eliminate an invalid provision for a recognizance from a statute providing therefor as a condition of appeal from a conviction in order to sustain the statute as authorizing an appeal without a recognizance.

4. The constitutional right to an accusation by information before being put on trial for a misdemeanor stands on the same ground, under Const. art. 88, as the right to indictment before being put on trial for felony.

(Clark, Wallace, and Pikes, JJ., dissent.)

(July 31, 1896.)

EXCEPTIONS by defendant to rulings of the Merrimack County Court denying his motion to dismiss an appeal from a judgment of a police justice convicting him of an aggravated assault for the alleged reason that the

proceedings were beyond the jurisdiction of the police magistrate. *Sustained.*

The facts are stated in the opinion.

Mr. A. F. Burbank, for defendant:

Chapter 117 of the Laws of 1895 is unconstitutional because it seriously impairs the right of jury trial.

The language of the Constitution is to be understood in the sense in which it was used at the time of its adoption. Opinion of Justices, 44 N. H. 635. At that time all criminal cases, except those of the most trivial character, were tried by jury. A person charged with as serious a crime as aggravated assault was by law and settled usage entitled to a jury trial, and his right to such a trial was unqualified, unfettered, unclogged, and absolute.

Copp v. Henniker, 55 N. H. 187, 20 Am. Rep. 194; 1 N. H. Prov. Papers, 887, 895, 450; 3 Prov. Papers, 183.

The defendant in this case not having been convicted "by the judgment of his peers or the law of the land," the conviction is void, and the appeal should be dismissed.

East Kingston v. Towle, 43 N. H. 64, 97 Am. Dec. 575, 2 Am. Rep. 174.

The present case being beyond the jurisdiction of a justice, this burden was not a incident to the defendant's constitutional right of jury trial.

Copp v. Henniker, 55 N. H. 202, 20 Am. Rep. 194; *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786; *Greene v. Briggs*, 1 Curt. C. C. 311.

Messrs. W. D. Hardy, H. I. Goss, George B. Cox, J. W. Remick, and D. C. Remick for the State.

Carpenter, Ch. J., delivered the opinion of the court:

An aggravated assault is punishable by a fine not exceeding \$200, or by imprisonment not exceeding one year, or by both. Pub. Stat. chap. 278, § 21. If the police court had no jurisdiction to try and determine the question of the defendant's guilt or innocence of the offense charged in the complaint, the judgment is void, and the appeal must be dismissed. *State v. Dolby*, 49 N. H. 483, 6 Am. Rep. 539; *State v. Runnals*, 49 N. H. 498; *State v. Thornton*, 63 N. H. 114; *State v. Perkins*, 63 N. H. 89. By the act of March 29, 1895 (Laws 1895, chap. 117, § 1), jurisdiction of all criminal cases where the fine does not exceed \$200, and the term of imprisonment does not exceed one year, is expressly conferred upon police courts; and if, under the Constitution, the legislature had the power to enact it, the defendant's motion to dismiss the appeal was properly denied. "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or by the law of the land." Bill of Rights, art. 15. It has never been denied or doubted that by this article trial by jury according to the course of the common law is secured to the defendant in all criminal cases without exception. *State v. Rye*, 63 N. H. 406, 407, 56 Am. Rep. 529. It is the only provision of the Constitution relating to trial by jury for prosecutions for crimes not capital. 88 L. R. A.

Strike it out, and there is nothing to prevent the enactment of a statute providing that all criminal offenses now known to our law, except murder in the first degree, may be tried and determined without a jury by the supreme court, by a justice of the peace, or by a police court. The framers of the Constitution, who took care to secure a jury trial to the parties in a controversy over the smallest amount of property (Bill of Rights, art. 20; Const. 1792, art. 77), did not intend to leave in doubt the right of persons charged with an offense, however trivial (63 N. H. 407, 56 Am. Rep. 529), against the criminal law, to a like trial. Their language means what they understood it to mean: "The language of the Constitution is to be understood in the sense in which it was used at the time of its adoption." *Opinion of Justices*, 44 N. H. 633, 635, 41 N. H. 550, 551; *Hale v. Everett*, 53 N. H. 9, 170, 16 Am. Rep. 82; *Copp v. Henniker*, 55 N. H. 179, 193, 20 Am. Rep. 194; *State, Rhodes v. Saunders*, 66 N. H. 39, 76, 18 L. R. A. 646; *State v. Griffin*, 66 N. H. 326, 327. Whatever the parties to the Great Charter understood in 1215 to be the meaning of the words "by the judgment of his peers" (*Hurtado v. California*, 110 U. S. 516, 529, 28 L. ed. 232, 236; 1 Stephen, Hist. Crim. Law Eng. 162; 1 Pol. & M. Hist. Eng. Law, 152, note, 518; Hall, Mid. Ages, 342, note), our fathers in 1784, as well as the first continental Congress, in 1774, understood them to mean trial by jury,—that they secured to them "the great and inestimable privilege of being tried by their peers of the vicinage according to the course" of the common law. 2 Kent, Com. 6. Such was the understanding of Coke when he wrote his commentary on the Great Charter. 2 Inst. 28, 29, 48–50. Precisely what significance is to be given to the words "or the law of the land" need not now be considered. *Mayo v. Wilson*, 1 N. H. 53, 56–59; *Dartmouth College v. Woodward*, 1 N. H. 111, 130; 2 Kent, Com. 13; Cooley, Const. Lim. 358, 356; 2 Inst. 50–52. Whatever may be their meaning, they do not restrict or qualify the right of trial by jury in prosecutions for crime. "The Constitution contains no definition or description of the trial by jury. . . . It is referred to in the Bill of Rights as an institution which constant practice from the earliest periods of the colonial history had made perfectly familiar to the people; and when trial by jury is spoken of in the Constitution the term must be understood to mean that method of trial according to the common law of England, and substantially such as was used and practised at that time in this state." Chief Justice Perley's charge to the grand jury at Plymouth, November, 1866. It "is a trial according to the course of the common law, and the same in substance as that which was in use when the Constitution was framed." *East Kingston v. Towle*, 43 N. H. 57, 64, 97 Am. Dec. 575, 2 Am. Rep. 174; *Copp v. Henniker*, 55 N. H. 179, 193–203, 20 Am. Rep. 194; *King v. Hopkins*, 57 N. H. 334, 350; Story, Const. § 1783. "The essentials of jury trial . . . are shown by common-law principles and by history." *State, Rhodes v. Saunders*, 66 N. H. 39, 76, 18 L. R. A. 646. "Accusations of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guaranteed by the Consti-

tution without qualification or restriction it must be understood as retained in all those cases which were triable by jury at the common law and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused." Cooley, Const. Lim. 4th ed. 394. It is essential to a jury trial that it be had in a court of competent jurisdiction presided over by a judge qualified to instruct the jury in matters of law. *Pierce v. State*, 13 N. H. 536, 566-569; *State, Rhodes v. Saunders*, 66 N. H. 39, 76, 18 L. R. A. 646. "Another excellency of this trial is: that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law emerging upon the evidence to direct them, and also in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies." Hale, Com. Law, 291, 292.

There must be a lawful accusation. This is as essential to a common-law trial by jury as any other incident,—as, for example, the number of the jurors, and the unanimity of their verdict. By the common law of the colony no one could be subjected to a trial for any criminal offense beyond the jurisdiction of a justice of the peace, except upon an indictment returned by a grand jury in cases of felony, or in the case of misdemeanors, on such indictment, or upon an information filed by the attorney general. The English common law respecting appeals of murder and other crimes (4 Bl. Com. 812-816), and its rule that one found guilty of a felony by the verdict of a jury in a civil cause might, without other accusation, be put on trial for the crime (1 Chitty, Crim. L. 164, 165; Bacon, Abr. *Indictment*, B), were never adopted here. The provincial act of 1718 (Prov. Laws 1771, chap. 86), relating to the power and duty of coroners in taking inquisitions of death, was declaratory of the common law. Bacon, Abr. *Coroner*, C; 1 East, P. C. 381. It is not material to the present inquiry whether the colony adopted the English common-law doctrine that upon the inquisition alone one could be put on his trial for the homicide (4 Bl. Com. 801, 802) because a coroner's jury was a grand jury (1 Hale, P. C. 161, note; 2 Hale, P. C. 59; 2 Burn, Justice of the Peace [29th ed.] 29; Act 1718, *supra*; Act June 10, 1791; Laws 1797, p. 132), and their inquisition an indictment (2 Inst. 32, 550; 4 Coke, 46, 47; *Reg. v. Ingham*, 5 Best & S. 257, 270). If in colonial times or since there ever was such a trial, no record or historical mention of it has been produced. Without an accusation by indictment or information, no one could be tried or punished for any criminal offense not within the jurisdiction of a justice of the peace. The required accusation was not a mere form of procedure, but a substantial protection of every citizen against false and malicious charges of crime; a valuable security of his "life, liberty, and estate," and of his enjoyment thereof. "As for trials in causes criminal, they have this further advantage: that regularly the accusation, as preparatory to a trial, is by a grand jury. So that, as no man's interest, according to the course of the common law, is to be tried or determined

without the oaths of a jury of twelve men, so no man's life is to be tried but by the oaths of twelve men, and by the preparatory accusation or indictment by twelve men or more, precedent to his trial." Hale, Com. Law, 295. "In times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the King and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the Crown. . . . The founders of the English law have with excellent forecast contrived, that no man should be called to answer to the King for any capital crime unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations which may sap and undermine it by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And, however convenient these may appear at first, . . . let it be again remembered . . . that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution, and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 Bl. Com. 349, 350. With this language of Blackstone the members of the bar who assisted in framing the Constitution in 1784 were familiar. His work was the chief, if not the only, legal text-book they possessed. It is morally certain that the people among their reserved rights did not intend to omit, and did not understand that they did omit, any part of this "twofold barrier" against oppression, this "sacred bulwark" of their liberties. "The grand jury perform most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies." 2 Story, Const. § 1779. "If . . . the people are enlightened and honest, and zealous in defense of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury." Id. § 1785. "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray, 329, 344.

In the case of misdemeanors, the require-

ment of an information filed by a sworn public officer, learned in the law, who has no motive "other than to protect and promote the public interest" (*State v. Dover*, 9 N. H. 472), and whose duty it is as much to secure the innocent from persecution as to prosecute the guilty, affords a protection against unfounded and malignant charges at least equal to that afforded by the grand jury in the case of felonies. It would be much greater than that of the latter if the proceedings and practice in the grand-jury room were the same here as in England, where, to prevent vexatious indictments for certain misdemeanors, it has been found necessary to provide by statute that no one shall lay before the grand jury a charge of certain misdemeanors without permission of a judge, the attorney general, or of the solicitor general, unless he is bound over to prosecute by a magistrate. The criminal code commissioners in 1879 recommended that the restriction be extended to all offenses. 1 Stephen, Hist. Crim. Law Eng. 293, 294. In this state grand juries have, it is believed, usually, if not always, been instructed not to return a bill against the accused unless upon the evidence laid before them—the state's evidence alone—they are satisfied of his guilt beyond a reasonable doubt. 1 Chitty, Crim. L. 818; 4 Bl. Com. 303. But whether this is the true rule or not, the law that no man can be publicly arraigned and put on trial for any alleged crime upon the mere accusation of his neighbor, though made under oath, until the charge has been investigated, and found true, or probably true, by a grand jury of his fellows, or an impartial public officer, is an invaluable protection against false and malignant accusations of crime. In the exceptional class of cases referred to,—cases of which a justice of the peace in 1784 had jurisdiction,—the right of the accused was to obtain a jury trial by taking an appeal from the judgment of the justice on giving security to prosecute it, and paying costs. *State v. Griffin*, 66 N. H. 326. This burden upon the right of jury trial has been maintained under the Constitution upon the sole ground that it existed when the Constitution was adopted. *Copp v. Henniker*, 55 N. H. 179, 195, 196, 20 Am. Rep. 194. In all other cases trial by jury was free. The accused was not obliged to purchase, or even to demand, it. Without it, he could not be convicted or punished. It was his right not to be "deprived of life, liberty, or estate" for any criminal offense, until in the due course of the common law a verdict of guilty against him was obtained. The burden rested not upon him to procure either a trial or an acquittal. It rested on the state—the prosecution—to obtain a trial by jury, as well as a conviction by their verdict. If he pleaded not guilty, he was not, and could not be, required to do or say anything more. The law esteemed him innocent until a verdict to the contrary was rendered. The common law—the words of the Great Charter—assured him that he should not be condemned or punished for any criminal offense until a verdict of guilty by a jury of his equals was first obtained against him. That the common-law right of trial by jury in criminal cases as it existed here in 1784, with all its incidents, "so far, at least, as they can be regarded as tend-

ing to the protection of the accused," is secured to the people by the Constitution, is not open to doubt. It is established by numerous judgments of the court, and is not questioned by the counsel for the state.

The question presented is whether this right is infringed or substantially impaired by the act of March 29, 1895 (Laws 1895, chap. 117), which provides that "police courts shall have concurrent jurisdiction with the supreme court in any criminal case where the fine does not exceed \$200 and the term of imprisonment does not exceed one year. In case of an appeal in any case which is beyond the jurisdiction of a justice of the peace, the appellant shall enter into recognizance as in other cases in any sum not less than \$100, nor more than \$300." It is not claimed that offenses punishable by such a fine or term of imprisonment were, in 1784, within the jurisdiction of a justice of the peace. In substance, the act (on the interpretation most favorable to the state) declares that a person accused in the cases specified may be tried, found guilty, and condemned to the prescribed punishment by a police judge, subject only to the right of appeal provided by the general law as follows: "A person sentenced for an offense by a police court . . . may at the time such sentence is declared appeal therefrom to the supreme court at the trial term next to be holden for the county. Before the appeal is allowed the appellant shall enter recognizance with sufficient sureties in a reasonable sum, not exceeding \$100, to appear at the court of appeal, to prosecute his appeal with effect, to abide the order of the court thereon, and, if so required, to be of good behavior in the meantime. If the appellant fails to enter and prosecute his appeal . . . his recognizance shall be declared forfeited, and the clerk . . . shall transmit to the . . . police court appealed from a certificate of such forfeiture. The justice shall record such certificate, shall add to the costs fees for copies sent to the clerk, 50 cents for the clerk's certificate, and 50 cents for recording it; and he shall issue a mittimus to carry into effect the original sentence with such increased costs." Pub. Stat. chap. 253, §§ 2-4. If, because of his poverty, or because he is a stranger in a strange land, or for other reason, he is unable to obtain sufficient sureties, or to pay the required fees, the accused has no appeal, and no jury trial. If he secures his appeal, but is unable, or for any cause fails, to enter and prosecute it, not only is the sentence of the police court affirmed, but he is charged with additional costs, and his recognizance is forfeited. In other words, for taking and failing to pursue his appeal he is subjected, not only to the original sentence, but also to the penalty of paying costs, and the amount of his recognizance. The only ground upon which it has been held or claimed that under the Constitution the right of jury trial may be subjected to these burdens is that in 1784 they existed by law in cases within the jurisdiction of a justice of the peace; that it is, with these burdens upon it, the same trial, in substance, as that which was in use in those cases when the Constitution was framed. It is not questioned that the imposition of these burdens on the right of jury trial in any other cases forbidden by

the Constitution. "If, in a class of criminal cases, at the date of the Constitution, a defendant was entitled to a jury trial upon his complying with the single condition of remaining in custody, or giving security for his appearance merely, as he might elect, his constitutional right would be infringed by such a material alteration of the terms on which he can enjoy the right, as making his enjoyment of it depend upon his paying a jury fee, or the costs of the prosecution, or giving security for his appearance without the option of remaining in custody, or giving security for anything else than his appearance, or incurring the risk of increased punishment, or submitting to anything else that would operate as a penalty for the exercise of the right." *Copp v. Henniker*, 55 N. H. 179, 202, 20 Am. Rep. 194; *State v. Griffin*, 66 N. H. 326, 328, and cases cited.

But it is suggested that the court may grant an appeal without requiring the defendant to comply with the requirements of the law regulating appeals; that an appeal may be allowed upon the defendant's merely recognizing for his appearance, as in cases where he is bound over to answer. The statute admits of only two possible constructions. It either does or does not confer the right of appeal. If it does not, nobody contends that it can be sustained. If it does, it gives the appeal provided by the general law. This is undoubtedly the true construction. It is what the legislature intended. The statute is to be read precisely as if the general law of appeal were repeated in it and re-enacted. But there was no occasion for re-enacting the general law. Statutes are construed in view of the existing law. The general law of appeal—the provision that any person sentenced by a police court may appeal therefrom—extends to every case created by subsequent legislation that falls within it. *Roberts v. Stark*, 47 N. H. 223, 225; *State v. Rum*, 51 N. H. 373; *State v. Rann*, 63 N. H. 249. An appeal from a subordinate tribunal's determination of fact is unknown to the common law. It exists only by statute. *Wetherbee v. Johnson*, 14 Mass. 412, 420; *Com. v. Richards*, 17 Pick. 295, 296; *United States v. Wanson*, 1 Gall. 5, 14, 15; *State v. White*, 41 N. H. 194, 196. The court cannot allow an appeal where none is provided, nor can it dispense with any of the prescribed conditions of an appeal that is provided. When the legislature declares that before an appeal is granted the appellant shall enter into a recognizance, the court cannot say that it shall be granted without a recognizance. For appeal on condition the court cannot substitute appeal without condition. For the appeal intended and provided by the legislature the court cannot substitute an appeal which the legislature did not intend. The court cannot lawfully legislate. Undoubtedly, "when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the Constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are

bound to presume that the legislature did not intend to violate the Constitution." *Opinion of Justices*, 41 N. H. 553, 555. This is merely saying that a statute is to be held unconstitutional in those particulars only that conflict with the Constitution. So, "where there are different provisions in the same statute so distinct and independent that the one may not have been the motive or inducement to the other, one may be held valid and the other" unconstitutional and void. *Jones v. Robbins*, 8 Gray, 329, 338; *Nolans' Case*, 122 Mass. 330, 332, 333. A statute made in express terms both retrospective and prospective may be held valid so far as it looks to the future and void so far as it affects past transactions. *Kent v. Gray*, 53 N. H. 576; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 181. Undoubtedly, "whatever may be the language of the legislature" in any case, "the court is bound to presume that it intended to keep within the limits of the Constitution." *Leavitt v. Loering*, 64 N. H. 607, 608, 1 L. R. A. 58. In other words, if the language of the statute is capable of being so construed as to be consistent with the Constitution, the court is bound to give it that construction. If not capable of such construction, all the court can do is to pronounce it void. This is the whole extent of the doctrine. It affords no warrant for giving the statute a meaning that the legislature did not intend. It does not authorize the addition to the statute of such words, provisions, or modifications not therein expressed or implied as may be necessary to render it consistent with the Constitution. If it did, an unconstitutional statute would be impossible. By addition or subtraction its defects could always be cured. For example, in *Perkins v. Toole*, 58 N. H. 425, § 23, chapter 231, of the General Statutes, extending the provision for actions by a landlord against a tenant to cases where that relation does not exist, was held unconstitutional, because by § 17 of the act the defendant is required, before his appeal is allowed, to recognize with sufficient sureties to enter and prosecute his appeal, to pay all rent then due or which may become due, and such damages and costs as may be awarded against him, thereby imposing upon his right of trial by jury an unwarranted burden. The objection could have been easily cured by striking out of § 17 the requirement of a recognizance, if the court had the power. It is, in this particular, impossible to distinguish that case from the present. If the provision for a recognizance can be stricken out here, it could and ought to have been in that case. If, under the statute now in question, the court can give the defendant an appeal without costs, free of all the conditions prescribed by the statute, it could and ought to have given the defendant in that case such an appeal, and have sustained the statute, so far, at least, as the ground upon which it was decided was concerned. So, a statute authorizing searches without a warrant might be sustained as constitutional by judicially incorporating in it article 19 of the Bill of Rights, or, perhaps, a statute giving a justice of the peace jurisdiction of all felonies (Const. art. 4) by supplying, by judicial legislation, provisions for the attendance at his court of grand and petit

juries. *State v. Peterson*, 41 Vt. 504, 523. If the court had the power to repeal the statute imposing burdens upon the appeal, if in defiance of the legislative will it could give, or if the legislature should give, the accused "an unobstructed and unclogged right of appeal," the statute in question would not be free from constitutional objection. The obligation to appeal is itself a burden unwarranted by the Constitution.

By the statutes of Massachusetts the appellant from the sentence of a justice of the peace or police court is required to recognize with sureties to appear at the court appealed to until the final sentence or order of that court, to abide such final sentence or order, and not depart without leave, and in the meantime to keep the peace and be of good behavior. He is subjected to no costs of taking or prosecuting his appeal, unless upon his trial he is convicted. If he "fails to enter and prosecute his appeal, he shall be defaulted on his recognizance, . . . and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court." Gen. Stat. chap. 173, §§ 1-5. On such default a more severe punishment than that imposed by the police court may be awarded him. *Batchelder v. Com.* 109 Mass. 361. In *Jones v. Robbins*, 8 Gray, 329 (decided in 1857), it was held by a divided court that article 12 of the Massachusetts Bill of Rights (identical with our article 15, except that it contains the additional provision that "the legislature shall not make any law that shall subject any person to . . . infamous punishment . . . without trial by jury") was not infringed by a statute authorizing a police court to try and pass sentence upon persons charged with an offense punishable by infamous punishment, subject to the right of appeal provided by the statutes above cited. The court also held that these statutes conferred on the appellant "an unqualified and unfettered right of appeal." The decision rests upon the mistaken view that the constitutional right of trial by jury is a privilege to be asserted, instead of an unconditional immunity from sentence or punishment for crime, until at the hands of a jury a verdict of guilty is obtained. The court, after stating in substance that the last clause of article 12, prohibiting the legislature from making any law which shall subject any person to infamous punishment without trial by jury, was "added for greater caution," and though more explicit than the preceding clause, "judgment of his peers," did not materially modify its meaning, say (p. 341): "As the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election, and as the purpose of the provision is to secure the right without directing the mode in which it shall be enjoyed, it is not violated by an act of legislation which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is

also the delay of the trial till the sitting of such court. They are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail." A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to appear, and demand the trial, without which the Constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime, and he has not sufficient intelligence to demand and take the proper steps to obtain a trial by jury. As long as he remains entirely passive, as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty, he is assured by the express terms of the Constitution that he cannot be condemned until the state has obtained a verdict of guilty from twelve of his neighbors. "No subject shall be . . . deprived of life, liberty, or estate but by the judgment of his peers." This language does not mean—it cannot reasonably be construed to mean—that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to secure a constitutional trial. To say that the required recognizance upon an appeal subjects the party to no greater inconvenience is no greater burden than the recognizance required upon an examination and binding over, if it were true, does not conclude the matter. It is not merely the recognizance, but the judgment of the magistrate, the sentence without a jury trial, that is in question. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the Massachusetts statute, sentenced for the offense charged by the court appealed to, as if he had been convicted in that court. By his default he is held to waive a jury trial. *Com. v. Whitney*, 108 Mass. 5-7. If this is sound constitutional law, the legislature may enact a statute providing that a person bound over on examination, who forfeits his recognizance, or who in default of a recognizance is committed to jail, and escapes, may be brought in on a capias, and sentenced for the offense charged, as if he were convicted. It might dispense with the examination and recognizance, and provide that a person charged with crime, who fails to appear upon a simple notice or summons, may be brought in, and judgment rendered against him upon default, as in civil actions. In each case he would be no more deprived of a jury trial than is the appellant. If he should appear, and demand a jury trial, it would be accorded him. Trial by a magistrate, trial with-

out a jury, is, in a constitutional sense, no trial; and no reason appears why, upon the forfeiture of a recognizance, the court may not be authorized to pronounce final sentence as well without as with such a trial. The consequence of the forfeiture of the appellant's recognizance under our statute (Pub. Stat. chap. 252, § 4) is, in effect, the same as it was in Massachusetts in 1857, except that there he might receive a more severe sentence than that appealed from. The difference is immaterial to the constitutional question.

The opinion of the majority of the court in *Jones v. Robbins* makes no answer to these views, nor to those expressed by Thomas, J., dissenting, who says (pp. 351-358): "I concur also in the opinion [of the majority] that the citizen cannot be subjected to trial for an offense visited by a capital or infamous punishment, without the intervention of a grand jury, which, standing between him and the power of the government and the passions of the prosecutor, shall say, upon their oaths, that there is good cause why he shall be subjected to trial. But there is, to myself, plainer and more solid ground upon which the conclusion rests, that a police court, or a justice of the peace, cannot be clothed with jurisdiction to try the citizen for an offense which will subject him to a capital or infamous punishment. It is obvious to remark that, if the intervention of a grand jury is all that is wanting to the validity of this jurisdiction, the legislature might at once provide for the return of indictments into the police court, and, reserving to the accused the right of appeal, might subject him to trial even for his life, before a single magistrate. I find it impossible to assent to any such conclusion, or to any reasoning that would lead to it. It seems to me plain that when the Constitution declares that 'the legislature shall not make any law that shall subject any person to a capital or infamous punishment . . . without trial by jury,' its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed, clog and obstruct his trial by jury; but the difference between that and this is in degree only. The subjecting the accused to one trial by a single magistrate obstructs the right of trial by jury, and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and holding to bail. . . . It subjects him to unnecessary, and often fatally burdensome, expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right 'freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay.' When you state the proposition that a man may be constitutionally tried for murder

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by a justice of the peace or a police court, or by any single judge, even after indictment, and that he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common-law rights secured by it, shrinks from the conclusion; yet it is to be observed that the 12th article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishment. They stand on the same ground. . . . It is not an unobstructed and unclogged right of appeal, which the 12th article secures, but an unobstructed and unclogged right of trial by jury." To these weighty words of Judge Thomas no satisfactory reply has ever been made.

The doctrine of *Jones v. Robbins* has not found favor. It is repudiated by the highest courts of the land. The question first arose in the United States district court of New York in *Re Dana*, 7 Ben. 1, 4, 5, decided in 1878. Dana was charged by information in the police court of the District of Columbia with having published a libel, and was arrested in New York. A warrant to authorize his being taken to Washington was refused on the ground that he would there be tried in a manner forbidden by the Constitution; that is to say, in the police court, without a jury, subject to a right of appeal to the supreme court of the District, and there be tried by jury. Blatchford, J., said the offense of libel is "one of the crimes which must, under the Constitution, be tried by a jury. The act of 1870 provides that the information in this case shall not be tried by a jury; but shall be tried by the court. It is true that it gives to the defendant, after judgment, . . . the right to appeal to another court, where the information must be tried by a jury, but this does not remove the objection. If Congress has the power to deprive the defendant of his right to trial by jury for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court without a jury on several successive convictions before allowing a trial by a jury. In my judgment, the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury." The case is cited and approved in *Callan v. Wilson* (1887) 127 U. S. 540, 554, 555, 82 L. ed. 223, 228, where it was unanimously held that a person accused of conspiracy is entitled, under the provisions of the Constitution of the United States, to a trial by jury, and that an act of Congress providing that he may be tried, convicted, and sentenced by the police court of the District of Columbia subject to a right of appeal to the supreme court of the District, is unconstitutional and void. The court say (pages 556, 557, 127 U. S. and pages 228, 229, 82 L. ed.): "The argument made in behalf of the government implies that, if Congress should provide the police court with a grand jury, and authorize that court to try without a petit jury all persons indicted—even for crimes punishable by confinement in the penitentiary—such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried

and sentenced in the police court, is given an unobstructed right of appeal to, and trial by jury in, another court to which the case may be taken. We cannot assent to that interpretation of the Constitution. Except in that class or grade of offenses called petit offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution conducted either in the name or by or under the authority of the United States secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine, or be imprisoned for not paying it, does not satisfy the requirements of the Constitution." However free and unobstructed the right of appeal may be, it subjects the accused to the trouble, expense, and anxiety of two trials on the issue of guilt or innocence, instead of one.

It is said that a trial by the magistrate instead of an examination is "rather a benefit to the accused than a burden or disadvantage to him," because on a trial he must be discharged if a "reasonable doubt of his guilt is not removed," while on examination he "must be held for probable cause," and that no more bail would be required on his appeal from a conviction than upon a binding over for his appearance. *State v. Craig*, 80 Me. 85, 89. But the question is upon the effect of the statute in the case of a conviction, not in the case of acquittal. The constitutional guaranty is not that the accused shall not be acquitted, but that he shall not be convicted and punished without a jury trial. *Com. v. Graves*, 112 Mass. 282. An examination is not a trial. The holding to bail thereupon is not even an accusation. It is merely a finding that, before the defendant is formally accused of the crime, the question of his guilt or innocence ought to be investigated by a competent tribunal, namely, the grand jury. 1 Chitty, Crim. L. 89. It adds nothing to the weight of the complainant's charge. The defendant may, without prejudice to his rights, or stain upon his reputation, other than that caused by the charge alone, waive an examination, and recognize without a hearing. It may be said that he may also waive a trial, and take his appeal. Possibly he may, but he goes forth as a convicted criminal, with merely a right to a new trial. He stands morally, and in respect to his character and good name, as if, after a jury's verdict of guilty, he is awarded a new trial. This is a hardship to which by the common law of England and the common law of the colony in 1784 he could not be subjected. The court in *State v. Craig* were apparently of opinion that no burden not pecuniary is or can be in law an unjustifiable burden upon the jury trial of the Constitution. In the minds of a great majority of mankind a stain upon their reputation or a blot on their character is a heavier burden than any mere pecuniary loss. If the award of an unobstructed jury trial upon

appeal answers the constitutional guaranty in one class of cases, it does in all. To sustain this statute will establish it as the constitutional law of the state that a police court may, if the legislature think fit, be invested with authority to try and determine all felonies, including murder, subject only to the right of appeal. The constitutional right to an accusation by information before being put on trial for a misdemeanor stands on the same ground as the right to indictment before being put on trial for a felony. Informations and indictments are classed together in the Constitution. Const. art. 88. If the former may be abolished, so may the latter, and, with them, grand juries. All the barriers which the common law interposed between malicious and groundless charges and a public trial may be removed. Anyone owing a grudge against his neighbor, by his mere accusation of crime, no matter how false and malignant, may compel him to undergo the humiliation and shame of being publicly arraigned and tried on the question of his guilt or innocence. In and prior to 1784 a justice of the peace had authority to try and determine, subject to appeal, those criminal offenses only that were punishable by a fine not exceeding 40 shillings, by whipping, or setting in the stocks. 1 Prov. Papers, 393, 395; 3 Prov. Papers, 187, 224; Prov. Laws 1761, pp. 1, 2, 48, 49; Prov. Laws 1771, pp. 9, 11, 16-18, 30, 31, 39, 40, 43, 52, 60. By the act of December 18, 1812 (Laws 1815, p. 328, § 3), a justice was authorized to punish larceny of property not exceeding \$6.67 in value by a fine of \$10 or imprisonment not exceeding thirty days. By the Revised Statutes he was given authority to try and determine all cases where the punishment was by fine not exceeding \$10 (Rev. Stat. chap. 223, § 1), certain cases punishable by imprisonment not exceeding thirty days (Id. chap. 113, § 15), and certain others punishable by imprisonment not exceeding six months (Id. chap. 116, §§ 2, 3). In the revision of 1867 a justice was given jurisdiction of all offenses where the punishment is by fine not exceeding \$20 or by imprisonment not exceeding six months or by both. Commissioner's Report, chap. 235, § 4; Gen. Stat. chap. 234, § 4.

The question of the constitutionality of this apparently increased jurisdiction of a justice of the peace has never been raised. Whether it is to be or may be sustained on the ground that the increase is ostensible rather than actual, that \$10 in 1812 and 1842 and \$20 in 1867 was no more in value than 40 shillings in 1784, and that imprisonment in jail for six months is not more than a just and reasonable equivalent for the barbarous punishment of a public whipping and setting in the stocks, or on the ground of usage and acquiescence. *Pierce v. State*, 13 N. H. 536, 573; *Copp v. Henniker*, 65 N. H. 179, 209, 20 Am. Rep. 194; *King v. Hopkins*, 57 N. H. 384, 356; *Keniston v. State*, 63 N. H. 87, 88; *Boston, O. & M. R. Co. v. State*, 62 N. H. 648, 649; *State v. Bowditch*, 18 Vt. 402, 413), is a question not raised, and not necessary to be considered.

Exceptions sustained.

Blodgett, Chase, and Parsons, JJ., concur.

Clark, Wallace, and Pike, JJ., dissent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Charles H. McCANN, *Plff in Err.*,
v.

CONSOLIDATED TRACTION COM-
PANY.

(59 N. J. L. 481.)

*1. If a servant is acting in the execution of the orders of his master, and by his negligence causes injury to a third party, the master will be responsible, although the act of the servant was not necessary for the proper performance of his duty to his master, or was even contrary to the orders of his master.

2. Anyone who undertakes to propel a street-railway car in a condition in which a reasonably prudent man would apprehend that it would frighten horses is bound to employ reasonable means to prevent injury to persons riding or driving along the street.

3. Where black coats were hanging on a projection at the side of a street water sprinkler operated by electricity by, along, and on the tracks of an electric street railway, and the coats, by waving to and fro in the wind, or by operation of the car sprinkler along the tracks, frightened a well-broken horse of gentle disposition, and caused injury to the plaintiff, who was thrown from his carriage, the question whether the employees of the defendant, the street-railway company, were in the exercise of reasonable care to prevent injury in operating such street-car sprinkler, and the consequent liability of the company for the injuries to the plaintiff, is a question which the trial court must submit to the jury for their determination, even though it be that the coats belonged to such employees, and were by them hung upon the projection of the car. The car being in such a condition as to cause fright to the horse and consequent injury to the plaintiff, it became a question for the jury to determine whether the defendant company was negligent in the performance of its duty to exercise reasonable care, by its servants, in the use of the public street, by operating the car while in this condition.

4. *Quære*: Can the operation of a street-railway car, painted a conspicuously bright and attractive color, along a public street, causing fright to a horse, with injury resulting therefrom, constitute negligence on the part of the street-railway company, and render it answerable for injuries resulting from such cause?

(March 9, 1897.)

ERROR to the Essex County Circuit to review a judgment in favor of defendant in an action brought to recover damages for personal injuries caused by the frightening of plaintiff's horse through defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Howard W. Hayes, for plaintiff in error:

Defendant was operating the sprinkler, with the coats hanging on it, and it was an unusual object, and calculated to frighten a well-

broken horse. That is enough evidence of negligence to go to the jury.

Mallory v. Griffey, 85 Pa. 275; *Jeffrey v. St. Pancras Vestry*, 68 L. J. Q. B. N. S. 618; *Watkins v. Reddin*, 2 Fost. & F. 629; *Harris v. Mobbs*, L. R. 8 Exch. Div. 268; *Phelon v. Stiles*, 43 Conn. 426; *Howe v. Young*, 16 Ind. 812; *Smith, Mast. & S. Blackstone's ed.* p. 295.

Mr. Joseph Coult, for defendant in error:

The natural presumption was that the coats belonged to the employees operating the sprinkler, and that the defendant company was not responsible for their unauthorized acts not within the scope of their employment.

Smith, Mast. & S. 4th ed. 1886, p. 299; *Walton v. New York Cent. Sleeping Car Co.* 139 Mass. 556.

Lippincott, J., delivered the opinion of the court:

This is an action to recover damages for personal injuries. The defendant in error (the defendant below) operates an electric street car line of railway in the city of Newark. On the line of its street railway, and on the tracks thereof, the defendant company, at times, for the purpose of allaying dust, operates a water sprinkler. This car or tank is propelled by electricity, and operated and managed by a motorman and one or two other employees of the defendant. It is a car upon which a large tank of water is placed. On August 11, 1895, the plaintiff in error was driving a horse, attached to a low top buggy, along Washington avenue, one of the streets upon which the car was being operated, when his horse took fright at the car, became unmanageable, and turned sharply around, and threw the plaintiff out of the buggy, and severely injured him. At the conclusion of the evidence on the part of the plaintiff, the trial judge, on motion of defendant, directed a nonsuit.

The evidence of the plaintiff shows that the horse was a well-broken animal, and of a gentle disposition, and although very often, both day and night, it had been driven on the streets in the presence of the ordinary electric cars, had never before become frightened by them. The plaintiff was driving along Washington avenue to the north, while the sprinkling car was approaching from the opposite direction. When about 25 feet apart, the horse became frightened. The plaintiff, in his evidence, says that the car was "an enormous big tank, they had on trial there, painted yellow." The evidence also shows that upon a projection of the car, at or near the rear thereof, there were hanging two black coats, which, by the motion of the car, were caused to swing to and fro, and wave in the air something like a flag. The plaintiff describes them as a blanket, which kept swinging out. Other witnesses speak of the objects as coats hung upon a projection from the side of the car at the rear thereof, which, from the motion of the car, swung to and fro. An ordinary electric car was going in the same di-

*Headnotes by LIPPINCOTT, J.

NOTE.—As to the frightening of a horse by a railroad locomotive, see *Texas & P. R. Co. v. Scoville* (C. C. App. 5th C.) 27 L. R. A. 179; *Bittle v. Camden* 38 L. R. A.

& A. R. Co. (N. J.) 23 L. R. A. 283; *Omaha & R. Valley R. Co. v. Clarke* (Neb.) 23 L. R. A. 504; and *Doster v. Charlotte Street R. Co.* (N. C.) 34 L. R. A. 481.

rection as the plaintiff, while the tank car was approaching in the opposite direction. The cars passed each other, and, when the tank car came in view, the horse stopped, turned sharply around, and threw the plaintiff out. The horse, after so turning around, became at once manageable, and the plaintiff was afterwards driven home in the buggy. The plaintiff testifies that the swinging coats on the sprinkler scared the horse. The plaintiff, with the horse, on this same day, had passed the ordinary electric cars, to which the horse had paid no attention. Some evidence was admitted, over objection, to show that the car was in a condition, both by reason of the bright yellow color, and because of the moving coats thereon, calculated to frighten an ordinary well-broken horse. It is not here intended to consider the admissibility of the evidence that the color of the car was calculated to frighten horses, and it is not deemed in any sense to have been the cause of the accident to the plaintiff in this case. Upon this motion to nonsuit it must be taken as an indisputable conclusion that the black coats were hanging on the projection of the sprinkler, waving to and fro; and whether the operation of the sprinkler in this condition by the employees of the defendant in charge of it constituted negligence, causing the horse to be frightened, and consequent injury to the plaintiff, was a question which should have been submitted to the jury.

The defendant's right to use a sprinkler upon its tracks for lawful purposes cannot be denied. It has as much authority in law to use the sprinkler as it has to operate its ordinary traction cars, but its use of the highway in this manner must be exercised with reasonable care, and thus so far protect from injury others who are in the lawful use of the street; and this reasonable care is as well applicable to the condition in which the cars are operated as to the mere act of operation or propulsion along the street. If the sprinkler was in a condition calculated to frighten the horse, and thus cause injury, it certainly became a question for the jury to determine whether the defendant had neglected to exercise reasonable care in this respect or not. The liability for injuries resulting from horses being frightened by unusual sights in the highway caused by a defendant has been distinctly recognized, and the question whether the defendant was making a negligent use of the highway, to the injury of the plaintiff, was one which required that the learned trial judge submit it to the jury.

There was a contention of the plaintiff that the conspicuous color of the sprinkler caused the fright of the horse and injury. This cause of liability has been suggested in some cases (*Jeffrey v. St. Pancras Vestry*, 63 L. J. Q. B. N. S. 618); but this contention under the evidence here has not been considered, because the trial judge directed the motion to nonsuit, upon the assumption that it had been established that the swaying of the coats caused the fright of the horse, and consequent injury to the plaintiff. The nonsuit by the trial judge was based upon two grounds: First, that there was no evidence that the coats were owned by the employees of the defendant,

operating the car; and, secondly, if they did belong to such employees, still the act of hanging them upon the projection at the side of the sprinkler was not an act authorized by the defendant company, nor was it an act done in the course of the employment of the servants of the defendant in operating the sprinkler, and therefore no liability on the part of the defendant had been established. The gravamen of the action was that the sprinkler was being operated by the employees while in a dangerous condition; that is, in a condition calculated to frighten the horse. There is no evidence as to who hung the coats upon the projection, but the fact is well established that they had been hanging in this condition for some time previous to the time of the accident, and the car was being operated with them in this position. It would seem as if it was not material whether these coats were placed there by the defendant company, by its employees, or by a stranger, so long as the existence of them in this position created a dangerous situation, of which the employees of the defendant had knowledge, and still continued to operate the car. The fact is that they were upon a car sprinkler of the defendant company, which was being operated by its employees, who were bound to the exercise of reasonable care in its operation, and thus protect others from injury. It was conceded on this motion that a car with these coats swaying upon it was calculated to frighten a well-trained horse of gentle disposition; but, whether conceded or not on this motion to nonsuit, the fact must be considered, and it certainly remained for the jury to determine whether reasonable care had been exercised in the operation of the sprinkler. Besides, the master is liable for all incidental acts of his employees in the course of his employment; and if the coats were worn by the motorman or other employees, as necessary to be worn in the work of operation of the sprinkler, then the act of hanging them upon this projection was an act incidental to their employment and would render the company responsible for such an act; and if such an act created a dangerous condition, in its further operation, there is no known rule of law to be invoked to protect the defendant from the responsibility for the injurious results of such operation; and, generally speaking, the defendant company owed the duty to the plaintiff to exercise reasonable care to keep the sprinkler in a condition that injury should not arise to others; and if its employees used it when it was in a dangerous condition, or they themselves, in operating it, did that which rendered it dangerous, the defendant company became liable for the consequences. *Phelon v. Stiles*, 43 Conn. 426. In these respects the question for the jury would have been whether reasonable care had been exercised, and it is this question which, under this evidence, should have been submitted to the jury. *Comben v. Belleville Stone Co.* 59 N. J. L. 226, and cases cited.

In *Mallory v. Griffee*, 85 Pa. 275, the questions whether the fright of a horse was occasioned by a large stone along the highway, and whether it was calculated to frighten an ordinary, quiet, and well broken horse, and whether the defendant was negligent in placing

such stone there, were left to the jury. *Jeffrey v. St. Pancras Vestry*, 68 L. J. Q. B. N. S. 618, was a case where a steam roller frightened plaintiff's horse, by puffing out steam. The question of recovery was held to have been properly submitted to the jury. In this latter case, Collin, J., speaking of the construction of a carriage for use on a highway, says: "But, on the other hand, if he has his carriage constructed and painted in such a manner as to be very conspicuous indeed, it might then become a nuisance." Liability has been established where a horse was frightened by a plow being left alongside a public road. *Harris v. Mobbs*, L. R. 8 Exch. Div. 268; where the noise and appearance of a steam engine were calculated to frighten horses (*Watkins v. Reddin*, 2 Fost. & F. 629-684). In *Phelon v. Stiles*, 48 Conn. 426, the servant, in delivering bran for his master, left several bags by the roadside, his object being to save unnecessary transportation, and to give him time to attend to some private business of his own; but it was held that he was acting in his master's employment, and that the latter was liable for an injury caused by the fright of a horse caused by the bags of bran. In *Hove v. Young*, 16 Ind. 812, the plaintiff's complaint averred that his horse was frightened, and his buggy damaged, by the defendant's driving his horse and wagon along the highway in a reckless manner. On demurrer the complaint was held good. *Elliott, Roads & Streets*, p. 624.

The general rule is a very clear one that the master is liable for any act of his servant done within the scope of his employment, and "if a servant is acting in the execution of his master's orders, and by his negligence causes in-

jury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to the master, or was even contrary to his master's orders." *Smith, Mast. & S. Blackstone's ed.* p. 295, and cases cited. The case of *Walton v. New York Cent. Sleeping Car Co.* 139 Mass. 556, is cited as supporting the trial court in this nonsuit. That was a case where the porter of a drawing room or parlor car threw a package or bundle, containing soiled clothing and other articles, from the train. Arrangements by the porter had been previously made that some person at the place should pick up and take care of the package for him. The package struck the plaintiff, and injured him. It was held that the act of the porter was not the act of the company, nor in the course of his employment, but for his own convenience. But the distinction between this case and the one at bar is clear. In that case the porter was not operating a car in a dangerous condition, nor a car which he had rendered dangerous by his act, both of which instances would have been in the course of his employment; nor was his act incidental to his employment, but an act for his own convenience solely,—as much so as if he had no connection whatever with the car.

One other ground is urged in support of the nonsuit, and that is that the proof of negligence varies from the averments of the declaration; but it is sufficient to say that the rulings of the trial court excluded any motion for amendment which the plaintiff could have been permitted to make. For these reasons, *I shall vote to reverse the judgment of nonsuit.*

NORTH CAROLINA SUPREME COURT.

Lilly E. ROBBINS

v.

A. S. RASCOE and Wife, *Appls.*

(120 N. C. 79.)

The delivery of a deed to his natural child by the grantor to the deputy clerk of the court with instructions to have it proved by the subscribing witness before the clerk, who was then absent from the office, and to have it duly registered, is complete and passes title, and cannot be defeated by the grantor's subsequently changing his mind and recalling the deed and destroying it before it had been proved, although the grantee knew nothing of the deed or of its recall.

(*Clark, J., dissents.*)

(March 9, 1897.)

APPEAL by defendants from a judgment of the Superior Court for Bertie County in favor of plaintiff in a proceeding to quiet title to real estate. *Affirmed.*

NOTE.—As to delivery of deed by leaving it for record, see also *Lewis v. Watson* (Ala.) 22 L. R. A. 297; *Lee v. Fletcher* (Minn.) 12 L. R. A. 171, and note; 88 L. R. A.

The facts are stated in the opinion.

Mr. Francis D. Winston for appellants
Messrs. Martin & Peebles for appellee.

Faircloth, Ch. J., delivered the opinion of the court:

The natural father of the plaintiff executed a deed signed and sealed, conveying property to the plaintiff, and "delivered said deed to the deputy clerk of the superior court of Bertie county, with instructions to have the same proved by the subscribing witness before the clerk of said court, who at the time was absent from his office, and to have the same duly registered;" and some time thereafter, before any probate was had, without plaintiff's knowledge or consent, the grantor took the deed from the deputy clerk, and carried it away from the office, stating that he had changed his mind about the delivery of the same; and after his death his executor destroyed the deed. Plaintiff knew nothing of the deed, or of its recall. The court held that the delivery was complete, and the title passed. Exception and appeal.

also some cases in note to *Taylor v. Street* (Ga.) 5 L. R. A. 121.

This is the only question in the case, the defendants denying that there had been a delivery.

Upon principle and the authorities we must affirm the judgment. The principle is that when the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete, and the title passes at once, although the grantee may be ignorant of the facts and no subsequent act of the grantor or anyone else can defeat the effect of such delivery. In *Threadgill, Hough, v. Jennings*, 3 Dev. L. 884, it is stated that "a deed is good if delivered to a stranger, to the use of the obligee," and at "the time it was thus delivered." In *Tate v. Tate*, 1 Dev. & B. Eq. 26, David Tate executed a deed of bargain and sale conveying land to his infant children, and delivered the deed to their uncle, Hugh Tate, in whose possession it remained until his death, when the bargainor went to the widow of Hugh Tate, and obtained the deed before it was registered, and canceled it by tearing off his signature and that of the witness; and he (David Tate) conveyed the same property to another. The delivery of the deed was upheld, the court saying: "When the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered as a deed for the benefit of the grantee; and it is for the maker to show that it was on condition, as an escrow. Such a delivery to a third person is good, and the deed presently operates, and infants may assent to such a deed to themselves, and their assent is presumed until the contrary appears,"—citing several English cases. In *Kirk v. Turner*, 1 Dev. Eq. 14, Henderson, J., says: "A delivery of a deed, is in fact, its tradition from the maker to the person to whom it is made, or to some person for his use; . . . for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is, not that he will accept, but that he does." In *Morrow v. Alexander*, 2 Ired. L. 388, a father residing in South Carolina signed and sealed a deed to his daughter, residing in North Carolina, and delivered it in South Carolina to his son, to be given to his daughter. Held by this court that the delivery to his son was complete and the title passed. *Gaskill v. King*, 12 Ired. L. 211, sustains and cites *Tate v. Tate*, 1 Dev. & B. Eq. 26. In *McLean v. Nelson*, 1 Jones, L. 896, the court says: "When one delivers a deed to a third person, in the absence of a grantee, the latter is presumed to accept it; so that it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may, of course, be rebutted by proving that the party refused to accept it; but, until he refuses, his assent is presumed, for the purpose of giving effect to the instrument as a deed. *Ut res magis valeat quam pereat*." In *Phillips v. Houston*, 5 Jones, L. 302, the donor signed and sealed the deed, and delivered it to Holland, the witness, "and requested him to take it to the courthouse and have it recorded," which was not done until after the donor's death. It was held that the delivery to the first person (Holland) was perfect, and it made no difference

whether it was registered before or after the donor's death, the court saying: "In the case of *Hall v. Harris*, 3 Ired. Eq. 300, it was said by the court that the delivery of a deed 'depends upon the fact that a paper signed and sealed is put out of the possession of the maker.' That, we think, is the true test, and if it appear that the grantor or donor has parted with the possession of the instrument to the grantee or donee, or to any other person for him, the delivery is complete, and the title of the property granted or given thereby passes. But it will be otherwise if the grantor or donor retain any control over the deed; as if he, when he hands it to a third person, requests him to keep it, and deliver it to the person for whom it is intended, unless he shall call for it again. These principles will be found to govern all the cases, beginning with *Tate v. Tate*, 1 Dev. & B. Eq. 22,"—and then a large number of North Carolina cases are cited. This principle has governed this court to the present time. *Helms v. Austin*, 116 N. C. 751; *Frank v. Heiner*, 117 N. C. 79. The case of *Adams v. Adams*, 88 U. S. 21 Wall. 185, 22 L. ed. 504, is well argued by the court, and the same conclusion arrived at. It is there stated upon the ancient authorities that if A execute a deed to B, and deliver it to C, though he does not say to the use of B, yet it is a good delivery to B if he accepts of it, and it shall be intended that C took the deed for him as his servant; that it is conclusive unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed. There are some decisions in the states holding otherwise, but they are not in harmony with the higher and better authorities. *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542, was a controversy between a grantee and a mortgagee, and was decided in conformity to the laws of Nebraska. *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554, is a decision to the contrary, but the annotator of 4 Kent, Com. calls attention to this case as out of line with the better decisions. In *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416, the grantor left the deed with the register to be recorded, his daughter being the grantee. The deed was dated October 2, 1823, and was recorded October 3, 1823. An attachment was levied on the same property on October 4, 1823. The court held unanimously that the delivery was equivalent to an actual delivery to the grantee personally. In the case before us, that the grantor intended a delivery, and that the title should pass, at the time he put the deed in the hands of the deputy clerk with instructions to have it probated and registered, is manifest from his statement when he took the deed from the deputy clerk, saying "that he had changed his mind about the delivery of the same, owing to some conduct of the plaintiff that displeased him."

Affirmed.

Clark, J., dissenting:

It is elementary law that a deed is "a written instrument, signed, sealed, and delivered," and that the delivery is as essential as the signing and sealing. There are cases which hold that registration raises a presumption of acceptance by the grantee (1 Devlin, Deeds, § 392, and cases cited), all of which hold that such

presumption can be rebutted by evidence. There are cases where a deed is delivered to a party for the benefit of infant children, in which case, as they cannot accept, the law presumes acceptance (*Ellington v. Currie*, 40 N. C. 21, *Gregory v. Walker*, 38 Ala. 26); and also cases where a deed has been delivered to a third person, to be registered at the grantor's death, on which event, its recall by the grantor being impossible, a delivery is presumed. But the doctrine of constructive delivery has been extended no further, and there is no case applying it to the facts of the present action, and many to the contrary. Here the deed, which was a deed of gift, was not delivered to the grantee, nor to her agent, nor even to anyone to deliver it to her; it was not accepted by her, nor was its existence then known to her, nor till after its revocation by the grantor. It was not even registered, and hence there is not the presumption of acceptance or delivery. The grantor gave it to a messenger, the deputy clerk, who was to have the clerk probate it, and was then to hand it to the register, who was to record it; but before it got into the hands of the register—indeed, before it was probated—the grantor changed his mind, and took back the deed. Here, certainly, there was no delivery, and no presumption of delivery. In *Parmelee v. Simpson*, 72 U. S. 5 Wall. 81, 18 L. ed. 542, the United States Supreme Court held that, though the deed is delivered to the register and recorded, this is not a delivery if the grantee is ignorant of the existence of the deed, as this rebuts the presumption of acceptance raised by the registration, an acceptance being necessary to constitute delivery. In *Derry Bank v. Webster*, 44 N. H. 264, 268, it is said: "That the mere sending of the deed to the registry for record is not a delivery, is well settled,"—citing *Barnes v. Hatch*, 3 N. H. 804; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Samson v. Thornton*, 3 Met. 281; *Oxnard v. Blake*, 45 Me. 602; 4 Kent, Com. 455, 456. Even though the deed was executed, and sent to the register in consequence of a previous agreement that this should be done, if the grantee did not know of its being sent (*Jackson, Eames, v. Phipps*, 12 Johns. 418), the acceptance is essential to a delivery (*Jackson M'Crea, v. Dunlap*, 1 Johns. Cas. 114, 1 Am. Dec. 100; *Jackson, Ten Eyck, v. Richards*, 6 Cow. 617). It is true that the registration raises a presumption of acceptance, and that the subsequent acceptance of a deed registered without the knowledge of the grantee is sufficient (*Thayer v. Stark*, 6 Cush. 11), unless in the meantime the rights of third persons have accrued, as by an attachment against the grantor, or registration of a deed to another (*Harrison v. Phillips Academy*, 12 Mass. 461; *Jackson, Russell, v. Rowland*, 8 Wend. 666); but the assent must be made before the grantor revokes his intention to convey (*Canning v. Pinkham*, 1 N. H. 357). In *Hawkes v. Pike*, 105 Mass. 561, 7 Am. Rep. 554, the grantor gave the deed to the register to be recorded, without the grantee's knowledge. The next day the grantor called, the deed being then partially recorded, and asked to recall it. The register refused till he had completed the recording, and then handed the deed back. It was held

38 L. R. A.

that no title passed. To same purport, that even a registration of a deed, if without the grantee's assent, is not a delivery, is 1 Devlin, Deeds, § 290, and numerous cases there cited. It must be recalled that here there was no registration, hence no subsequent assent which could turn it into a delivery, and no presumption of delivery. If there had been such presumption, it would have been rebutted by the admission that the grantee had no knowledge of the deed till after its recall. Indeed, the deed was not only not delivered, and not registered, but it did not even get into the hands of the register, and was never in a condition to be registered, since it was recalled by the grantor before it was probated. It was given to a subordinate to hand to the clerk to probate, and then to be carried to the register, but recalled before there was any probate by the clerk, or any delivery to the grantee, or any acceptance, or even knowledge, on her part, or any registration which could have raised even a presumption of delivery. There is no precedent which will make it a valid deed in this absence alike of probate, of delivery, of acceptance, and of registration. This case differs from *Phillips v. Houston*, 5 Jones, L. 302, and other cases cited in the opinion of the court, in that here the deed was not delivered to anyone to hold for the grantee. It was delivered to the deputy clerk, who was the agent of the grantor, not of the grantee, since his duty was to have it probated for the grantor, and was then to convey it to the register. At no time was it in the hands of anyone for the use of the grantee, or who was directed by the grantor or authorized to deliver it to the grantee. While the execution was still incomplete for lack of delivery to the grantee, or to anyone for her, the grantor revoked what he had done, and refused to perfect the execution, and recalled the inchoate instrument.

E. WILSON *et al.*

v.

J. W. LEARY *et al.*, *Appls.*

(120 N. C. 90.)

1. A conveyance in fee to a corporation which has a limited existence is not limited to the life of the corporation, and does not give the grantor a resulting trust which will take effect when the corporation ceases to exist.
2. The common law is simply the "right reason of the thing" in matters as to which there is no statutory enactment.
3. A decision which misconceives and wrongly declares the law, whether it is an ancient or a recent one, is subject to be overruled.

(February 16, 1897.)

NOTE.—The above case by overruling an early decision of the same court as based on an unjust rule of the common law probably marks the final disappearance from the courts of that now "obsolete and odious" rule.

As to the right of a corporation to alienate its property, see *Chamberlain v. North Eastern R. Co.* (S. C.) 25 L. R. A. 139.

APPEAL by defendants from a judgment of the Superior Court for Bertie County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Battle & Mordecai for appellants.

Messrs. Francis D. Winston and Shepherd & Busbee for appellees.

Clark, J., delivered the opinion of the court:

The plaintiffs must recover upon the strength of their own title, and not upon defects, if any, in the title of the defendants. The conveyance by their ancestor, Henderson Wilson, was in fee simple to trustees "to convey to Oriental Lodge, No. 24, I. O. O. F., when the same shall have been incorporated by the legislature of North Carolina." It was subsequently incorporated. Though no conveyance by such trustees to the lodge is shown, the learned counsel for the plaintiffs admitted that the statute of uses (27 Hen. VIII.), in force in this state, by virtue of our statute executed the use without the execution of a deed. The grant of the trustee being in fee simple, the *cestui que trust* took in fee. *Holmes v. Holmes*, 86 N. C. 205. When the lodge ceased to exist for want of members, whether its property passed to the grand lodge of I. O. O. F. in this state, of which Oriental Lodge No. 24, was a member, or escheated to the state for the university (Code, § 2637), does not concern the plaintiffs, and is not before us. The title in fee simple had passed out of the grantor, and, having vested in the Oriental Lodge, upon the extinction of the latter as a corporate entity, its property by no just construction could return to those whose ancestor had conveyed it in fee upon receipt of the purchase money, which he and they have kept and enjoyed. The plaintiffs' counsel insist, however, that at the time of the conveyance the Revised Statutes (chap. 26, § 17) provided that a corporation, unless otherwise specially stated in its charter, had existence for only thirty years; and, as there was no special provision in his charter, the grantor only parted with the property for thirty years, and held a resulting trust. But the conveyance was in fee, and a corporation limited in duration can take a fee-simple conveyance just as a natural being, whose existence is also limited. Either may convey away the property, and upon the death of either without having disposed of it the property will go to pay creditors, to heirs, to stockholders, or as an escheat, according to the circumstances; but in neither case is there any reverter to the grantors. On the death of a corporation the property is usually administered by a receiver, and on the death of a natural person by the personal representative, or passes to the heirs. By the Constitution of North Carolina (art. 8, § 1) all corporations (if chartered since 1868) are subject to extinction at any time, or their duration can be abridged or extended, at the will of the legislature. It would now be a startling doctrine that upon the repeal of a charter all real estate, though conveyed to the corporation absolutely in fee simple, reverts, as at common law, to the original grantors, to

the total exclusion and loss of creditors and stockholders. On the contrary, such property, when not held on a base or qualified fee, as was the case in *State v. Rives*, 5 Ired. L. 297 (though it has since been held that there are no qualified fees in this state, — *School Committee v. Kesler*, 67 N. C. 443), would be administered to pay creditors, the surplus being divided among the stockholders. If there were no stockholders, then the question might arise whether the property had escheated to the state; but certainly the grantors, upon such corporation becoming extinct, would have no greater right to a reversion than would the grantors to any other corporation. It is true, it was held in an opinion by Gaston, J., in *Fox v. Horah*, 1 Ired. Eq. 358, that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the state, and its choses in action became extinct; and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtors being absolved by the dissolution. Judge Thompson (5 Thomp. Corp. § 6720) refers to this decision "in accordance with the barbarous rule of the common law" as "probably the last case of its kind," and notes that it has since been, in effect, overruled in *Von Glahn v. De Rosset*, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 Kent, Com. 307, note), says: "This rule of the common law has, in fact, become obsolete and odious," and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations. 5 Thomp. Corp. § 6730. The subject is thoroughly discussed by Gray on Perpetuities, §§ 44-51, and he demonstrates that my Lord Coke's doctrine rested on the *actum* of a fifteenth century judge (Mr. Justice Choke, in the *Prior of Spaulding's Case* [1467] 7 Edw. IV. 10-12), and is contrary to the only case deciding the point (*Johnson v. Norwary* [1622] Winch, 37), though Coke's statement has often been referred to as law.

But, whatever the extent of this rule at common law, if it was the rule at all it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that "upon dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not escheat to the state." 5 Thomp. Corp. § 6746; *Owen v. Smith*, 81 Barb. 641; *Towar v. Hale*, 46 Barb. 361. The crude conceptions of corporations naturally entertained in a feudal and semibarbarous age, when they were few in number, and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the fanciful reason given by him (Co. Litt. 136) for the reverter of their real estate, to wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited. That which is termed "the common law" is simply the "right reason of the thing" in matters as to which there is no statutory enactment. When it is misconceived, and wrongly declared, the common

rule is equally subject to be overruled, whether it is an ancient or recent decision. Upon the facts agreed, judgment should be entered below against the plaintiffs, dismissing their action.

Reversed.

Lizzie A. BROWN, *Appt.*,

v.

Jesse R. BROWN.

(.....N. C.)

1. The disabilities of married women at common law still exist as to their person and property, except to the extent of changes by legislation in express terms or by reasonable construction of the same.

2. An action by a married woman who has been abandoned by her husband, against one who induced the abandonment, may be brought in her own name without joining her husband, under statutes giving an abandoned wife right to contract as a free trader, and also to set up, if sued for a tort, any counterclaim growing out of the same transaction, and recover affirmative judgment if her damages exceed those of the other party.

(*Furche, J., dissents.*)

(October 12, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court for Pasquotank County in favor of defendant in an action brought to recover damages for causing plaintiff's husband to abandon her. *Reversed.*

The facts are stated in the opinion.

Mr. E. F. Aydlett, for appellant:

The plaintiff can maintain her cause of action under either one of the sections of the Code, because her right of action is property, and she can sue for her property under the statute, and under the Constitution of North Carolina.

The right of action, though a tort to the wife, is a chose of action.

Kelly, *Contracts of Married Women*, § 4, p. 35, chap. 8, p. 44; *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606; *Muselman v. Gallagher*, 32 Iowa, 383; *Pancoat v. Burnell*, 32 Iowa, 394; *Rangler v. Hummel*, 37 Pa. 180; *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Hennies v. Vogel*, 66 Ill. 410; Cooley, *Torts*, 227 note; N. C. Const. art. 10, § 6; Bishop, *Married Women*, § 271; *Skuler v. Millsaps*, 71 N. C. 297; Pom. Rem. & Rem. Rights, §§ 236, 246.

Because plaintiff alleges that her husband has abandoned her, and she can sue as a freetrader.

Finley v. Saunders, 98 N. C. 463; *Heath v. Morgan*, 117 N. C. 508; *Hall v. Walker*, 118 N. C. 377; *Gregory v. Paul*, 15 Mass. 31; Schouler, *Dom. Rel.* § 219; *Benadum v. Pratt*, 1 Ohio St. 404; Kelly, *Contracts of Married Women*, 195; 2 Bishop, *Married Women*, § 276; *Rhea v. Rhenner*, 26 U. S. 1 Pet. 105, 7 L. ed. 72; *Prescott v. Fisher*, 22 Ill. 390; *Love*

v. Moynahan, 16 Ill. 278, 63 Am. Dec. 306; *Lawrence v. Spear*, 17 Cal. 421; *Hazelbaker v. Goodfellow*, 64 Ill. 238.

The action for the loss of the husband's affections will lie for the wife, as it is a tort, and where there is a wrong there is a remedy.

Cooley, *Torts*, p. 227; *Holleman v. Harvard*, 119 N. C. 150, 34 L. R. A. 303; *Westlake v. Westlake*, 84 Ohio St. 621, 32 Am. Rep. 397; Bishop, *Mar. & Div.* §§ 1357, 1358, 1359, also §§ 1355-1353; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 553.

Messrs. G. W. Ward and Shepherd & Bushee, for appellee:

The husband must be joined with the wife. N. C. Code, §§ 178-185.

A husband refusing to join with his wife must be made a party defendant.

N. C. Code, §§ 184, 185; *McGlennery v. Miller*, 90 N. C. 215; *Barnes v. Barnes*, 104 N. C. 617; *Finley v. Saunders*, 98 N. C. 462.

A common law a wife could not maintain such action.

Westlake v. Westlake, 84 Ohio St. 621, 32 Am. Rep. 397; *Van Arnam v. Ayers*, 67 Barb. 544; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Duffies v. Duffler*, 76 Wis. 374, 8 L. R. A. 420.

No action that could not have been maintained jointly by the husband and wife, for the violation of the personal rights of the wife before the statute was passed, could be maintained after the passage of the statute.

Mann v. Marsh, 35 Barb. 63.

Faircloth, Ch. J., delivered the opinion of the court:

The sole question presented is whether a married woman, being abandoned by her husband, can maintain an action in her own name for a tort. This question has not been heretofore decided by this court. The case is here upon complaint and demurrer, and the allegations of the complaint are at present taken as true. The complaint alleges that the defendant, who is the father of her husband, has, by persuasion and numerous wilful and unlawful acts, caused her husband to wholly abandon and neglect her, to her great damage, etc. The demurrer is grounded on a denial of her right to maintain this action in her own name without the joinder of her husband. The disabilities of married women at common law still exist, as to their person and property, except to the extent of changes by legislation in express terms, or by reasonable construction of the same. These changes tend to relax the common-law rules, and must receive a reasonable construction in the spirit of their enactment. Our Constitution and statutes have made very material and important changes in the status of married women in this state by extending protection to their person and separate property, and allowing them the privilege of free traders, suing in their own names, etc., in certain conditions. Code, § 1832, declares that every woman whose husband shall abandon her "shall be deemed a free trader . . . so far as to be competent to contract and be contracted with," etc.; and this section has

NOTE.—For action by wife on account of the enticement of her husband from her, see *Clow v. Chapman* (Mo.) 26 L. R. A. 412, and cases cited in footnote thereto; also *Kroesin v. Keller* (Minn.) 37 88 L. R. A.

L. R. A. 685; *Hodgkinson v. Hodgkinson* (Neb.) 27 L. R. A. 120; and *Price v. Price* (Iowa) 29 L. R. A. 150.

been held to be constitutional. *Hall v. Walker*, 118 N. C. 377. These privileges, as well as those found in Code, § 178, necessarily imply responsibilities and liabilities in certain cases. *Finley v. Saunders*, 98 N. C. 462, was an action for possession of land against a wife, whose husband had abandoned her, and it was held upon good authorities that the action could be maintained against her alone. *Heath v. Morgan*, 117 N. C. 508, was an action for personal property unlawfully withheld by the wife, whose husband had abandoned her, and could not be served with process, and it was held that the nonjoinder of the husband was no defense. If a wife then, whose husband has abandoned her, be sued in tort, she may set up a counterclaim for any damages arising out of the same "transaction," disclosed in the complaint; and, if her damages exceed those of the complainant, she is entitled to a judgment for the excess. Code, § 244; *Bitting v. Thaxton*, 72 N. C. 541; *McKinnon v. Morrison*, 104 N. C. 354. If, then, she can recover damages by way of counterclaim, which is only her cross action, we fail to see why she cannot do so by direct action. Upon these cases, and upon reason, we think she is entitled to prosecute her claim in this action.

Error.

Furches, J., dissenting:

I do not agree with my brethren. At common law the plaintiff could not have brought and maintained this action. *Pippen v. Wesson*, 74 N. C. 487. It is admitted in the opinion of the court that the common-law disabilities still exist, unless they have been removed by legis-

lation. Section 1882 of the Code was cited, and is relied on, as making the change that authorized this action. But this section provides that in cases where the wife is abandoned by her husband she "shall be deemed a free trader so far as to be competent to contract and be contracted with and to bind her separate property." To make this section apply, the action must be upon contract, express or implied, or for a tort growing out of contract, or connected with her separate property, or for the recovery of her separate property; and I submit that this action is for neither. *Hall v. Walker*, 118 N. C. 377, holds that § 1882 of the Code is constitutional and no more. It puts no construction upon this section. *Finley v. Saunders*, 98 N. C. 462, was an action for land, and *Heath v. Morgan*, 117 N. C. 508, was an action for personal property, and I submit, have no bearing upon this action. *Bitting v. Thaxton*, 72 N. C. 541, and *McKinnon v. Morrison*, 104 N. C. 354, only established the fact that a defendant who is entitled to an action against the plaintiff may set up his right of action by way of counterclaim in those cases provided for by statute. They do not apply in this case, because the plaintiff has no right of action. I am forced to this conclusion by reasoning from common-law principles, and I am sustained in this conclusion by authority. 9 Am. & Eng. Enc. Law. 834, notes, pp. 8, 9; *Van Arnam v. Ayers*, 67 Barb. 544; *Westlake v. Westlake*, 34 Ohio St. 621, 83 Am. Rep. 397.

For these reasons and upon these authorities, I am of opinion the action cannot be maintained.

NEBRASKA SUPREME COURT.

NORFOLK STATE BANK, *Appt.*,

v.

Martin T. MURPHY *et al.*

(40 Neb. 735.)

***A judgment of a district court in an action commenced prior to the term at which it was rendered, except a judgment**

***Headnote by NORVAL, Ch. J.**

NOTE.—Priority of judgment over conveyances made after beginning of term.

- I. English rule.
- II. American comments on English rule.
- III. States in which the judgment relates back.
- IV. General American rule.
- V. Judgment with stay of execution.
- VI. Special cases.

I. English rule.

The rule of the common law was that for some purposes at least a judgment would relate back to the first day of the term at which it was rendered. The precise limits of this rule are rather difficult to ascertain. When it was first formulated judgments were not liens on land, so the question of priority over conveyances made after the beginning of the term could not arise. And about the 38 L. R. A.

by confession, is a lien upon the lands and tenements of the judgment debtor within the county from the first day of the term, no matter on what day of the term it was actually pronounced; and where a mortgage on the real estate of the defendant is executed and recorded during the term, but before the rendition of such judgment, the lien of the judgment is superior to that of the mortgage.

(*Ryan and Ragan, OC., dissent.*)

time that land was made subject to the payment of judgments, it was provided by statute that the lien should not relate back so as to prejudice bona fide purchasers. So that the principal effect of the doctrine of relations seems to have been to render valid judgments which were entered after the death of defendant or to prevent one creditor from obtaining priority over others who obtained judgments at the same term. Where there was no reason for the court to consider the question of exceptions it has been stated in the broadest terms that the judgment relates to the first day.

Comyns, Dig. Temp. C, 7, says the term regularly is esteemed as one day, and therefore if a deed be alleged to be enrolled in such term it shall be intended the first day.

In Lord Porchester v. Petrie, 3 Dougl. 261, it is said it is an ancient and fundamental maxim that

(June 5, 1894.)

APPEAL by plaintiff from a judgment of the District Court of Douglas County making a mortgage held by the bank against property belonging to defendant Murphy inferior to the lien of a judgment which had been recovered by Gray against the property. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wigton & Whitham, for appellant:

Section 477 of the Code simply determines

judgments are of the first day of the term, and that a fiction shall not be contradicted in order to defeat the ends of that fiction.

The whole term is but one day. And all the judgments are entered as upon the first day of the term. *King v. Poynes*, 3 Bulst. 114.

If time is for argument on an appeal yet the judgment will be entered as of the first day of the term, the time for argument being merely matter of grace. *Egerton v. Morgan*, 1 Bulst. 68.

In *Duke Norfolk's Case*, 7 Mod. 99, it is said that none but a purchaser shall be admitted to say that the judgment was not signed on the first day of the term.

Archbold, Pr. 8d ed. 321, says as far as relates to purchasers bona fide for a valuable consideration a judgment affects the lands, tenements, and hereditaments of the party only from the time it is signed. But as to all other persons not purchasers the judgment as it affects lands relates to the first day of the term at which it is signed.

In *Johnson v. Smith*, 2 Burr. 967, where the court was considering the question of the antedating of papers, it says the reason why nobody should be permitted to aver that a judgment was signed after the first day of the term is because the fact is not relevant. The rule of law is that they should be made complete and bind to all intents and purposes by relation. But the moment that the law said judgments should bind purchasers only from the signing, it followed that in the case of purchasers the time of signing might be shown.

Relation to assign day.

A judgment shall relate to the first day of the term, viz., the assign day, for in law that is the first day of the term and all legal acts should have relation thereto. *Vin. Abr. Judgment*, W, subdiv. 6.

In contemplation of law the assign day is the first day of the term. *Bolton v. Eyles*, 2 Brod. & B. 53.

Though courts do not sit on the assign day it is considered as the first day of the term. *Belk v. Broadbent*, 3 T. R. 92.

In an action by original the judgment relates to the assign day of the term so as to be good, although the defendant dies after that time and before the judgment is entered. *Whittaker v. Whittaker*, 8 Barn. & C. 788.

It is said in a note to *Walter v. Bould*, 1 Bulst. 86, that in an assize between the parties not demandable before *quarto die post*, the question may be to what day a judgment in full term should have relation, whether to the assign day or to the day in full term, and it was held that the judgment given in full term shall relate to the first day, that is, the assign day. It is further said that it has been the general opinion of the lawyers that a judgment cannot be given upon the assign day, nor yet have relation to the first day, being given in the full term, but this is error; and a case from 22 Edw. IV. is cited to prove that a judgment given in full term relates to the first day, the assign day, "which is the essential day of the term and the other days are but days of grace." And it 88 L. R. A.

the priority of liens of judgment creditors as between themselves; and, to prevent a scrambling among litigants at the same term of court to obtain judgments first, it provides that all judgments rendered during the term in actions begun before the term shall stand on an equal footing, and shall be preferred to judgments rendered in actions begun during the term.

That is, § 477, to clearly express the meaning of the legislature, would read: The lands and tenements belonging at the rendition of the judgment to the debtor and within the county

is further said that if there is an appearance the judgment will relate to the first day of the term proper, but if it is a judgment by default it must be to the fourth day before which no default can be recorded.

The assign day was that on which the court was to sit to hear excuses for not appearing to answer to the writs. And it would appear from 1 Bulst. 35, that the writs were made returnable on the first day of the term, and the defendant had grace until *quarto die post* until which day the judges acquired the habit of not assembling, so that the fourth day was actually the first day of the term on which any business was transacted, while the assign day was the fourth day prior thereto. And this is borne out by 3 Bl. Com. 278. So, in *Stamford & Coopers' Case*, Herley, 72, it is stated that the first day of the open term was four days after the assign day. And judgment related to the assign day and not to the first day of open term. In a note to 1 W. Bl. 497, it is said that the assign day is in reality the first day of the term but commonly speaking the appearance day or *quarto die post* is so considered.

Judgment will relate to day prior to death of defendant.

If the judgment is regularly entered in vacation after a term during which the defendant was alive, it will be good although he died before the actual entry of the judgment. *Chancy v. Needham*, 14 Vin. Abr. *Judgment*, W, subdiv. 7, p. 617, 2 Strange, 1081.

A judgment on a warrant of attorney entered in vacation will relate to the beginning of the preceding term so as to be good against the assets of the debtor, although he died after the beginning of the term. The statute of frauds which enacts that no judgment shall bind land but from the signing concerns only purchasers and not creditors. *Robinson v. Tonge*, 3 P. Wms. 397.

A judgment entered in vacation after a term during which the defendant was alive is a good judgment, although he died before entry, because it relates to the beginning of the term. *Heapy v. Parris*, 6 T. R. 368; *Odes v. Woodward*, 2 Ld. Raym. 786; *Bragner v. Langmead*, 7 T. R. 20; *Calvert v. Tomlin*, 5 Bing. 1; *Fann v. Atkinson*, Willes, Rep. 427; *Kuller v. Jocelyn*, 2 Strange, 882; *Northern v. Oliver*, Barnes, 266; *Hall v. Morse*, Barnes, 267; *Savile v. Wiltshire*, Barnes, 270; *Fawkes v. Atkinson*, Barnes, 268; *Fuller v. Jocelyn*, 2 Strange, 882.

Bankruptcy claims.

Where a judgment was entered on the 15th of June during a term which commenced on the 7th the plaintiff had a claim which could be proved under bankruptcy proceedings commenced on the 15th. *Ex parte Birch*, 4 Barn. & C. 880.

A judgment against one who becomes bankrupt after the beginning of the term will relate to the first day of the term so as to be barred by the bankrupt's certificate. The court says at common law all judgments related to the first day of the term in which they were entered up, and that this ruling

where the judgment is entered, shall be bound for the satisfaction thereof, as between judgment creditors whose judgments are obtained in actions begun before the term, from the first day of the term at which judgment is rendered; but judgments by confession, etc.

Galway v. Malchow, 7 Neb. 285; *Manafield v. Gregory*, 11 Neb. 297; *Manafield v. Gregory*, 8 Neb. 434; *Metz v. State Bank*, 7 Neb. 165.

The question then occurs, When is a judgment rendered? Evidently not before it is announced by the court.

Horn v. Miller, 20 Neb. 98.

still exists except as it has been modified by statute. *Greenway v. Fisher*, 7 Barn. & C. 436, 1 Moody & R. 330.

Exceptions.

There seems to have been a well-grounded exception to the rule to the effect that if the judgment was entered upon a later day with the intent that it should not take effect until then, or if for any reason it could not have been entered on the first day, it would not relate to the first day.

A judgment shall have relation to the first day of the term as if it were given on that very day, unless there is a memorandum to the contrary. *Dickinson v. Holt*, Ch. J., 3 Salk. 212.

In *Miller v. Bradley*, 8 Mod. 139, it was held that the judgment would relate back to the first day of the term so as to support an execution, but it is said if continuances had been entered no execution could be prior to such entry.

In *Bennett v. Isaac*, 10 Price, 154, where the question was whether a judgment had been entered in one year or another of a certain King's reign, it is said a judgment of the vacation being considered as referring to the first day of the preceding term is merely a fiction of law, but that fiction must not be suffered to work injustice. The court to prevent its operating injuriously may, and frequently does, inquire of the fact of the actual day on which judgment was entered up. In that case a marginal reference on the record shows the exact day, and the court followed the date so recorded.

In *Swann v. Broome*, 3 Burr. 1599, the court said that the judgment could not relate to the first day of the term because it could not be given before the return day of the writ of summons which appears by the record to be in the term. But it also said that a judgment relates to the assign day of the term unless something appears on the record to the contrary showing that the judgment cannot have that relation.

In *Huys v. Wright*, Yelv. 35, where the declaration showed that judgment had been taken after an award requiring the plaintiff therein to release all demands against the defendant, the court held that the award would not be defeated by the relation of the judgment to the beginning of the term, since the declaration particularly alleged in a collateral way that the judgment was after the award and that the court was bound by the allegation, it not having been denied.

In *Selwin v. Selwin*, 1 W. Bl. 227, where after proceedings had been set on foot for a common recovery the tenant in tail made a will after the beginning of the term at which the recovery was suffered, and also died before such recovery, it was argued that the judgment of recovery should relate to the beginning of the term and therefore take precedence of the will, but it appeared that the return day of the writ was on the third return day of the term which was after the date of the will, and the court thought it could not consider the judgment in the recovery as prior to the return day of the writ.

Where pending the term at which a recovery was had the vouchee died, counsel argued that the recovery should relate to the first day of the term.

The policy of our law is to discourage secret liens, and to require all instruments affecting the title of real estate to be entered of record.

Edminster v. Higgins, 6 Neb. 265.

While the lien is created by the rendition of the judgment, it is not until the judgment is indexed that it affects purchasers.

Hastings School Dist. v. Caldwell, 16 Neb. 73; *Morgan v. Sims*, 26 Ga. 283; *Pope v. Brandon*, 2 Stew. (Ala.) 409, 20 Am. Dec. 55.

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Precedence over claims of third persons.

There are a few cases in which the question of relation so as to affect the rights of third persons has been considered, and the judgment has been held to relate back so as to defeat a statute acknowledged during term which was a pledge of the land until the profits should pay the debt.

In *Gerrard v. Norris*, Latch, 53, where judgment was entered on the 20th day of June and an adverse claim was made under a statute which was acknowledged during the same term on the 2d of June, the reporter says: "I have heard that it was adjudged that the plaintiff had the best right, for he claimed under a judgment, and all the term is in law but one day."

Where the assign day was on the 20th day of the month and a statute was acknowledged on the 22d, and a judgment confessed on the 24d, it was held that the judgment by relation would defeat the statute. *Stamford & Cooper's Case*, Hotley, 72, *sub nom.* *Standford v. Cooper*, Cro. Car. 108, *Standford v. Cooper*, Hutton, 96.

In *Jenk*, 250, it is said that if A covenants to levy a fine at Mich. term and acknowledges a statute to a third person on October 8 of the same year, and the fine is levied according to covenant on October 12, the cognizee shall avoid the statute by relation to the assign day which was before the 8th.

II. American comments on English rule.

In *Coutts v. Walker*, 2 Leigh, 268, the court says there is a dictum of Lord Holt in 3 Salk. 212, repeated by counsel in argument and admitted by the court in *Miller v. Bradley*, 8 Mod. 190, that the relation does not exist if there is a memorandum to the contrary, as where there is a continuance of the cause to another day of the term. But the occasion or circumstances under which this dictum fell from Lord Holt, or the purpose to which it was applied, is not stated by Salkeld. It is hardly sufficient to overturn the common-law doctrine applied particularly to the lien of judgments, that the whole term is in law one day and that the first day.

A judgment at common law did not bind lands. But courts construed the statute which gives the

law of conveyances of this state. A mortgage in Ohio was not executed until it was delivered for record, and until delivered for record was but a mere agreement for a mortgage.

Holliday v. Franklin Bank, 16 Ohio, 587.

And a deed of conveyance of any kind was of no force as a conveyance, even between the parties, until acknowledged before competent authority, thus making the formalities of more importance than the substance. Such is not the law of this state.

Harrison v. McWhirter, 12 Neb. 155.

elegit so as to infer a lien from the power to take the land in execution. *Bank of United States v. Winston*, 2 Brock, 252.

The rule of the English courts which regarded a term of court as a single day and all judgments rendered during the term as rendered on the first day is never allowed to prevail over the substantial equities of third parties. *Powe v. McLeod*, 76 Ala. 418.

The Georgia statutes repealed the common-law rule that judgments related to the first day of the term, and the rule of the statute of frauds that lands were bound from the signing of the judgment as to purchasers, and the personal property from the delivery of the execution to the sheriff, although they provided that in case of judgments all rendered at the same term of court should be taken to be of equal date. *Johnson v. Mitchell*, 17 Ga. 568.

The English doctrine making the whole term one day and making each judgment relate back to the first day of the term is not in force in Missouri. *Friar v. Ray*, 5 Mo. 510.

In *Boyer's Estate*, 51 Pa. 432, 91 Am. Dec. 129, it is said at common law the judgment related back to the first day of the term and it required the passage of the act of 1772 to confine its operation to the day on which it was signed in favor of bona fide purchasers for a valuable consideration.

In *Berry v. Clements*, 9 Humph. 812, it is said that whenever the true time of signing the judgment could be ascertained from anything in the record the fiction of relation to the first day of the term was displaced and ceased to operate, and the relation of the judgment in such case was only to the true time of its rendition.

A judgment rendered during term does not relate back to the first day of the term so as to defeat a bona fide purchaser or assignee. The court says the reason of the rule that a judgment operates to restrain control of the debtor over his real estate is founded upon the supposition that the proceedings in a court of record are of public notoriety, and that he who purchases real estate after judgment purchases with notice of its existence. The reason could not extend to give judgments a lien from a period of time anterior to their rendition. The fiction that the whole term of court is considered as but one day is designed to advance, but never to defeat, the purposes of justice. To give retroactive effect to a judgment would be rather subversive than promotive of justice. *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49.

Judgment liens are the creatures of positive law without which they cannot exist. *Jeffrey v. Moran*, 101 U. S. 235, 25 L. ed. 735.

III. States in which the judgment relates back.

There are some states in which the doctrine of relation has been adopted to the full extent, so that the judgment will relate back to the beginning of the term and take priority over a conveyance made between that day and the entry of the judgment.

Under a territorial statute of Arkansas judgments and decrees in chancery related to the first 33 L. R. A.

In the case of *Urbana Bank v. Baldwin*, 3 Ohio, 65, the court confesses that "the case may be a hard one," yet influenced, doubtless, by their statutes concerning conveyances of real estate, they have made it "a hard one" by their construction of the statute, and have even gone beyond the wording of the statute to give effect to such liens as against innocent and bona fide purchasers without notice, actual or constructive, of any judgment lien.

It is within the power of courts to declare that a thing which is within the letter of a

day of the term and created a lien from that time which was superior to the title of a purchaser after the first day of the term but prior to the day the decree was actually made. *Keatts v. Fowler*, 22 Ark. 483.

In Kansas the judgment is a lien from the first day of the term at which it is rendered. *Kiser v. Sawyer*, 4 Kan. 508.

A judgment rendered during an adjourned term will relate back to the date of the opening of the original term. *Kingsley v. Bagby*, 3 Kan. App. 23.

But a judgment of amercement is a lien from its date. *Knox v. Merrill*, 22 Kan. 572; *Lisle v. Cheney*, 36 Kan. 573.

Under the Nebraska Code the judgment takes effect as of the first day of the term in all cases begun at a prior term, and therefore will bind land which is conveyed after the beginning of the term at which the judgment is rendered. *Kellerman v. Aultman*, 30 Fed. Rep. 383.

All judgments rendered during the term in actions commenced prior thereto are liens from the first day of the term. *Colt v. DuBois*, 7 Neb. 301; *Miller v. Finn*, 1 Neb. 254.

But the lien attaches only to the actual interest the judgment debtor has in the land when it is rendered. *Galway v. Malchow*, 7 Neb. 285; *Mansfield v. Gregory*, 8 Neb. 434; *Dewey v. Walton*, 31 Neb. 812; *Mansfield v. Gregory*, 11 Neb. 297.

The rule that a judgment may relate back to the first day of the term so as to be good, although the defendant died prior to its entry, is recognized in *Nichols v. Chapman*, 9 Wend. 452.

Under the Ohio statutes the judgment relates back to the first day of the term, and will take priority of a mortgage executed before the beginning of the term but not recorded until the first day of the term has expired. *Bank of Cleveland v. Sturges*, 2 McLean, 341; *Doe, Sturges v. Bank of Cleveland*, 3 McLean, 140.

Under the Ohio law a judgment is a lien from the first day of the term at which it is rendered. *Jeffrey v. Moran*, 101 U. S. 235, 25 L. ed. 735; *McCormick v. Alexander*, 2 Ohio, 65; *Urbana Bank v. Baldwin*, 3 Ohio, 65; *Baird v. Kirtland*, 3 Ohio, 23; *Towner v. Wells*, 3 Ohio, 136; *Bish v. Burns*, 7 Ohio C. C. 235.

But judgments voluntarily confessed in open court only have a lien on lands from the day on which they are actually signed or entered. *McCormick v. Alexander*, 2 Ohio, 65.

A judgment entered by confession must be postponed to a subsequent judgment entered during the same term upon regular process. *Riddle v. Bryan*, 5 Ohio, 48.

But a subsequent statute made judgments by confession relate back to the first day of the term. *Jackson v. Luce*, 14 Ohio, 514.

To save the lien a levy must be made within a year after the rendition of the judgment. *Shue v. Ferguson*, 3 Ohio, 136; *Waymire v. Staley*, 3 Ohio, 366; *Sellers v. Corwin*, 5 Ohio, 396; *Thompson v. Atherton*, 6 Ohio, 30; *Farmers' Bank v. Commercial Bank*, 10 Ohio, 74; *Corwin v. Benham*, 2 Ohio St. 35.

A mortgage recorded on the first day of the term

statute is not governed by the statute, because not within its spirit or the intention of its makers.

Church of the Holy Trinity v. United States, 12 Sup. Ct. Rep. 511, 143 U. S. 457, 86 L. ed. 326.

Messrs. Wharton & Baird for appellees.

Norval, Ch. J., delivered the opinion of the court:

On the 24th day of June, 1890, appellee Fred W. Gray commenced an action in the district

of court but before the court actually convenes will prevail over a judgment recovered at the term. *Follett v. Hall*, 16 Ohio, 111, 47 Am. Dec. 365.

Neglect to issue execution will not defeat the judgment as against a mortgage. *Myers v. Hewitt*, 16 Ohio, 449.

The lien of the judgment will attach at the time fixed for the opening of court although court does not in fact open until later in the day. *Davis v. Messenger*, 17 Ohio St. 231; *Hemlinway v. Davis*, 24 Ohio St. 150.

If after the first judgment is entered a mortgage is given upon the property and then a second judgment is obtained, neglect to issue execution within the proper time will not postpone the first judgment to the other liens because the statute does not apply in case of mortgages and the second judgment is prevented from operating by the intervening mortgage. *Brazee v. Lancaster Ohio Bank*, 14 Ohio, 318; *Holliday v. Franklin Bank*, 16 Ohio, 533; *Fitch v. Mendenhall*, 17 Ohio, 578.

A judgment entered on a day of the term although on a writ issued after the first day will relate to the first day so as to have priority over a deed of trust executed on the second day of the term. *Farley v. Lea*, 4 Dev. & B. L. 199, 32 Am. Dec. 603; *Poust v. Trice*, 8 Jones, L. 494; *Norwood v. Thorp*, 64 N. C. 632; *Johnson v. Sedberry*, 65 N. C. 5. Although in *Den, Bell v. Hill*, 1 Hayw. (N. C.) 72, it was held that a judgment bound from the time it was pronounced.

A subsequent statute provided that the lien should be from the time the judgment is docketed. *Ross v. Alexander*, 65 N. C. 576; *Hoppock v. Shober*, 49 N. C. 153; *Whitehead v. Lettiam*, 58 N. C. 232; *Holman v. Miller*, 108 N. C. 118; *Sawyers v. Sawyers*, 96 N. C. 324; *Williams v. Weaver*, 94 N. C. 134; *Dewey v. Sugar*, 109 N. C. 323, 14 L. R. A. 393; *Vanstony v. Thornton*, 113 N. C. 196.

But the statute provides that all judgments rendered in any county by the superior court thereof during a term of court, and docketed during the same term or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of the term. *Holman v. Miller*, 108 N. C. 118.

The judgment may relate back so as to avoid the death of defendant. *Miller v. Jones*, 2 Speers, L. 315; *Mills v. Jones*, 2 Rich. L. 398; *Dibble v. Taylor*, 2 Speers, L. 308, 42 Am. Dec. 363.

As between creditors the judgment will relate to the first day of the term. *Porter v. Earthman*, 4 Yerg. 358.

In *Clements v. Berry*, 52 U. S. 11 How. 398, 13 L. ed. 745, it is said that in Tennessee, as against a bona fide purchaser of personal property, the lien of the judgment will not attach prior to the award of execution; but it is said that the judgments entered on the last day of the term by the law of Tennessee have relation to the first day of the term so as to place all the judgments entered at the term on an equality in regard to liens. This is proper to do equal justice to creditors whose judgments are necessarily entered on different days of the term from the arrangement of the cases on the docket; 38 L. R. A.

court of Douglas county against Martin T. Murphy to recover the amount due on a promissory note executed by Murphy. Summons was duly served upon Murphy on June 26, and at the September, 1890, term of said court, to wit, on the 3d day of January, 1891, Gray recovered a judgment in said action against Murphy for \$1,285.49, and costs. The September term, 1890, of the district court of the county of Douglas, convened on the 29d of September. After the commencement of said suit, and while the same was pending, on the

and the same is true as regards an assignee for benefit of creditors.

In Virginia the lien of a judgment on lands relates back to the first day of the term. *Mutual Assur. Soc. v. Stanard*, 4 Munf. 539; *Cautts v. Walker*, 2 Leigh, 1268; *Jones v. Myrick*, 8 Gratt. 179; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

The fiction of law which gives a judgment relation to the first day of the term applies to all cases at which the judgment might have been rendered on that day, but not to a case in which it could not have been so rendered. *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Yates v. Robertson*, 80 Va. 476.

The lien of a judgment upon the land of a debtor relates back to the commencement of the term at which the judgment was obtained and overreaches a deed of trust on the land executed by him after the first day of the term. *Skipwith v. Cunningham*, 8 Leigh, 271, 31 Am. Dec. 642.

Under the Code of 1860, as against a purchaser for value without notice, no judgment operated as a lien upon real estate unless it was docketed within a year from its date. *Hill v. Rixey*, 26 Gratt. 72.

The Code of 1873 makes a judgment a lien from the time of its rendition. *Gurnee v. Johnson*, 77 Va. 712; *Coldiron v. Asheville Shoe Co.*, 93 Va. 364.

But in *Hockman v. Hockman*, 93 Va. 455, it is said that the statute had been construed so that the judgment would relate to the first day of the term even under it. The court says that the statute discloses no intention on the part of the legislature to abrogate the principle of unity of the common law in respect to the day as a point of time. Although confessed judgments are liens from their dates.

IV. General American rule.

The general rule in this country is that the judgment will not relate to the first day of the term. The matter is regulated by statute, and the authorities given here are merely cases in which the statute in force at the time the decisions were rendered was construed. The rule is subject to change at any time, and these authorities are valuable only as showing how the rules have been changed, and as indicating sources of authority for the construction of statutes which may be adopted or changed from time to time. Various words are used in designating the time when the lien will begin. Many of them, however, mean practically the same thing.

Rendition.

Under the Arkansas statutes a judgment was a lien on personally only from the time of issuance of execution. But it was a lien on real estate from the time of its rendition. *Baldwin v. Johnston*, 8 Ark. 280.

It is a lien on land from its date. *Whiting v. Beebe*, 12 Ark. 426; *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596; *Hersby v. Rogers*, 45 Ark. 303.

In Florida the judgment is a lien from the time of its rendition. *Moseley v. Doe*, *Edwards*, 2 Fla. 423; *Union Bank v. Powell*, 3 Fla. 175.

In Illinois the lien commences with the judgment. *Rogers v. Dickey*, 6 Ill. 636, 41 Am. Dec. 204.

A statute regulating the practice in the courts of

29th day of November, 1890, Murphy and his wife gave to appellant, the Norfolk State Bank, a mortgage upon certain real estate in Douglas county, to secure the payment of a promissory note for \$4,676 70, executed by Murphy to cover his overdrafts on the bank. The property described in the mortgage was owned by Murphy prior to the commencement of the term of court at which the judgment aforesaid was rendered. On the 11th day of September, 1891, the Norfolk State Bank brought its action in the court below to foreclose said mortgage, to which the Murphys, Fred W. Gray, and others were made defend-

ants. Gray filed an answer, setting up said judgment, and praying that the same be decreed a lien on the premises included in plaintiff's mortgage prior to the lien of the mortgage. Upon the trial, a decree was entered foreclosing the mortgage, but making the lien thereof junior to the judgment lien of Gray.

The sole question to be decided on this appeal is, Which lien has priority,—the mortgage or judgment? The determination of the question necessitates an examination of § 477 of the Code of Civil Procedure, which reads as follows:

"Sec. 477. The lands and tenements of the

Cook county provided that all judgments should be liens from the time they are entered in the judgment docket. *Smith v. Lind*, 29 Ill. 24.

Under Revised Laws 1883, a judgment in Illinois did not become a lien until the last day of the term of court at which it was rendered. *Riggin v. Muljigan*, 9 Ill. 60; *Jones v. Guthrie*, 23 Ill. 421; *Kirk v. Vonberg*, 34 Ill. 440; *Scammon v. Swartwout*, 35 Ill. 823; *Wight v. Wallbaum*, 39 Ill. 554; *McFadden v. Worthington*, 45 Ill. 302; *Tenney v. Hemenway*, 53 Ill. 97; *Priest v. Wheelock*, 58 Ill. 114.

In *Ryhiner v. Frank*, 105 Ill. 323, a judgment was given effect from its date as against a subsequent deed of trust on the property, but there is no discussion or explanation of the rule which had previously obtained that the judgment was a lien only from the last day of the term.

But in *Dobbins v. First Nat. Bank*, 112 Ill. 559, it appears that in 1872 a judgment was made by statute a lien from the time of its rendition.

And all judgments rendered at the same time are entitled to share *pro rata*. *Gay v. Rainey*, 39 Ill. 221, 31 Am. Rep. 76.

In Indiana judgments are liens from the time of their rendition. *Ridge v. Prather*, 1 Blackf. 401; *Goodsell v. Stinson*, 7 Blackf. 437; *Simpson v. Niles*, 1 Ind. 196; *Fletcher v. Holmes*, 25 Ind. 458; *Mahoney v. Neff*, 124 Ind. 380.

Judgments are liens in the order in which they are rendered. *Maxwell v. Vaught*, 96 Ind. 136.

The lien of a judgment is subject to all equities which exist against the land in favor of third persons at the time of the rendition of the judgment. *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562; *Leonard v. Broughton*, 120 Ind. 538.

A judgment of the United States court for the district of Indiana is a lien from its date. *Barth v. Makeever*, 4 Bies. 206.

In Louisiana judgments are liens from the date on which they are recovered except in courts outside of the parish of Orleans where they take effect from the day of the adjournment of the term. *Wolf v. Youbert*, 45 La. Ann. 1100, 21 L. R. A. 772; *Chaffe v. Walker*, 39 La. Ann. 35.

In Missouri the lien is from day of rendition. *Scott v. Whitehill*, 1 Mo. 764; *Union Bank v. Marnard*, 51 Mo. 548; *Cravens v. Rosseter*, 116 Mo. 338; *Whittlesey v. Brohammer*, 31 Mo. 98; *Slattery v. Jones*, 96 Mo. 216.

In 1853 it was provided that judgments of courts of St. Louis county should not be liens upon real estate until abstracts were filed in the land court, but this statute did not repeal the provision of the Code that there should be no priority between judgments rendered at the same term of court. *Dunscomb v. Maddox*, 21 Mo. 144.

Entry.

Some of the statutes make the judgment a lien from the time of its entry.

The Supreme Court of the United States has held that in Mississippi the judgment is a lien from the time of its rendition. *Brown v. Clarke*, 45 U. S. 4 How. 4, 11 L. ed. 880.

88 L. R. A.

And under the Code of 1867 the judgment was a lien from the rendition of it. *Clark v. Duke*, 59 Miss. 575.

Before that the lien existed from entering of judgment. *Biggam v. Merritt*, Walk. (Miss.) 430, 12 Am. Dec. 576; *Burney v. Boyett*, 1 How. (Miss.) 89; *Smith v. Ship*, 1 How. (Miss.) 234; *Smith v. Everly*, 4 How. (Miss.) 178; *Andrews v. Doe*, Wilkes, 6 How. (Miss.) 534; *Moody v. Doe*, Harper, 25 Miss. 484.

Under the act of 1844 the judgment was a lien from the time of enrolment. *Wyatt v. Beatty*, 10 Smedes & M. 463; *Planters' Bank v. Conger*, 12 Smedes & M. 527; *Stevens v. Mangum*, 27 Miss. 481; *Reed v. Haviland*, 36 Miss. 323.

Under the Code of 1880 the judgment was a lien from the time of rendition, and should have priority according to the order of enrolment. *Scharff Bros. v. Zimmerman*, 60 Miss. 793; *Hamilton-Brown Shoe Co. v. Walker*, 67 Miss. 197.

Under the Delaware statutes the judgment is a lien from the time of its entry. *Hollingsworth v. Thompson*, 5 Harr. (Del.) 433.

In New Jersey the lien is from time of actual entry. *Reeves v. Johnson*, 12 N. J. L. 99; *McNamara v. New York, L. E. & W. R. Co.*, 56 N. J. L. 56; *Edmunds v. Smith*, 52 N. J. Eq. 212.

In Pennsylvania the lien takes effect only from the entry of judgment. *Welch v. Murray*, 4 Yeates, 197.

Judicial liens have precedence according to the days on which they are entered. *Small's Appeal*, 24 Pa. 398.

The statute provides that judgments shall bind as against bona fide purchasers from the time they are signed. *Emerick v. Garwood*, 1 Browne (Pa.) 20, 4 U. S. 4 Dall. 321, note, 1 L. ed. 851.

A judgment is a lien from its entry on the judgment docket. *Hohman's Appeal*, 127 Pa. 209; *Evans v. Evans*, 1 Phila. 113.

A judgment entered after the death of defendant cannot relate back so as to have priority over other creditors. *Patterson's Appeal*, 96 Pa. 93.

In Pennsylvania judgments will take priority according to their dates of entry. *Welsh v. Murray*, 4 U. S. 4 Dall. 320, 1 L. ed. 850.

In South Carolina a judgment is a lien from the time it is entered up. *De Saussure v. Zeigler*, 6 S. C. N. S. 12; *Adickes v. Lowry*, 12 S. C. 97; *Woodward v. Woodward*, 30 S. C. 259.

In some cases the lien dates from entry on docket.

In California the judgment is a lien from the time it is docketed. *Isaac v. Swift*, 10 Cal. 71, 70 Am. Dec. 688; *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *People, Bowman, v. Hovious*, 17 Cal. 471; *Barroilbet v. Hathaway*, 81 Cal. 395, 89 Am. Dec. 193; *Rogers v. Druffel*, 46 Cal. 654; *Hibberd v. Smith*, 50 Cal. 511; *Eby v. Foster*, 61 Cal. 228; *Menzie v. Watson*, 105 Cal. 109.

In Iowa judgments did not operate as liens on real estate prior to 1840. *Woods v. Mains*, 1 G. Greene, 275.

Then the lien attached at the date of the judgment. *Hopping v. Hurnam*, 2 G. Greene, 39; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 364; *Redfield v.*

debtor within the county where the judgment is entered shall be bound for the satisfaction thereof, from the first day of the term at which judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments were rendered; all other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

The language just quoted is too plain to admit of more than one construction, and that is, all judgments rendered in a district court

in actions brought therein prior to the term, except judgments by confession, become liens upon the real estate of the judgment debtor situate within the county from the first day of the term. At common law, all judgments of a court of record relate back to the first day of the term, and are regarded as rendered on that day, no matter on what day of the term they were actually entered. Our statute is declaratory of the rule of the common law, and places all judgments of a district court, except rendered on confession, or in cases in which actions were instituted during the term, upon equality in regard to liens. The judg-

Hart, 12 Iowa, 855; Swift v. Conboy, 13 Iowa, 444; Wilhelmi v. Leonard, 13 Iowa, 380; Lewis v. Barnaby, 14 Iowa, 88; Goodenough v. McCoid, 44 Iowa, 636; White v. Keokuk, Fr. D. M. & M. R. Co. 52 Iowa, 97; Burlington, C. R. & M. R. Co. v. Verry, 48 Iowa, 458.

By Code, § 197, a judgment is not a lien until it is entered in the index of all liens. *Ætna L. Ins. Co. v. Heiser*, 77 Iowa, 881, 4 L. R. A. 122.

In *Taylor v. Thompson*, 30 U. S. 5 Pet. 368, 8 L. ed. 134, an English statute applicable to the colonies was held to have been adopted in Maryland so as to create a lien from the time of the rendition of the judgment.

The lien on the lands is from the rendition of the judgment. *Hanson v. Barnes*, 8 Gill & J. 359, 22 Am. Dec. 822; *Miller v. Allison*, 8 Gill & J. 35; *Mo-Meichen v. Marman*, 8 Gill & J. 57.

But judgments rendered at the same term of court but on different days do not relate to the first day of the term and become effective as of that date. They are liens only from the dates at which they are really entered on the docket. And that ruling is put upon the ground that the fiction of relation is excluded by the facts of the record which always contains the date when they were made. The court says that it is the general rule of the common law that all judgments rendered during the term relate back to the first day of the term and are considered as rendered on that day. But it has been entirely abolished as against purchasers by the statute of frauds. *Anderson v. Tuck*, 23 Md. 221; *Coombs v. Jordan*, 3 Bland, Ch. 234, 22 Am. Dec. 226.

A later case says a judgment has relation to the time when it is entered up, and will not affect a bona fide conveyance made for value before that time. *Dyson v. Simmons*, 48 Md. 207.

In Minnesota the lien is from time of docketing. *Daniels v. Winslow*, 4 Minn. 818; *Marshall v. Hart*, 4 Minn. 450; *Ferguson v. Kumlur*, 11 Minn. 104; *Dutton v. McReynolds*, 81 Minn. 66.

In New York the judgment is a lien from the time of its docketing in the county clerk's office. *Crocker v. Lewis*, 144 N. Y. 140; *Sweet v. Jacobs*, 6 Paige, 365, 81 Am. Dec. 252; *Brooks v. Wilson*, 53 Hun, 178; *Wilkinson v. Paddock*, 57 Hun, 191.

So in Oregon. *Stannis v. Nicholson*, 2 Or. 322; *Baker v. Woodward*, 12 Or. 2.

In Montana the judgment is not a lien until docketed. *Skilower v. Abbott*, 19 Mont. 228.

In West Virginia there is no lien until the judgment is docketed. *Anderson v. Nagie*, 12 W. Va. 98.

But as between debtor and creditor judgments are a lien at and after their date, or if they were rendered in court from or after the commencement of the term at which they were rendered. *Renick v. Ludington*, 14 W. Va. 367.

As between debtor and creditor the statutory provision as to docketing has no application. *Graham v. Lucas*, 24 W. Va. 231.

Other terms in use.

In Georgia the judgment is a lien from the time 33 L. R. A.

it is signed. *Ex parte Stebbins*, R. M. Charit. (Ga.), 77; *Forayth v. Marbury*, R. M. Charit. (Ga.) 324; *Bailey v. Mizell*, 4 Ga. 123; *Kollock v. Jackson*, 5 Ga. 153; *Morgan v. Sims*, 26 Ga. 283.

Under the Connecticut statutes the judgment is a lien from the time of filing the certificate. *Beardsley v. Beecher*, 47 Conn. 414.

In Washington the judgment is a lien from the time of filing a transcript. *Sawtelle v. Weymouth*, 14 Wash. 21.

The United States court held that in Wisconsin a judgment is a lien from the time it is rendered. *Milwaukee & M. R. Co. v. James*, 73 U. S. 6 Wall. 750, 18 L. ed. 854.

But the Wisconsin court held that there is no lien until the transcript is filed. *Baltimore Annual Conference v. Schell*, 17 Wis. 308.

In Tennessee a judgment binds from the time it is pronounced. *Porter v. Cooke*, Peck, 30; *Hickman v. Murfree*, Mart. & Y. 24; *Blake v. Heyward*, Bail. Eq. 208.

The English rule does not apply in Tennessee, and a judgment there takes effect only from the day it is actually rendered. *Murfree v. Carmack*, 4 Yerg. 270, 25 Am. Dec. 232.

The judgment is a lien under the act of 1831 from the date of its rendition. *Greenway v. Cannon*, 3 Humph. 177, 30 Am. Dec. 161; *Berry v. Clements*, 9 Humph. 512.

No lien exists unless the memorandum is registered in the county where the land is situated. *Stahlman v. Watson* (Tenn. Ch. App.) 30 S. W. 1055.

In Texas it was a lien from date of rendition. *Fisher v. Foote*, 25 Tex. Supp. 811; *Blankenship v. Douglas*, 28 Tex. 225, 82 Am. Dec. 606; *Grace v. Wade*, 45 Tex. 323; *Frazier v. Thatcher*, 49 Tex. 26.

But under the Revised Statutes the judgment is a lien from the time it is recorded. *Belbase v. Ratto*, 66 Tex. 636; *Kennard v. Mabry*, 78 Tex. 151.

Under the Revised Statutes the judgment does not operate as a lien until the index to the record is alphabetical, showing the names of each plaintiff and defendant. *Steffens v. Cameron* (Tex.) 19 S. W. 1068.

Execution necessary.

In Alabama a judgment originally bound land from the time of its rendition, and had no relation to the first day of the term. *Quinn v. Wiswall*, 7 Ala. 645; *Forrest v. Camp*, 16 Ala. 642; *Morris v. Elia*, 8 Ala. 562.

Judgments take effect from the day on which they are rendered. *Ex parte Dillard*, 68 Ala. 594.

Under the Alabama system a term of court is not regarded as one day. *Alabama Coal & Nav. Co. v. State*, Hamilton, 54 Ala. 38.

Under the later Alabama statutes judgments do not constitute liens. But execution must be issued to have that effect. *Gamble v. Fowler*, 58 Ala. 576.

In Alabama a judgment in itself imposes no lien upon the property of a judgment debtor, but the issuance of an execution and its delivery to an officer are necessary for that purpose. *Beebe v. United States*, 161 U. S. 104, 40 L. ed. 633.

ment of Gray has relation to the first day of the term at which the same was recovered, and was a lien upon the lands owned by Murphy within the county from the first day of such term. The same construction was placed upon the statute in *Miller v. Finn*, 1 Neb. 254, and was followed in the case of *Colt v. Du Bois*, 7 Neb. 891.

It is insisted by counsel for plaintiff in error that the section quoted merely determines the priority of liens of judgment creditors as between themselves; and, further, that the lien of a mortgage duly recorded during a term of court, and before the entry of a judgment at that term, is paramount to the lien of the judgment. We are unable to so construe the statute. It, in express terms, declares that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered." Plain language could not have been selected. The lien of a judgment does not at-

tach merely to the debtor's interest in land when the judgment is obtained, but to whatever interest therein he possessed on the first day of the term at which the same was entered. To hold otherwise would be to make the law, and not simply to apply the same.

A judgment being a lien upon real estate from the first day of the term, such lien is superior to the lien of a mortgage subsequently given by the debtor. To adopt the construction contended for by counsel would be injecting words into the statute by judicial interpretation, which we have no power to do. Had the legislature intended that the doctrine of relation as to lien of judgments should not apply where a mortgage is recorded before the judgment is actually entered, it would have used apt words indicative of such purpose. Our conclusion is that the lien of the mortgage is junior to that of the judgment. The construction we have given the section does not conflict with the prior decisions of this court cited in the brief of counsel, as a cursory examination

Under the Alabama statutes a judgment is not a lien, but the lien is acquired by the issuance of execution. *Perkins v. Brierfield Iron & Coal Co.* 77 Ala. 408; *Carlisle v. Godwin*, 68 Ala. 137.

Under the act of 1889, however, the judgment becomes a lien when it is registered in the office of the county probate judge. *German Security Bank v. Campbell*, 99 Ala. 249.

From last day of term.

In New Hampshire the intentment is that the judgment was entered on the last day of the term unless the record shows it to have been entered on a different day. *New Hampshire Strafford Bank v. Cornell*, 2 N. H. 324.

The decree of the probate court is considered as made and entered as of the last day of the term unless a minute be made in the record indicating an earlier day. *Goodall v. Harris*, 20 N. H. 363.

In Massachusetts judgments are presumed to be entered on the last day of the term unless they are in fact entered previously. *Herring v. Polley*, 8 Mass. 119.

A judgment is considered as rendered on the last day of the term. *Bradish v. State*, 35 Vt. 452; *Hoar v. Commissioners of Jail Delivery*, 3 Vt. 403; *Day v. Lamh*, 7 Vt. 426.

Later it is said that judgments take effect from the time they are rendered, and not from the time they are recorded. *Huntington v. Charlotte*, 15 Vt. 44.

V. Judgment with stay of execution.

A judgment with a stay of execution creates no lien until the right to issue the execution accrues. *Bank of United States v. Winston*, 2 Brock. 252; *Soriba v. Deane*, 1 Brock. 170.

But in Mississippi judgments rendered with a stay of execution given under the law of 1824 were liens from the date of rendition. *Pickett v. Doe*, *Planters' Bank*, 5 Smedes & M. 470, 43 Am. Dec. 523.

VI. Special cases.

There are several cases in which the judgment is made to relate, not only to the first day of the term, but even to the commencement of the proceedings. This class of cases is not within the scope of this note, and a full collection of the cases is not made here, but only enough are cited to illustrate the rule.

In *Jones v. Jones*, 1 Bland, Ch. 443, 18 Am. Dec. 227, it is said that in claims in favor of the King the 38 L. R. A.

lien existed, not only from the date of the judgment, but from the commencement of the suit, to the exclusion of all subsequent encumbrances.

A statute providing that a judgment affecting real estate shall only be a lien from the time it is actually docketed has no reference to a judgment of foreclosure of a mortgage. *Huntington v. Meyer*, 22 Wis. 557.

A judgment and sale in foreclosure of a mortgage will relate to the date of the mortgage. *Robinson v. Thornton*, 102 Cal. 675; *Miller v. Fluck*, 8 Pa. Co. Ct. 585.

A judgment of foreclosure may, as between the parties, relate back to the date of the mortgage. *Christy v. Dyer*, 14 Iowa. 433, 31 Am. Dec. 498; *State, School Fund, v. Lake*, 17 Iowa. 215.

In Illinois the statute establishes a lien against the property of a convict from the time of his arrest or indictment. *Hitchcock v. Roney*, 17 Ill. 231.

The Indiana statute provides that judgments on bonds shall bind the real estate of the debtor from the commencement of the action. *Shane v. Francis*, 30 Ind. 92; *Day v. Worland*, 38 Ind. 75; *Flemer v. Taggart*, 116 Ind. 189; *Leonard v. Broughton*, 120 Ind. 536.

Judgments in special actions against officers may be made to take effect from the time the action is commenced. *Hoge v. Brookover*, 28 W. Va. 304.

The Georgia statutes provide for a retroactive judgment in divorce proceedings where special property is scheduled in the pleadings and a prayer made that it be made subject to payment of alimony. *Coulter v. Lumpkin*, 94 Ga. 225.

A South Carolina statute provides that when an action against a railroad company for damages for personal injuries shall be prosecuted to judgment the lien of the judgment shall relate back to the time the injury occurred. *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. Rep. 257.

The doctrine of relation of judgments is entirely distinct from that of *lis pendens*, which is discussed in *Chautauque County Bank v. Risley*, 19 N. Y. 399, 75 Am. Dec. 347; and *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559.

Under that doctrine a purchaser may be postponed to a judgment, but it is because the statute forbids him to meddle with the property pending the suit, and not because the judgment relates to the first day of the term. The doctrine of *lis pendens* is obviously not within the scope of this note. The question discussed in *GORTZINGER v. ROSENFIELD* as to division of a day will be reserved for a future note.

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of the cases will disclose. In *Galway v. Malchow*, 7 Neb. 285, certain judgments were recovered against Malchow after the recording of a mortgage given by him to the plaintiffs. By mistake, the land intended to be included in the mortgage was described as being in section 28, instead of section 33. It was held that the lien of the judgments was subject to the equity of the mortgage. The proposition we have been discussing was not involved nor passed on in that case. That decision simply affirms the doctrine that a judgment upon real estate is subject to all prior equities existing against the debtor at the time of its becoming a lien. This court did not undertake to decide at what date the lien of a judgment attaches to the lands of the defendant. The rule stated in *Galway v. Malchow* has been reaffirmed and applied in *Metz v. State Bank*, 7 Neb. 165; *Manfield v. Gregory*, 8 Neb. 434, 11 Neb. 297; *Leonard v. White Cloud Ferry Co.* 11 Neb. 333; *Dewey v. Walton*, 31 Neb. 819.

It is unnecessary to point out the difference between the facts upon which they are decided and those in the case we are considering. It is sufficient to say that in none of the cases mentioned was § 477 of the Code before the court for consideration, nor was the question raised by this record discussed therein. Under the above authorities, a judgment lien is subject to all prior liens on the land of the defendant; but this principle does not militate against the construction we have given § 477. Had plaintiff's mortgage been made before the term of court at which Gray's judgment was entered, although recorded subsequent thereto, the cases would have some bearing here. But it was not so made; hence the judgment lien antedates the mortgage. The effect of the decisions of this court is that a creditor acquires no better right to his debtor's property than the latter himself has. The lien of a judgment is subordinate to all equities which existed in favor of third parties when the lien of the judgment attaches; in other words the lien of a judgment is limited to the actual interest the debtor has in the property. Another decision of this court relied on by the appellant is *Horn v. Miller*, 20 Neb. 96. It was there ruled that the time within which to perfect an appeal taken from a decree of the district court begins to run from the date on which the court formally announces its conclusion and judgment, and not from the date on which the clerk enters the same on the court journal. *Horn v. Miller* was expressly overruled in *Bickel v. Dutcher*, 35 Neb. 761, it being there decided that the time within which an appeal may be taken does not commence running until the decree is entered of record. For the purposes of an appeal, the date of a judgment is deemed to be the time it is actually spread upon the records, but that is no reason for holding that the lien of a judgment does not attach until that time. The language of the section relating to the time for perfecting appeals is quite different from the provision on the subject of judgment liens. For the purpose of an appeal, the date of a judgment is regarded as having been rendered at one time; while, for the purpose of binding the lands of the debtor by legal fiction, it is considered as

having been entered at a date often anterior to the time it was pronounced by the court. The decisions of this court to the effect that a judgment does not become a lien upon the lands of the defendant, as against a subsequent purchaser, without notice, until properly indexed, have no application to the case at bar, since plaintiff is not such a purchaser. It is not even a good-faith mortgagee. The bank did not extend credit to Murphy on the strength that the land was free from liens, but the mortgage was given to secure a prior indebtedness of the mortgagor. When the security was taken, the officers of the bank knew, or ought to have known, that the records of the district court of Douglas county disclosed that the action was pending against Murphy, and that a judgment might be recovered therein during the term which would be a lien on the land.

We are unable to perceive that the statute relating to *lis pendens* (§ 85 of the Code) has any bearing upon the question under consideration, since, in actions at law to recover money judgments merely, no notice of their pendency is required to be given to third parties. It is only in a suit brought to affect the title to real property that the statute requires that notice of *lis pendens* shall be given. The pendency of an action to recover a money judgment is of itself notice to anyone purchasing the lands of the defendant during a term of court that, before the close of the term, the plaintiff may recover a judgment therein which will be a lien upon said real estate. We know that text writers state the general rule to be that judgments do not relate back to the first day of the term, so as to create a lien on the real estate of the defendant anterior to their rendition; and such is the trend of decisions of the courts in most of the states. But it should be remembered that all the states, excepting a few, have statutes which, in express terms, provide that judgments shall become liens upon the lands of the debtor, either from the date on which they are rendered or the last day of the term. 1 Black, Judgm. § 443. Such, however, is not the common-law rule, nor is it the doctrine in states having statutes similar to our own. Mr. Black, in his treatise on Judgments, at § 441, observes that "it was the rule of the common law (and this rule still obtains in some of the states) that the judgments of a court of record all relate back to the first day of the term and are considered as rendered on that day; and therefore their lien will attach to the debtor's realty from the beginning of the term, and will override a conveyance or mortgage made on the second or any succeeding day, although actually prior to the rendition of the judgment." There, the same author, in the next section, says that, "as against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance."—citing *Morgan v. Sims*, 26 Ga. 283; *Pope v. Brandon*, 3 Stew. (Ala.) 401, 20 Am. Dec. 49. The same doctrine is stated in a note on page 115, 12 Am. & Eng. Enc. Law, and the following, in addition to the Georgia case above referred to, are cited in support thereof: *Skipwith v. Cunningham*, 8 Leigh,

272, 81 Am. Dec. 642; *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Brockenbrough v. Brockenbrough*, 31 Gratt. 580.

An examination of the foregoing authorities will disclose that all but one fall far short of sustaining the principle they are cited to support. In *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78, a judgment and a decree were rendered at the same term of court, the former eleven days before the latter. The question was whether they were both of equal priority. The court held that the lien of the judgment was superior to that of the decree, inasmuch as the case in which the decree was obtained was not in such a situation as to entitle plaintiff to a final adjudication on the first day of the term. We quote the following from the syllabus of the case: "The fiction of law which gives a judgment relation to the first day of the term applies to all cases in which the judgment might have been rendered on that day, but not to a case in which it could not have been rendered." The above case was cited with approval and followed in *Yates v. Robertson*, 80 Va. 475, *Skipwith v. Cunningham*, 8 Leigh, 271, 81 Am. Dec. 642, was this: At the October term, 1827, of the superior court of Petersburg, to wit, on the 17th day of October, Humbertson Skipwith, executor, recovered a judgment against one Richard M. Cunningham for \$4,187.88. The October term should have commenced on the 15th day of October, but, owing to the failure of the judge to attend sooner, the court did not actually convene until three days later. On the 18th day of October, 1827, Cunningham executed a deed of trust upon his real estate to secure certain creditors, which deed was recorded on October 15. The court adhered to the doctrine laid down in the former decisions in *Mutual Assur. Soc. v. Stanard*, 4 Munf. 539, and *Coutts v. Walker*, 2 Leigh, 268, to the effect that a lien of a judgment relates back to the commencement of a term at which it was recovered, and has priority over a deed of trust on the land of the defendant, executed on or after the first day of the term. The court also held that the day on which the court actually commences its session, and not the day appointed by law for the beginning of the term, should be regarded as the first day of the term. The court, in the syllabus, says: "It is well settled, as a general rule, that the lien of a judgment upon the land of the debtor relates back to the commencement of the term at which the judgment was obtained, and overreaches a deed of trust on the land executed by the debtor on or after the first day of the term. But the term is not considered as necessarily commencing on the day appointed by law for its commencement. A deed admitted to record on the day appointed for commencing the term, but before the day on which the court actually commences its session, will be unaffected by the lien of the judgment." In *Brockenbrough v. Brockenbrough*, 31 Gratt. 580, the question arose as to which of the two judgments was the prior lien, both being rendered at the same term of court,—one on the first day thereof, and the other on the last day. The court held that both judgments related back to the first day of the term, and that there was no priority

between them. Burks, J., observed: "It is further contended that if the judgment is not void, the appellant's judgment has priority as a lien. The latter was a judgment by default in a pending suit, and has relation to the first day of the term of the court in which it was rendered. The judgment of Settle was confessed in the same court and on the first day of the same term. Both must be treated as judgments rendered on the same day, at the same time. Neither has precedence over the other in point of time. In such case the court takes no notice of the fractions of a day," citing *Coutts v. Walker*, 2 Leigh, 268; *Skipwith v. Cunningham*, 8 Leigh, 271, 81 Am. Dec. 642; *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Freem. Judgm.*, §§ 369, 370. *Morgan v. Sims*, 26 Ga. 283, was based upon a statute entirely different from § 477 of the Code of this state. In Georgia the statute relating to the liens of judgments provides that the property of the defendant "shall be bound from the signing of the first judgment; but where several judgments shall be of equal date, the first execution delivered to the sheriff shall be first satisfied." Cobb's Analysis & Forms, 89. Under such a provision the court very properly held that the judgment was a lien from the time of the signing thereof, and that the doctrine of relation did not apply. In the Alabama case (*Pope v. Brandon*) 2 Stew. (Ala.) 407, 20 Am. Dec. 49) the doctrine contended for by appellant herein was held and applied. Other cases may be found which are in line with *Pope v. Brandon*, but they are almost wholly influenced by local statutes. The following authorities sustain the construction we have given § 477 of the Code: *Urbana Bank v. Baldwin*, 8 Ohio, 65; *Jackson v. Lucie*, 14 Ohio, 514; *Davis v. Messenger*, 17 Ohio St. 231; *Doe, Sturges, v. Bank of Cleveland*, 8 McLean, 140; *Mutual Assur. Soc. v. Stanard*, 4 Munf. 539; *Coutts v. Walker*, 2 Leigh, 268; *Horsley v. Garth*, 2 Gratt. 471, 44 Am. Dec. 393; *Kellerman v. Aultman*, 80 Fed. Rep. 888; *Farley v. Lea*, 4 Dev. & B. L. 169, 32 Am. Dec. 680; *Norwood v. Thorp*, 64 N. C. 682; *Porter v. Earthman*, 4 Yerg. 358.

The case of *Urbana Bank v. Baldwin*, 8 Ohio, 65, was this: Josiah Baldwin conveyed to C. and E. B. Caville certain real estate in Clark county, the deed bearing date November 21, 1820. The November term, 1820, of the court of common pleas of that county commenced on the 20th day of that month, and on the same day the Urbana Bank commenced a suit against Baldwin and others. After service of summons, and on the 25th day of the same month, judgment was rendered against the defendants, served upon confession. Subsequently, on September 4, 1826, the real estate conveyed to the Cavillers was levied upon to satisfy the judgment. A motion was made by the purchasers under Baldwin to set aside the levy. The supreme court held that the judgment was a lien upon the land, although it had been sold by the judgment debtor four days prior to the rendition of the judgment, but subsequent to the commencement of the term of court. In *Jackson v. Lucie*, 14 Ohio, 514, the facts were these: At the April term, 1842, of the court of common pleas of Ashtabula county, which commenced on the 10th

day of the month, plaintiff recovered a judgment against the defendants for \$1,474.37. The judgment was obtained by confession on April 10. On April 7 the defendants executed a mortgage to one Eastman upon certain real estate in the county, to secure the sum of \$2,300, which mortgage was filed for recording on April 12. In an action brought to settle the priorities of the lien of the judgment and mortgage the court held that the judgment operated as a lien upon the land from the first day of the term, and was superior to the lien of the mortgage. *Bank of Cleveland v. Sturges*, 2 McLean, 841, arose in Ohio. It was a contest between a mortgagee of real estate and a judgment creditor of the mortgagor. The judgment was recovered the second day of the term of court, and the mortgage was recorded the same day. It was ruled that, under the statute of Ohio, the lien of the judgment was paramount, since it took effect on the first day of the term. To the same effect is *Doc. Sturges*, v. *Bank of Cleveland*, 3 McLean, 140.

It is urged that the two Ohio cases referred to and the decisions reported in 2 and 3 McLean, were decided under a statute materially different from the one relating to the liens of judgments in this state. The statute in force in Ohio when said cases arose declares "that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor from the first day of the term at which judgments shall be rendered in all cases where such lands lie within the county where the judgment is entered, and all other lands, as well as the goods and chattels of the debtor, shall be bound from the time they are seized in execution." Ohio Laws 1824, p. 108; Swan's (Ohio) Stat. 1841, p. 468; 3 Chase's Stat. p. 1709.

The only difference between the foregoing provision and our § 477 is this: Under the Ohio statute all judgments, whether by confession or not, become liens from the first day of the term at which they are entered; while, under ours, judgments by confession and judgments rendered at the same term at which the actions are commenced become liens from date of rendition. All other judgments in this state relate back to the first day of the term, and are liens from that date. It requires no argument to show that the Ohio decisions to which reference has been made are entitled to great weight in construing our statute. In fact, the statutory provisions of the two states being so nearly alike, and ours having been adopted in 1858, after the highest court of Ohio had construed the section above quoted, the precedents are almost, if not quite, conclusive upon the question under consideration. Our § 477 is precisely the same as § 421 of the present Code of Ohio, which was enacted in that state in 1858. Swan's Stat. 1864, p. 675. After the legislature of Ohio had adopted the statute relating to liens of judgments, of which ours is a literal copy, the supreme court of that state, in 1867, in *Davis v. Messenger*, 17 Ohio St. 231, held that a judgment operates as a lien upon the lands of the defendant from the first day of the term, and is superior to a mortgage recorded during the same term, although prior to the date of the judgment. In that case the plaintiff recovered a judgment against Joseph

Johnston in the court of common pleas of Union county at the May term, 1859, of said court, which began at 12 o'clock noon on the 9th day of said month. The judges of said court, under and in pursuance of the statute of that state, issued an order specifying that the term would commence at 10 o'clock on said day, which order was spread upon the journal of the court, as required by said law. Johnston executed a mortgage to the defendant Messenger on 120 acres of land situated in said county, and owned by Johnston, which mortgage was delivered for record on the 9th day of May, 1859, at 11 o'clock A. M. The trial court held that the lien of the judgment did not attach until the court actually commenced, and that the lien of the judgment was junior to that of the mortgage. On error to the supreme court, the judgment was reversed, the court holding that the judgment lien had priority over that of the mortgage. This case is precisely in point.

A construction has been placed on § 477 of the Code in *Kellerman v. Aulman*, 30 Fed. Rep. 888, which arose in the circuit court of the United States for this district. On the 4th day of February, 1883, the defendants recovered a judgment against one Van Slyke in a suit commenced in October, 1882. The judgment was rendered at the January term, 1883, the term commencing on the 1st Monday in January. On January 17, 1883, but prior to the entry of the judgment, Van Slyke conveyed the lands in controversy, which he had owned for several years, to the plaintiff's grantor. Execution was issued and levied upon said lands under said judgment, and plaintiff brought an action to restrain the sale thereunder. Judge Brewer, after citing § 477 of the Code, held that the judgment was a lien from the first day of the term, and took priority in date over the conveyance.

We have been unable to find, although we have made diligent search, a single decision under a statutory provision similar to the Nebraska statutes which sustains the contention of counsel for appellant. We do not think that the district court erred in giving the judgment priority over the mortgage.

The decree is affirmed.

Irvine, C., having presided in the court below, took no part in the above decision.

Ryan, C., dissenting:

The case at bar presents the question of priority as between the lien of a judgment rendered in a case continued from a former term, as against the rights of a mortgagee under a mortgage taken and recorded prior to the rendition of the judgment, but during the same term. The writer hereof conceives that there is a difference in priority between mere liens upon real property, both of them having their origin during the same session of court, and the lien of a judgment rendered during a term, but subsequent to a conveyance by deed of the property attempted to be charged with the lien of a judgment. In the latter case it would seem that, at the time of the rendition of the judgment, the defendant is possessed of no interest in the real property upon which a general judgment could be operative, hence

the difference in the principles above stated. Section 477 of the Code of Civil Procedure provides that "the lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered," etc. There are other classes of cases included within the provision of this section, but the language quoted is all that is applicable to the matter under consideration. It is contended that the term "the lands and tenements of the debtor" refers to the first day of the term at which judgment is rendered, and that therefore this provision should be construed as though it read: "The lands and tenements of the debtor which he owned on the first day of the term shall be bound for the satisfaction of a judgment rendered, no matter at what time during that term." In passing, it may be observed that the literal construction contended for would exclude any lands or tenements of the debtor acquired subsequently to the first day mentioned,—a conclusion which has been repudiated by this court. It seems to the writer hereof that a more natural and reasonable construction would be that which would cause a paraphrase of the language to read as follows: "The lands and tenements of the debtor owned by him when the judgment is rendered shall be bound for the satisfaction thereof from the first day of the term at which such judgment is rendered." Any other construction renders the judgment lien operative against lands not owned by the debtor when the judgment is entered,—a construction which seems incompatible with several of the decisions of this court. In *Colt v. DuBois*, 7 Neb., on page 894, is found the following language of Judge Gant, referring to the lien of a judgment upon real property acquired after the rendition of a judgment: "The lien is neither a *jus in re* nor *jus ad rem*, and amounts only to a security against subsequent purchasers and encumbrancers. 4 Kent, Com. 437. It confers only the right to levy on the land to the exclusion of other adverse interests subsequent to the rendition of the judgment, and this right applies to all the lands and tenements of the debtor in the county where the judgment is entered, whether held by him at the time of the rendition or subsequently acquired." In *Galwey v. Matchow*, 7 Neb. 285, the subject under discussion was whether or not the lien of a judgment should be declared paramount to the lien of a mortgage as against lands which the mortgage, by reason of a mistake, failed properly to describe; and it was held that the judgment was within the class of cases against which the mortgage had become effective irrespective of the record thereof as provided by § 16, chap. 48, Rev. Stat. Judge Lake, discussing the lien of the judgment in this case, said: "And this lien is a legal one, and does not exceed the actual interest which the judgment debtor had in the estate at the time the judgment was rendered." *Pierce v. Brown*, 74 U. S. 7 Wall. 205, 19 L. ed. 134. It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will always limit the lien to the actual interest of the judgment debtor.

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Freem. Judgm. § 857, and cases cited: *Swartz v. Stees*, 2 Kan. 286." In *Berkley v. Lamb*, 8 Neb., on page 399, will be found the following language of Maxwell, Ch. J., to wit: "In the case of *Colt v. DuBois*, 7 Neb. 891, it was held that the lien of a judgment attaches to all the lands and tenements of the debtor in the county where the judgment is rendered, whether held by him at the time of its rendition or subsequently acquired. We adhere to that decision, but the lien of the judgment attaches only to the interest of the debtor in the land." *Pilley v. Duncan*, 1 Neb. 145, 93 Am. Dec. 887; *Uhl v. May*, 5 Neb. 157; *Galwey v. Matchow*, 7 Neb. 285. And the lien can attach to no greater interest than that owned by the debtor." Cobb, J., approved of the line of argument of the chief justice, and the dissent of Lake, J., is mentioned at the end of the above opinion, but there is given no statement of the grounds of that dissent, though, in view of his language in *Galwey v. Matchow*, quoted above, it could hardly have applied to the portion of the opinion of the chief justice just quoted. This inference finds countenance in the following language in the opinion filed by Lake, J., in *Mansfield v. Gregory*, 11 Neb., on page 298: "The lien of an ordinary judgment on the real estate of the debtor is not specific, but general, and is subject to all prior liens, either legal or equitable." *Metz v. State Bank*, 7 Neb. 165. Such lien does not exceed the actual interest of the judgment debtor in the land, and is subject to every equity therein existing against the debtor at the time of its rendition. *Galwey v. Matchow*, Id. 285."

In *Leonard v. White Cloud Ferry Co.* 11 Neb. 888, and in *Dewey v. Walton*, 31 Neb. 819, this court again reiterated and enforced the rule that the lien of a judgment could attach to no greater interest in the land than the defendant possessed; citing the authorities above referred to and quoted from. This may therefore be accepted without question as fully settled in this state, and it therefore becomes important to consider what interest a defendant retains in real property after his conveyance thereof. Section 50, chap. 73, Comp. Stat., provides that "every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." In *Edminster v. Higgins*, 6 Neb. 265, this court had under consideration the right of a vendor to a vendor's lien upon real property for its purchase price; and Maxwell, J., in the opinion filed, used the following language, immediately following § 50, *supra*, which he had just quoted: "The obvious intention of the registry acts is to give notice to all persons who may have occasion to ascertain whether there has been any prior encumbrance or conveyance of any real estate. And the notice given by the record is as effectual in law as personal notice to the party to be affected by it. The policy of our law is to discourage secret liens, and to require all instruments affecting the title to real estate to be entered of record. The law thus places the means within the reach of everyone desiring to purchase real estate of ascertaining the conditions of its title." The opinion just referred to contains the following language, almost at its close: "We are clearly

of opinion that the doctrine of a vendor's lien in a case like the one at bar is repugnant to our statutes in relation to real estate, and is therefore no part of our law." It is difficult to imagine why these considerations are not applicable to the lien of a judgment obtained after the first day of the term at which it was rendered, as affecting a conveyance meantime made by the defendant. It may be claimed, however, that the pendency of the action constructively affects with notice of the result all parties who contemplate purchasing real property of the defendant. The law governing *lis pendens* is found in § 85 of the Code of Civil Procedure. It provides that, "when a summons has been served or publication made, the action is pending so as to charge third persons with notice of pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." This language is followed by a long proviso, probably intended to require the filing in the office of the county clerk or register of deeds of a notice defining the object of the action, its subject matter, etc. As this proviso was intended as a limitation most likely, though as to its effect there is no great certainty, the party above quoted is that upon which alone, if at all, a judgment lien in the case supposed can be made effective as against the purchaser of real estate. It cannot escape observation that, by the provisions of § 85, notice is implied to third parties of the pendency of the action, and that, while the action is pending, third persons can acquire no interest in such subject matter as against the plaintiff's title. As has already been noted, it was stated in *Cole v. DuBois*, 7 Neb. 394, by Judge Gantt, in delivering the opinion of this court, that a judgment lien is neither a *jus in re* nor a *jus ad rem*, and amounts only to a security against subsequent purchasers and encumbrancers. The language of § 85 implies that notice *lis pendens* is restricted entirely to the plaintiff's title to the subject-matter in dispute, and therefore could operate only where the subject-matter litigated is a *jus in re* or a *jus ad rem*. The case of *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559, quotes from text-writers of approved authority, illustrating the origin, necessity, and application of the rule of *lis pendens*, laid down in § 85 of the Code of Civil Procedure, harmoniously with the views just expressed. The conclusion is irresistible that the pendency of a suit which finally culminates in a judgment during the term is not notice that such a lien may arise incidentally thereto as against a conveyance meantime made, for the very good and sufficient reason that it is not justified by the terms of § 85, just referred to. If a purchaser is not bound by the notice *lis pendens* as to the liens incident to and arising out of a judgment subsequently rendered against his grantor, and if the judgment lien is effective only against the interest of the judgment,—as it is believed has been conclusively shown by the decisions of this court,—the conclusion is inevitable that the lien of the judgment can have no relation back of its origin to the prejudice of a purchaser of real property of the defendant pending suit for the recovery only of a money judgment. This conclusion has been reached on other lines of

inquiry, as will appear by the following quotations and the cases cited in support of each: "A judgment will not be considered to relate to the first day of the term for the purpose of giving it priority over a conveyance to a purchaser for value and without notice." 12 Am. & Eng. Enc. Law, p. 115, citing in note the case following: *Morgan v. Sims*, 26 Ga. 283. See also *Skipwith v. Cunningham*, 8 Leigh, 272, 81 Am. Dec. 642; *Withers v. Carter*, 4 Gratt. 407, 50 Am. Dec. 78; *Brockenbrough v. Brockenbrough*, 81 Gratt. 590. In § 442 of Black on Judgments, is found the following language: "As against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance,—citing *Morgan v. Sims*, 26 Ga. 283, and *Pope v. Brandon*, 3 Stew. (Ala.) 401, 20 Am. Dec. 49. In § 269 of 2 Freeman on Judgments the rule is thus stated: "However the fiction of law by which judgments are considered as being rendered on the first day of the term may affect one judgment lien in a contest with other liens of the same nature, it seems to be generally conceded that it cannot prejudice the interests of bona fide purchasers. Whenever a purchaser, before the signing of judgment, without notice, and without being guilty of any fraud, acquires an interest in real estate, that interest cannot be charged with the lien of any judgment subsequently entered against his grantor, though such judgment might, as between itself and other judgments, rank as though entered at the beginning of the term, and at some time prior to its actual rendition. In Virginia, the rule that judgments relate to the first day of the term has always prevailed, unless the court in fact met for the term on a day subsequent to that appointed by law for the first day of the term, in which case a judgment lien was decided not to overreach a conveyance recorded before the day on which the court met, though after the time when it ought to have met. In order to rank as of the first day of the term at which it was rendered, the judgment must be the final determination of an action which was in such a condition that it might have been tried and disposed of on the first day if it had happened to have the first place on the calendar. The reason why judgments rendered at different dates were ever treated as of equal rank was because all the cases ready to be tried at the opening of a given term were equally entitled to the precedence arising from being first decided; and, in order to avoid giving any suitor an advantage due entirely to the fortuitous circumstance that his cause was first called for trial, it was thought proper by aid of a legal fiction, to assign his judgment a place in no wise superior to that assigned to others equally entitled to precedence." It is the belief that an examination of the cases upon this subject will sustain the utterances of the text writers quoted from, in relation to conveyances of real estate made during the term at which judgment is rendered. The language last above quoted indicates the reason why the statute fixed the rule as between lienors by virtue of judgments, and it is believed that portion of the statute should not be extended

so as to include rights other than those in the nature of liens upon the property in the hands of a judgment debtor at the time of the rendition of judgment.

In thus broadly stating the rule as to conveyances made during the term at which judgment is subsequently rendered, the case of *Kellerman v. Aultman*, 80 Fed. Rep. 888, has not been overlooked. In the case referred to, Brewer, Circuit Judge, after quoting § 477 of the Code of Civil Procedure, used the following language: "As the action in which the judgment of *Aultman v. Van Slyke* was rendered was commenced before the January term, the plain import of the language of this section carried the judgment lien back to the first of the term, and to a date before the conveyance of Van Slyke. This section is identical with those found in the statutes of Ohio and Kansas, and has by the courts of those states as well as of this, received a uniform construction. *Urbana Bank v. Baldwin*, 3 Ohio, 65; *Jackson v. Luce*, 14 Ohio, 514; *Davis v. Messenger*, 17 Ohio St. 231; *Kiser v. Sawyer*, 4 Kan. 503; *Miller v. Finn*, 1 Neb. 294; *Colt v. DuBois*, 7 Neb. 394. In this last case the court uses this language: 'The rule will not be questioned that under our statutes relative to judgment liens, all judgments rendered during the term, in actions commenced prior thereto, are liens on all the lands of the debtor within the county from the first day of the term.' These authorities, especially those from the supreme court of this state, construing the effect of one of its statutes, put the question at rest." It is clear from the language of Brewer, J., just quoted, that his opinion was largely based upon the language quoted from *Colt v. DuBois*, 7 Neb. 393. As illustrating the slight examination the learned judge must have given to that case, it will be profitable to examine the facts under consideration in the case of *Colt v. DuBois*. From the opinion of Gantt, Ch. J., we learn that on the 18th of October, 1872, O. J. Martin, one of the defendants, acquired possession of a certain tract of land in Lancaster county, Nebraska. The remaining statement of facts I quote from the opinion, as well as the language quoted by Brewer, J., in the connection in which it occurred; That "in August, 1872, Isalah Coppuck commenced an action against O. J. Martin in the district court of said county; and on the 30th of October, 1872, at a regular term of said court, which was begun on the 1st day of the same month, he recovered a judgment against said defendant Martin in said action. Afterwards Coppuck assigned this judgment to defendant J. W. Hartley, who thereby became the legal owner of the same. On the 2d of November, 1874, O. J. Martin and Ann, his wife, executed and delivered to S. C. Colt, plaintiff in error, a mortgage on all the above described lands. The plaintiff complains that, under these facts, the court below erred in deciding that the Coppuck judgment assigned to Hartley had priority of lien over his mortgage. It is insisted that the judgment in this case has relation to the first day of the term at which it was rendered; and, as all the lands described were subsequently acquired by defendant O. J. Martin, the judgment created no lien upon

any of these lands, though the title was acquired before the rendition of the judgment, and therefore the plaintiff's mortgage has priority of lien over the judgment. The rule will not be questioned that, under our statute relative to judgment liens, all judgments rendered during the term in actions commenced prior thereto are liens on all the lands of the debtor within the county from the first day of the term. This interpretation is given to the statute in the case of *Miller v. Finn*, 1 Neb. 294, and it places all such judgments entered at the same term upon equality in regard to liens, and thereby does equal justice to creditors whose judgments are necessarily entered on different days of the term." The quotation which has just been made includes the language quoted by Brewer, J., which he regards as decisive of the question as to the rights of a grantee under a deed made during a term at a date prior to the rendition of the judgment. The case actually under consideration by this court in the case of *Colt v. DuBois*, 7 Neb. 393, involved the right of a judgment lien holder as against a mortgagee, not as against the grantee under a deed. The case of *Miller v. Finn*, relied upon by Brewer, J., in that opinion, is correctly and fully summarized in the language which we have just quoted from *Colt v. DuBois*. It will thus be seen that in neither of the Nebraska cases relied upon by Brewer, J., was there involved any question of the rights of the holder of real estate under a deed. This distinction is important in view of the provisions of § 50, chap. 73, that every conveyance of real estate shall pass all the interest of the grantor therein unless a contrary intent can be reasonably inferred from the terms used. As to a mortgage, the provisions of § 55 of said chapter 73, are that, "in the absence of stipulations to the contrary, the grantor of real estate retains the legal title and right of possession thereof;" and the rule governing mortgages affords no analogy as to the principle which should be applied to absolute conveyances. The other cases cited by Brewer, J., in *Kellerman v. Aultman*, are equally wide of the mark. For instance, in *Urbana Bank v. Baldwin*, 3 Ohio, 65, the entire opinion of the court is as follows: "The case may be a hard one, but the law is clear in favor of the plaintiff's lien. The suit was pending on the first day of the term, and when that is the case, the judgment relates back to that day, no matter on what day of the term it was confessed. There can be no reason for the court to restrain the words of the statute in this case, that would not apply to every other. It does not follow that the lien must extend to the first day of every term, if no process was then pending. It is sufficient, however, to decide that case, when it comes up for decision." The principle decided in the case of *Jackson v. Luce*, 14 Ohio, 514, cited by Brewer, J., in support of his conclusion, is comprehensively stated in the syllabus in the following language: "A judgment entered by confession during the term of the court of common pleas operates as a lien upon the land of the judgment debtor from the first day of the term, and is to be preferred to the lien of a mortgage, executed before, but not recorded till after, the commencement of

the term." The sole remaining case cited by Brewer, J., is that of *Kiser v. Sawyer*, 4 Kan. 508, in which the court had under consideration the term "lands, tenements, and hereditaments," and the question was whether or not a statute providing that the lands and tenements should be bound for the satisfaction of a judgment included an equitable as well as a legal interest therein. It was held in that case that the lien of a judgment operated against the equitable as well as the legal estate in lands and tenements of the debtor, which equitable estate might be reached under the provisions of the Kansas statute applicable to cases of that kind. This was the only question that was decided, and as the supreme court of Kansas reached a different conclusion from that attained by this court in the case of *Nessler v. Neher*, 18 Neb. 649, in which the lien of a judgment was held not to attach to a mere equity in real estate, the Kansas case is of no value in the matter under discussion. From this review of the authorities relied upon by Brewer, J., it is apparent that the

opinion rendered by him in the case of *Kel-lerman v. Aultman* has very little practical value, for it is evident that he gave the case but very hasty consideration. The positive terms in which the contrary rule is laid down in *Black on Judgments*, in the *American & English Encyclopædia of Law*, and in *Freeman on Judgments*, supported, as these text-writers are, by the authorities cited, should have a much greater weight than should be accorded to the opinion of Judge Brewer referred to.

In view of the language of our statute, the former holdings of this court, the great injustice which would be wrought by any other holding, it is believed that the lien of a judgment which is rendered subsequent to a conveyance by the defendant of real property ought not to be held superior to, or in contravention of, the interest the grantee acquired by such conveyance.

Ragan, C., concurs.

WASHINGTON SUPREME COURT.

George GOETZINGER, *Resp't.*,

v.

James L. ROSENFELD *et al.*,

and

W. H. Vessey and Wife, *Appls.*

(16 Wash. 392.)

1. A statement in appellant's brief that the court held a mortgage prior to a judgment sufficiently points out the alleged error where that is the only question presented.
2. The presumption is that a judgment obtained against a husband, and which is claimed to be a lien upon community property, was for a community debt, if there is no proof on the subject.
3. The law divides the day where equity requires it.
4. A mortgage to secure an antecedent debt which is filed before the actual entry of a judgment which was filed soon afterward on the same afternoon will not have priority over the judgment, but their liens will be equal.

(February 2, 1897.)

A PPEAL of Vessey and wife from a judgment of the Superior Court for Yakima County giving plaintiff's mortgage upon the property of Rosenfeld priority over a judgment which had been obtained by appellants against Rosenfeld. *Reversed.*

The facts are stated in the opinion.

Messrs. Whitson & Parker, for appellants:

Does the law take note in this kind of a case of the fraction of a day?

Freeman on Judgments, vol. 2, 4th ed. § 870, says there are three classes of cases to which the doctrine may apply: (1) Those involving the precedence of judgment liens between one another; (2) those involving the priority of judgments and other liens; and (3) those involving the right of purchaser in good faith prior to actual rendition and docketing of the judgment.

This case falls within the second class.

The common-law rule is that the judgment takes effect as of the first day of the term, and a conveyance filed in the meantime, that is, after the first day, is inferior to the judgment lien.

2 *Freem. Judgm.* 4th ed. § 870; *Boyer's Estate*, 51 Pa. 432, 91 Am. Dec. 129.

Where the mortgage is filed the same day of the rendition of the judgment, the law, taking no note of the fraction of a day, will presume that the judgment was entered at the regular hour of the convening of the courts and that the judgment has priority.

Boyer's Estate, 51 Pa. 432, 91 Am. Dec. 129; *Follett v. Hall*, 16 Ohio, 111, 47 Am. Dec. 865.

Some authorities hold that inasmuch as the law takes no notice of the fraction of a day, hence they will be presumed to have been filed at the same time, and are of equal rank.

Murfrees v. Carmack, 4 Yerg. 270, 26 Am. Dec. 232; *Follett v. Hall*, 16 Ohio, 111, 47 Am. Dec. 865; *Hendrickson's Appeal*, 24 Pa. 863; *Olaason's Appeal*, 22 Pa. 359.

Messrs. H. J. Snively and Fred Miller for respondent.

Reavis, J., delivered the opinion of the court:

The plaintiff commenced an action in the superior court of Yakima county to foreclose a mortgage executed by the defendant Rosen-

See note to preceding case.

feld and wife to plaintiff upon certain real estate in the city of North Yakima. The mortgage was dated the 10th day of May, 1894, and filed for record on that day at 3 o'clock P. M. On the same day the defendant W. H. Vessey obtained a judgment against defendant J. L. Rosenfeld in the superior court of Yakima county, which was entered in the journal as of that day. In the complaint it was alleged that defendants Vessey and wife claimed an interest in the real estate described in plaintiff's mortgage, but that the claim of Vessey and wife was inferior to that of plaintiff. Vessey and wife answered, and set up the judgment, claimed a lien thereunder, and alleged that at the date thereof Rosenfeld and wife were the owners of the real estate as community property, and that the judgment was a community debt, and alleged that the lien of the judgment was superior to that of the mortgage. The court heard oral testimony to determine the question of the actual time of filing for record of both the judgment and the mortgage, and held, upon the proof taken, that the mortgage was filed first, and was therefore prior to the lien of the judgment, and should be first satisfied out of the proceeds of the real estate mortgaged.

Respondent moves to strike appellants' brief on three grounds: (1) That the appellants are made to appear as plaintiffs, and the respondent as one of the defendants; (2) that the errors relied upon to reverse the judgment are not clearly pointed out; (3) that the finding appealed from is not printed in the brief, nor was any finding that the court was requested to make and which was refused. The appellants' brief states that the court held that the mortgage was prior to the lien of the judgment, and that is assigned as error. We think this sufficiently points out in this case the error complained of, as there is but a single question presented. The superior court made no special findings of fact separately from the decree, but decreed the lien of the mortgage superior to that of the judgment. Therefore it would be of no assistance to this court to print in the brief the decree, or that portion of it relating to the priority of the mortgage over the lien of the judgment; and the motion to strike the brief cannot be sustained.

Respondent maintains that the judgment of W. H. Vessey was obtained upon a community debt, and that the appellants could not prorate with the respondent as against the community interests of Sere Rosenfeld, the wife, because appellants introduced no testimony to show that it was a community debt, and there was no finding by the court upon that issue. We think the presumption, in the absence of any proof, is in favor of the judgment creditors' contention that the judgment was obtained upon a community debt, and there is no question but that the real estate, the subject of this controversy, was community property.

The single question presented here is as to the priority of the mortgage which was assigned by the court over the judgment lien. At common law the judgment lien was established on the first day of the term in which the judgment was rendered, but such rule has been generally abrogated by practice, and in some instances by statute, in this country. The rule

is fixed in this state by statute. "The lien shall attach from the day of the date of said judgment." 2 Hill's Code, § 449. The court will not look further into the fraction of a day under this statute than to determine a superior equity. Where a purchaser in good faith parts with money for real estate upon a clear record, he ought to be protected against a judgment obtained upon the same day, but not actually entered at the time of the advancement of the money; and we think the same protection should reasonably be afforded a mortgagee who actually advances money upon the security on a clear record. Mr. Freeman, in his treatise on Judgments, says: "It seems to be well settled

that unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority, and entitled to be paid *pro rata* out of the debtor's real estate. Still this rule does not prevail universally. In many instances courts have inquired, even as between different judgments, the precise time when they were entered or docketed, and decided that the law will take notice of fractions of days in the contests between creditors seeking to have funds realized from the sale of lands applied in satisfaction of their judgment liens. Upon principle, one who advances money and takes a mortgage or deed of trust as security ought to be protected from secret liens to the same extent as if he were a purchaser of the property taking a conveyance of the legal title. The authorities, however, do not concur in this conclusion. In some of them, mortgagees are treated with the same indulgence granted to purchasers." 2 Freem. Judgm. 4th ed. § 370. In Pennsylvania the rule is that a mortgage and judgment entered on the same day will be regarded as taking effect simultaneously and as entitled to be paid *pro rata*. But some courts while conceding the necessity to ascertain the hour of the entry of the lien, nevertheless refuse to enter into any examination beyond the record, and the question is determined upon the record alone. But the weight of authority, and certainly sound principle, would seem to justify an inquiry into the precise time at which the judgment was entered, by less than record proof. The maxim that the law divides the day where equity requires it, would seem to be the correct one; and the law ought to divide the day in favor of one who loans money, or parts with anything valuable, when the inducement for his action is the security given him upon the then unencumbered real estate of the borrower. We do not think that the equity of the mortgage, where he has advanced his money, is necessarily or ordinarily inferior to the equity of a purchaser. In this cause the superior court heard other than record testimony to determine the precise time of the filing of the judgment, and also of the mortgage, and, while there was some conflict in the testimony of the witnesses, we think the court found correctly that the mortgage, which bore upon its face the hour of filing,—3 o'clock in the afternoon,—was placed on record before the judgment. It appeared from the testimony of counsel for the plaintiff, the mortgagee, that the time of the filing of the judgment was fixed in their memories, because plaintiff's claim had

been held by them for collection for a considerable time, and they were watching the progress of the trial between Vessey and Rosenfeld in order to file their mortgage before the judgment was actually entered. One of the attorneys for plaintiff testified: "The judgment entry in said cause was not filed until after the mortgage sued on here was filed. I am certain of this, because we had the claim of plaintiff for collection, and we were watching it for the purpose of getting in ahead of the judgment, and my attention was particularly called to it at the time." The judgment of Vessey was evidently filed very shortly after the mortgage the same afternoon, after 8 o'clock. There was no new consideration whatever for the execution of the mortgage held by plaintiff. It was executed to secure an antecedent debt. We cannot place this mortgage in the same rank with one which was executed upon a present valuable consideration and where the mortgagee in good faith advanced his money upon the faith of an existing clear record of unencumbered real estate. We think that here the court, having inquired into the fraction of the day to determine the equities between the lien of the judgment and the mortgage, should, upon the testimony, have found them equal, and directed that they be prorated in the proceeds from the real estate covered by both liens.

The cause is therefore reversed, with the direction to the superior court to modify its decree in accordance with this opinion.

Dunbar and Gordon, JJ., concur.

Rehearing denied.

GERMAN-AMERICAN SAVINGS BANK of Burlington, Iowa, *Resp.*,

v.

City of SPOKANE, *Appt.*

(..... Wash.)

1. Delay and negligence of city officers in providing a fund for the payment of street-grade warrants by levy and special tax or assessment will not render the city liable to an action, at least so long as the assessment plan can be enforced in any way.
2. Where one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself, and is the most at fault.

(Dunbar, J., *dissent*.)

(July 9, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to compel payment of the amount due on certain street-grade warrants because of defendant's failure to enforce payment of them by the proper persons. *Reversed*.

The facts are stated in the opinion.

NOTE.—For similar question, see *Barber Asphalt Pav. Co. v. Harrisburg* (C. C. App. 3d C.) 29 L. R. A. 401.

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Messrs. Plummer & Thayer, for appellant:

In *Stephens v. Spokane*, 14 Wash. 296, this court held that the city was not liable for negligence in failing to create the special fund upon which these warrants were drawn unless the negligence had proceeded to such an extent as to develop a loss of power upon the part of the city to create the fund, as, for instance, if the city had allowed the statute of limitations to run against the street-assessment liens; in such a case the city would be liable.

Messrs. Kennan & Belden, for respondent:

This court, on December 15, 1896, in *McEwan v. Spokane*, 16 Wash. 212, held that the city was liable for the nonpayment of similar warrants.

The remedy or means of enforcing a contract is a part of that obligation of a contract which the Constitution protects against being impaired by the law of a state.

Walker v. Whitehead, 83 U. S. 16 Wall. 314, 21 L. ed. 357; *United States, Von Hoffman, v. Quincy*, 71 U. S. 4 Wall. 585, 18 L. ed. 403.

Scott, Ch. J., delivered the opinion of the court:

Plaintiff brought this action to recover the amount due on certain street-grade warrants originally issued to one Massey, and payable out of the Victoria street-grade fund, and, having obtained a general judgment against the city therefor, the city has appealed. The foundation of the plaintiff's right of action, as presented in the briefs, was the delay and negligence on the part of the city's officers in providing the fund. The court also found, and that issue seems to have been presented in the pleadings, that the right to enforce collection of the special assessments was lost. The appellant (defendant) contests this finding, but, as the respondent does not seem to rely on it, we will not look into the evidence thereon at this time. It may become material, however, in the ultimate disposition of the case, and will be referred to later.

Questions relating to the character and enforcement of such liens have been before the court upon a number of former occasions, and our decisions thereon have in an instance or two been inconsistent and conflicting. It is a matter of common knowledge that most of the cities and towns here are heavily burdened with debt aside from these warrants, and, furthermore, that there is a large amount of this class of paper outstanding, and the question of the general liability of such municipalities, therefore, is of the utmost importance. Consequently, the gravest responsibility rests upon the court to settle and determine, as far as possible, the principles governing such liability, if it exists, with certainty and precision as the questions are presented. Owing to the paramount importance of the subject, and the various decisions thereon heretofore rendered, nearly all of which are in some measure involved in this and one or two other street-warrant cases submitted and now before us for our consideration, we have deemed it advisable at this time to review to some extent some of the cases we have heretofore decided relating thereto, and also some cases from other

states on the subject, for the purpose of definitely settling, if possible, a few principles. The matter may also call for a short notice of some other kindred questions discussed in those cases not necessarily involved in this one.

In *Baker v. Seattle*, 2 Wash. 576, the court held that such warrants, payable out of a particular fund, could not be considered as a general municipal liability with reference to the constitutional limitation on the amount of indebtedness a city could contract. There was no thought at that time that they ever could become such a liability here. In *Soule v. Seattle*, 6 Wash. 815 and 824, the court held that where a city had reached its constitutional limit of indebtedness it had no power to render itself liable for the cost of street improvements contracted for subsequent thereto, although the city failed to levy an assessment, and provide a special fund to pay for such improvements, as it had contracted to do. The principle was also recognized that where there was a lack of statutory authority to construct such improvements by a general tax, or from the general funds of the city, or where there was a failure to acquire jurisdiction of the subject-matter, there could be no general liability established against the city in any way. The city of Seattle had power to construct such improvement under its charter by a general tax. The city of Spokane has that power (*Stephens v. Spokane*, 11 Wash. 41); and it seems to be generally, though not universally, true of the various towns and cities of the state. It was also said in *Soule v. Seattle* that an action brought to establish a general liability against the city, where there had been a failure to provide the special fund, was not in the nature of an action *ex delicto*, but was for a breach of the original contract, or upon an implied agreement on the part of the city to pay in case of a failure to provide the special fund, where there was no express provision in the contract holding the city generally liable. We will next refer to the case of *Stephens v. Spokane*, 11 Wash. 41, where a judgment had been rendered in favor of the city, upon a demurrer interposed to the complaint, and the cause was reversed here, the court holding that the delay upon the part of the city to provide the special fund, as alleged, was sufficient to establish a general liability. There was no contention that the city had lost its right to proceed with the assessments. Thereafter, in *Thomas v. Olympia*, 12 Wash. 465, the court discussed and distinguished the cases of *Soule v. Seattle*, 6 Wash. 815 and 824, and *Stephens v. Spokane*, 11 Wash. 41, and held that where, in the case of a contract for street improvements to be paid out of a particular fund, the city had undertaken in good faith to collect the assessment, but had been unable to do so, owing to decisions of the courts, and was proceeding to make a new assessment, it could not be held liable for the cost of the improvements out of its general fund, and that where the contract provided; as in that case, that the contract would look only to the special fund, he had no right at all to proceed against the city generally for the negligence of its officers. When the case of *Stephens v. Spokane* was again before this court (14 Wash. 298 and 308), where the city had appealed from a judgment rendered against

it upon the trial, the court held that delay in providing the fund was not sufficient to enable the plaintiff to recover of the city but that it must appear that there was a loss of power to further prosecute the assessment, and that the city could not bind itself to create the fund within a certain time. Whatever inconsistency, if any, there may have been between these two cases, is immaterial here. In *McKwan v. Spokane*, 16 Wash. 212, the court held that where the city had contracted to provide the fund in the shortest possible time under its charter and ordinances, and had failed to do so, and had unreasonably delayed enforcing the assessments, it was liable generally, and that the city, and not the contractors, must look after the assessment, and enforce its collection. The right to recover was placed on the ground of delay alone. There was no contention that the statute of limitations had run against all of the special assessments, but the right to recover was sustained as to all of the warrants, regardless of such question. In *Bank of British Columbia v. Port Townsend*, 16 Wash. 450, while it was in effect held that an action would lie against the city where there was a failure to provide the fund, there was no discussion of that question. The case was disposed of on a demurrer to the complaint. Although the complaint alleged that the right to prosecute the assessments was lost, no importance was attached to it. In fact, the mooted question was other than that, as the opinion shows, and it was held that the complaint stated a cause of action. It was also held that, unless the contract was authorized by an ordinance, there could be no recovery. The most of these decisions were by a majority of the court only. The case of *McKwan v. Spokane* is in straight conflict with the decision rendered in *Stephens v. Spokane*, when it was last before the court, although there was no direct expressed intent to overrule it, and the same is true, but not in so great a degree, perhaps, of the case of *Bank of British Columbia v. Port Townsend*.

We will first note some of the propositions upon which there was no conflict in the decisions, and which we think may safely be regarded as settled here. One is that there can be no general liability contracted or established when the municipality has reached the limit of its indebtedness. *Baker v. Seattle*, 2 Wash. 576; *Soule v. Seattle*, 6 Wash. 815, 824; *Winston v. Spokane*, 12 Wash. 524. The first two cases held that indebtedness of that character was not a general indebtedness, and that the constitutional limitation did not apply. If such claims can subsequently become general liabilities against municipalities, serious complications are likely to arise, for in some instances the debt limit would undoubtedly be reached before all of such claims are provided for, and there might be some question as to which of them should be entitled to priority. If the contract in terms purposed to bind the city generally, and was lawfully entered into, the question should be determined with reference to the financial condition when such contract was made (*West v. Ohehalis*, 12 Wash. 869); and the priority of the respective times of execution would be controlling in determining the question as between the various contracts where only a part of them could be made a

general charge within the debt limit. Where the contract contained no such provision or no binding provision in that respect, and the right is founded on the breach of the contract in failing to provide the fund, a different question arises, and it must be decided with reference to the time either when the delinquency arose or when it should be judicially determined. Unless the latter time governs, there might be some question as to when the responsibility for the unreasonable delay becomes fixed, especially considering the fact that the city could not bind itself to provide the fund in a certain time, or in the shortest possible time, as has been sometimes attempted. *Stephens v. Spokane*, 14 Wash. 298 and 303.

Another proposition determined is that, where there was no power to construct the improvements in the first instance out of the general fund, the city cannot be made liable for a failure to provide the special fund. *Mindley v. Hull*, 13 Wash. 236. In a number of the foregoing cases, one, and sometimes two, members of the court dissented, or did not concur in the opinion, the grounds of disagreement generally not being stated, and, of course, they are not particularly important, but it may be well to observe that it was occasionally upon some point not discussed in the opinion, such as a different construction of the facts, or as to the application of the principle discussed to the case, which the nonconcurring members thought would require a different holding. There may have been no disagreement as to the law announced in the opinion.

The next question we will consider is as to whether an unreasonable delay in collecting the special fund is sufficient to sustain a general recovery. The provision involved in this case is as follows: "The city of Spokane Falls further agrees that it will proceed at once to levy a special tax or assessment upon the property fronting upon the street to be improved as aforesaid, for the payment of the sum aforesaid, and to complete the same, and pay the sum aforesaid as herein provided; and the city expressly covenants and agrees that it will prosecute the business of levying and collecting said special tax or assessment without any delay whatever in any part of the proceedings, and within the shortest time possible under its charter and ordinances relating thereto." There was no clause in the contract in terms binding the city generally to pay, and we have held that the city could not bind itself to provide the fund in a specified time. *Stephens v. Spokane*, 14 Wash. 298 and 303. So, this clause did not add very much strength to the contract, for, in the absence of it, the city officers could doubtless be compelled to proceed diligently in collecting the fund. We have held also that the warrant holders could mandamus the city officers to proceed to collect the assessment. *Soule v. Seattle*, 6 Wash. 315, 324, citing *Himmelmann v. Cofran*, 86 Cal. 411, which was a proceeding by mandamus. See also *Nate, Hemen, v. Ballard*, 16 Wash. 418, which was a mandamus proceeding, where the relator was successful in obtaining a judgment against the city officers to proceed. Other authorities sustaining this proposition are *Reock v. Newark*, 33 N. J. L. 129; *Wren v. Indianapolis*, 96 Ind. 206; and *Elliott, Roads & Streets*, p. 437; 38 L. R. A.

and more might be cited. There are some authorities against this proposition, one being *Diamond Match Co. v. Powers*, 51 Mich. 145, where it was held that mandamus is not adapted to cases calling for continuous action, but only to enforce a particular act. But if the remedy by mandamus proves inadequate or ineffective, or if for any other reason the proceedings could not be effectively enforced through the regular channels, we approve the doctrine laid down in *Soule v. Seattle*, 6 Wash. 315 and 324, that the courts could make and enforce the assessment. There is no reason why an action in equity could not be effectual to enforce and protect the rights of all parties. Such a right has been recognized and enforced, notwithstanding the fact that mandamus would lie. *Louisville v. Hyatt*, 5 B. Mon. 199. Probably a city taxpayer outside of the particular assessment district could mandamus the city officers to proceed to collect the special assessments in order to prevent the expense of the improvement from becoming a general charge against the city to his injury, but, as between such taxpayer and the warrant holder, justice would require that the burden should be placed on the latter, for he is a party directly and primarily interested. Such outside taxpayer would have no voice in the proceedings originally, unless, perhaps, where the contract in terms bound the city generally. He would have no right to remonstrate against the improvement, as is usually given to the taxpayers in the district, and would not be heard to contest or resist the contemplated action. In most instances where the liability of the city has been sustained, it has been on the ground that the city officers were the agents of the entire city, and that the city was liable for a failure upon their part to collect the fund. The decisions, however, have not been uniform in this respect, for in some cases it has been held that the city officers in such instances are not the agents of the entire city, but simply the agents of the particular district, for the purpose of carrying into effect a special improvement concerning the district.

An investigation of the decisions elsewhere upon the subject of such claims shows them to be in hopeless conflict. They are complicated also by the varying conditions of the respective contracts. In some instances the city had power to construct the improvement by a general tax. In others the power was limited to an assessment upon the property benefited. Some of the contracts contained a guaranty that the city would provide the fund. In some cases the rights of the contractors were expressly limited by the contract to the special assessment, there being a provision that they would in no event look to the city for payment, and there is a conflict in the decisions here also, for in some cases, notwithstanding such a provision, it has been held that the city was liable generally where the fund had not been provided through the fault or negligence of the city officers. In New York the doctrine of a general municipal liability in such cases is recognized. The latest case from that state to which our attention has been called is *Reilly v. Albany*, 112 N. Y. 80. In that case the city was held liable on such a contract for an unreasonable delay in collecting the special assessments.

There are a number of New York decisions upon this subject, and we shall not undertake to review them all, but will call attention to a few of them where some new features are involved. In *Cummingy v. Brooklyn*, 11 Paige, 596, the same ruling was had. It was said that the "local tax is a fund which has been provided by the legislature to reimburse the corporation for the expenses of an improvement which it has either paid or become liable to pay. And if the corporation, voluntarily or by compulsion, pays such expenses out of its general funds, any citizen who pays taxes may apply to the proper tribunal to compel the corporation to cause the general fund to be reimbursed, by an assessment and collection of the expense of such improvement from the owners of the property benefited, or out of the property itself, as authorized and directed by the charter." There may have been some conflict in the New York cases; at least, they are not clearly reconcilable. In the earlier case of *Lake v. Williamsburgh*, 4 Denio, 520, it seems to have been held that there was no such liability, and it was intimated that there might be an action on the case against the city officers personally for a failure to perform their duties. Also, see *Tone v. New York*, 70 N. Y. 157; *New York & B. Saw-mill & L. Co. v. Brooklyn*, 71 N. Y. 580; and *McOullough v. Brooklyn*, 28 Wend. 458,—to the same effect apparently. But the later case of *Reilly v. Albany*, 113 N. Y. 80, and *McCormack v. Brooklyn*, 108 N. Y. 49, held that there was such a liability, and the decisions of that state may fairly be said to support the doctrine. In Kansas the doctrine has been sustained. In *Atchison v. Byrnes*, 22 Kan. 65, the city was held generally liable, citing *Leavenworth v. Mills*, 6 Kan. 288, and *Wyandotte v. Zeitz*, 21 Kan. 649. See also *Atchison v. Leu*, 48 Kan. 128. The force of these decisions, however, as authority here, is much weakened by the holding that the contractor had no other remedy than to sue the city generally. The right to mandamus the board to enforce making the assessment was not recognized or discussed. The cases took the view also that the city was bound in the first instance, and that the provision for assessing the property benefited was intended to reimburse the general fund. In *Leavenworth v. Rankin*, 2 Kan. 357, it was held that the mode prescribed to create a general liability must be pursued, and the rule with regard to strict construction of the powers of municipal officers and agents was recognized. It seems that the prescribed mode had been pursued in the other cases. In Oregon the doctrine has been sustained. In *Portland Lumber & Mfg. Co. v. East Portland*, 18 Or. 21, 6 L. R. A. 290, a general liability was recognized, and the case seemed to proceed on the ground also that the right upon the part of the city to collect the special assessment was lost or inoperative. In the opinion of Lord, J., it is stated that it might be necessary to get additional legislation to that end. In that case the opinion of Strathan, J., holds that the method of charging the city might be different from that required under the charter for contracting a general obligation, but in that state the decisions have gone to an extreme in sustaining such a liability. In *North Pacific Lumbering &*

Mfg. Co. v. East Portland, 14 Or. 8, the city was held liable, although it could not have contracted a direct general liability in the first instance. In *Commercial Nat. Bank v. Portland*, 24 Or. 188, it was held that a stipulation providing that a contractor should look only to the particular fund would not relieve the city from general liability in the case of negligence in failing to provide the fund. In *Little v. Portland*, 26 Or. 235, it was held by that court that the liability for negligently failing to raise such a fund was one arising *ex delicto*, and that the city was liable, regardless of its debt limit. Upon that theory the holdings of the court could be sustained. But in our opinion, the authorities elsewhere do not support the proposition that such an action sounds in tort. At least, that is the general view taken, and we have followed it. Consequently, the decisions of that state could not be regarded as bearing strongly here upon the doctrine of a general liability. In Illinois the doctrine of a general liability has been indorsed, and to the extreme limit also in an instance or two. In *Maher v. Chicago*, 88 Ill. 266, it was held that a city could be estopped where it proceeded in disregard of its own ordinances; also that, notwithstanding an express provision in the contract to look only to the special fund, the city would be liable generally in case of an unreasonable delay. In the later case of *Chicago v. People*, 48 Ill. 416, it was held, in a mandamus proceeding to compel payment, that the contractor was bound by such a stipulation, it appearing that the city was then in good faith proceeding with the collection of the assessment. And *Maher v. Chicago*, 88 Ill. 266, was distinguished on the ground that there a special assessment could not be levied for want of power, and the court said it would hold differently in the case before it if the city were acting in bad faith, such as would be indicated by an unreasonable delay, or if there were defects in the special assessment proceedings which the city could not cure. In *Chicago v. Sexton*, 115 Ill. 280, the city was held liable for want of fidelity, or for the negligence of those who were authorized to act for it, and it was held that such liability was not within the limitation in regard to the creation of indebtedness. This case involved a building contract. But in *Gaddis v. Richland County*, 92 Ill. 119, which was a railroad bond case, in discussing the acts of public officers, it was held that they must follow the mode prescribed by law in order to create an indebtedness, and the doctrine of strict construction was recognized. These last two cases would seem to be inconsistent in so far as the debt limit, at least in the *Sexton Case*, was concerned. In *Morgan v. Dubuque*, 28 Iowa, 575, it was held that the city was liable for such improvements where there was a failure for an unreasonable time to collect the assessments. There was a stipulation in the contract for payment when the assessments were collected. There was no discussion of the question in the opinion. In *Bucroft v. Council Bluffs*, 63 Iowa, 646, which involved a grading contract, where the contractor had agreed to take for his pay assessment certificates upon owners of abutting property, and there was no power to assess such owners therefor, it was held that the city

was liable for the contract price. The city had power to construct such improvements out of its general fund, and it was held that the assumption of power to make the assessment was sufficient to bind the city. See also *Scofield v. Council Bluffs*, 69 Iowa, 695; *Polk County Sav. Bank v. State*, 69 Iowa, 24. The decisions in that state support the general liability doctrine. The same is also true of the state of Kentucky, according to the following decisions before us: In *Louisville v. Hyatt*, 5 B. Mon. 199, which was an action in equity to enforce such assessments against the property owners, and also to recover payment of the city, where the contract provided that the contractors would look to the lotowners for payment, it was held, the assessment being void, that the contractors could recover of the city, the city having power to construct such improvements out of its general fund. See, also *Kearney v. Covington*, 1 Met. (Ky.) 839. It was said in that case, although not necessary to its decision, that the city would be liable even if it had no power to construct such improvements out of its general fund. In *Allen v. Janesville*, 35 Wis. 408, where the assessment was void, and could not be cured, the city was held liable. It was said that no limitation on the general power to make a binding contract by the city had been disregarded. See also *Eilert v. Oakkosh*, 14 Wis. 587.

It may be said that the decisions in New York, Illinois, Iowa, Kentucky, and Wisconsin fairly support the doctrine of a general liability here, but some of them are weakened by their decisions in other cases holding to a strict construction with reference to the acts of municipal officers, the same principle being involved. In California the doctrine of such a liability has been partially recognized, but upon a different ground. In *Argenti v. San Francisco*, 16 Cal. 256, the city had collected a portion of the assessment, which had been transferred to its general fund. It was held that the city was primarily liable. In the opinion of Field, J., it was held that the mode for contracting a general liability had been pursued; that it was necessary to follow the mode, and that the city must proceed by an ordinance where one was required; also, that an estoppel would not arise upon the ground that the whole city had been benefited. Field, J., said, in part: "But I place my concurrence in the judgment heretofore rendered in this case upon the validity of the contracts with the city, which were completed by the acceptance of the proposals of the contractors, and the primary liability of the city for the work performed thereunder. I have been thus explicit, because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no application to cases of this character. In *McCracken v. San Francisco*, 16 Cal. 591, it was held that there could be no ratification where there was no original power to make the contract, and that, where the power

could only be exercised in a particular manner, the ratification must pursue the same mode, the doctrine of strict construction being recognized. See also *McCoy v. Bryant*, 58 Cal. 247, on the question of limited powers and manner of proceeding, and *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96, for comments on former California cases. These decisions cannot be said to support a general liability here. On the contrary, they support the propositions that the prescribed mode of contracting must be pursued; and that the liability cannot arise by estoppel, and in no event could a liability in excess of the power to contract be created. The same is true, we think, of Texas, Ohio, and Michigan, in so far as we are enlightened by the decisions before us. In *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 687, which was an action to recover for services as an attorney, it was held that, where the city had the power to employ by ordinance, its officers could not employ in the absence of one; that the city was not bound on the implied contract, and was not estopped in consequence of having had the benefit of the services. In *Creighton v. Toledo*, 18 Ohio St. 447, where the contractor was empowered to collect the assessments, and where some of the property sold thereunder did not bring enough to meet the amount of the assessments thereon, it was held that, where there was an express contract, none could be implied, and, the mode of payment having been stipulated, the contractor was bound by it, notwithstanding there was a deficiency, and that there could be no implied guaranty upon the part of the city that the amount should be sufficient. In *Goodrich v. Detroit*, 12 Mich. 279, which involved a paving contract which had been performed by a contractor who was to be paid out of the special fund, and where the special assessments therefor had been collected by the city collector, but which he had not paid over to the city treasurer, and was thought to have misappropriated, a suit being pending upon his bond therefor, it was held that, as the contract provided for payment when the assessments were collected by the city collector and paid over to the treasurer, the contractor could not recover of the city on the facts shown although the city had agreed to collect the assessments with reasonable care and despatch. It was shown that the suit against the collector was brought in November, 1861, a demurrer was interposed in January, 1862, and no further steps had been taken in the prosecution of the action when the contractor sued the city, in May, 1863. It was held that the charge of negligence was not sustained by the facts shown, but it does not clearly appear what the court would have held if it had thought negligence was established by the agreed case. The city had no power to construct such improvements out of its general fund. The above cases from the last-mentioned four states are not referred to as being directly and strongly against the doctrine of a general liability here in all its phases, but as being against some of the grounds on which a liability is urged in other states, and as tending against it generally, and in harmony with our holdings upon like principles in many instances. See *Sutton v. St. Joseph*, 60 Mo. 153, which is the latest ad-

judication in that state called to our attention, is against the doctrine squarely, and in effect overruled an earlier case, *viz.*, *Fisher v. St. Louis*, 44 Mo. 482, taking a different view. It was held also that a charge of negligence was not sustained by a showing of defective proceedings by the council. In New Jersey the decisions seem to conflict as to the principle involved. In *Reock v. Newark*, 88 N. J. L. 129, which was an action by a property owner to recover damages for the alteration of a grade in improving a street where such damages were to be paid by an assessment upon the property benefited by the improvement, and where the council had neglected to make the assessment, it was held that the plaintiff could not recover. In the later case of *Knapp v. Hoboken*, 88 N. J. L. 871, which was an action upon improvement certificates issued to a contractor for improving a street where the city had neglected to collect the assessments on property benefited, a contrary principle is recognized, and the right to recover was sustained, regardless of whether the city could collect the amounts. But in a still later case, *viz.*, *Paret v. Bayonne*, 40 N. J. L. 833, the principle adopted in *Reock v. Newark* was reaffirmed, the court saying: "The rule attempted to be vindicated in this case is plainly this: that by a certain course of law a city can be made liable, by a suit, for the expenses incurred in taking land for a public improvement, and the burden imposed upon the city at large, although the charter prescribes the mode of having such expenses assessed, and provides for their payment by the owners of the particular lands specially benefited. It is obvious that this is an endeavor to subvert the legislative scheme, which is to have the damages ascertained in an appointed manner, and paid by a certain class of persons. This, it has been repeatedly decided in this state, cannot be done." Here, in fact, a much stronger case was presented in favor of the claimant than the last one referred to, for, instead of a voluntary contractor, the court was dealing with the rights of a man whose land was taken from him by compulsory process for the purposes of the improvement. But neither of the former cases was referred to, and this is the latest case from that state called to our attention. In Indiana the non-liability doctrine is strongly sustained by a line of decisions. The latest before us is that of *Quill v. Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, where it is held that, in making and collecting such assessments the city authorities do not act as the general agents of the city, but as special agents of the district; also, that issuing bonds or certificates which show upon their face that they are issued in the course of constructing a street improvement, and are payable out of a special fund to be derived from assessments upon the property bordering on the street, is very far from creating a debt against the city; that assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received a pecuniary benefit which the citizens do not share in common; that the municipality as such is not benefited by the improvement, and there

is hence, under the law in question, neither a legal nor a moral obligation on the city at large to pay for it. See also *Montgomery County Comrs. v. Fullen*, 111 Ind. 410; *Wren v. Indianapolis*, 96 Ind. 206; *Tipton v. Jones*, 77 Ind. 807; *New Albany v. Sweeney*, 13 Ind. 245; *Johnson v. Indianapolis*, 16 Ind. 237; *Greencastle v. Allen*, 48 Ind. 847. In the last-mentioned case it was held, where the engineer refused to make an assessment, and the council refused to issue precepts, upon a proper application, against the property holders, that a suit could not be maintained against the town, and that the contractors' remedy was by mandamus, citing many authorities.

We have held in harmony with these and other authorities upon the subject coming from states where the nonliability doctrine is recognized upon many points. For instance, in the capitol building case (*Allen v. Grimes*, 9 Wash. 424), it was held that, even though the state could be sued, no cause of action could be stated against it by a warrant holder, and that such holder was limited to a right to require the officers to perform their duties; that the obligations to be issued there would create no liability against the state in any manner, but only against the fund, and it never was supposed for a moment that if anything should happen to the land grant, or if any contingency should arise whereby enough money should not be forthcoming to pay the warrants, the state would be liable. It would be hard to point out a difference between the equities of that kind of a contract and an ordinary street improvement contract. Both are payable out of a particular fund. In each the respective officers might fail to perform their duties. The same is true of *Winton v. Spokane*, 12 Wash. 524, where we held that the obligations there in question, payable out of the water-system fund, did not constitute a city indebtedness. This case was reaffirmed in *Kenyon v. Spokane* (Wash.) 48 Pac. 788. The holding in *Findley v. Hull*, 13 Wash. 236, that there could be no recovery against the city, is not in harmony with the decisions of most of the states sustaining the general liability doctrine, but lines up with many of those on the other side of the question. The same is true of the case of *Tacoma Light & W. Co. v. Tacoma*, 18 Wash. 115, holding to a strict construction of the powers of municipal officers. Others might be cited holding also against the doctrine of estoppel as applied to their acts. Our decisions we believe to have been consistent on that line, except as to some of these street improvement cases. Such representatives were not originally, nor now generally, looked upon as paternal boards or officers, with general powers and responsibilities in any way affecting the citizen, but only as authorized to bind their constituents in certain specified ways. The other view is an innovation, and dangerous in principle.

The Supreme Court of the United States has held strongly to the strict construction theory as applied to municipalities and municipal officers. In a late case, that of *Brenham v. German-American Bank*, 144 U. S. 173, 36 L. ed. 390, it was held that power conferred upon a municipal corporation to borrow money did not authorize it to issue municipal bonds there-

for, and, although the bonds which had been issued thereunder were in the hands of an innocent purchaser for value, it was held that there could be no recovery. Many cases were cited and commented on, and some earlier ones overruled. In *Peaks v. New Orleans*, 189 U. S. 343, 35 L. ed. 181, while the case is not exactly in point with the one before us, in that a particular board of city officers, instead of the general council, had been designated by the legislature for the carrying on of the improvement, it was held that there was no general liability upon the part of the city to make good the contract. While some importance was attached to the point mentioned, yet the argument proceeds against the right to recover of the municipality at all in such cases. In some respects the contract there in question was stronger against the city than the ordinary street improvement contract, especially that part with reference to funding the indebtedness in bonds of the city. The court, in its opinion, quoted from Cooley on Taxation (p. 416), stating, in substance, that general taxes are exacted in return for general benefits, but that special assessments are made upon the ground of special benefits to a limited portion of the community; that they are supposed to suffer no pecuniary loss thereby, their property being enhanced in value to an amount equal to the expenditure; and that "this is the idea that underlies all these levies." That being true, there is no basis for making them a public charge in such instances. Of course, it is generally put upon the ground of the negligence and agency of the city officers, but it is not well grounded. The court said there that, although the board was derelict in its duty, the city could properly say to the warrant holder, "Your remedy was by mandamus to compel prompt and efficient action by that board," and quoted approvingly from Judge Dillon as follows: "Why should all be taxed for the failure of the council to do its duty in a case where the contractor has a plain remedy, by mandamus, to compel the council to make the necessary assessment, and proceed in the collection thereof with the requisite diligence?" And the court says: "On what principle of right and justice can he [the warrant holder] ignore this remedy, and charge the municipality and burden all the taxpayers of the city?" It states also that the mere fact of noncollection did not prove dereliction of duty. If there had been dereliction of duty, the court inquired what would be the measure of liability, as there was no guaranty of payment in the contract. The whole trend of this case is strongly against holding municipalities generally liable on such contracts. In concluding its majority opinion, the court said: "It is equally the duty of this court, as of all others, to see to it that no burden is cast upon taxpayers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality, and, when a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor." Although the court made use of the expression

"without dereliction or wrong on the part of the city," here, in discussing the case, it nowhere appeared what the court would hold in case of such dereliction, nor what the court would deem dereliction on the part of the city. We do not take that expression as an intimation of any particular strength that such liability could be sustained, in the opinion of the court, on the ground of neglect of the city officers, for the whole trend of the argument is against it, as well as the authorities quoted. Nor is the case of *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659, in conflict with the foregoing, for in that case the general bonds of the city were issued not limited to the assessment fund, and the resort to lotowners upon the assessment was for the reimbursement of the city.

In 1 Dill. Mun. Corp. 4th ed. at § 459, it is said: "So, where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which by the charter must be made in a prescribed mode, if made without any contract or a valid one, the doctrine of implied liability does not apply in favor of the contractor, unless, indeed, the corporation has collected the amount from the adjoining owners, and has it in its treasury." And at § 482 it is said: "It has been several times decided that where the expense of making a local improvement is not to be raised by a general tax, but solely upon the property benefited, a failure of the corporation, though it is only the agent of the owners to be assessed, to discharge its duty, by making the necessary assessment, or its unreasonable delay in collecting and paying over the money, gives the contractor a right to recover his compensation in an action against the corporation. The cases on the point are conflicting. The right to a general judgment should, in our opinion, be limited, in any event, to cases where the corporation can afterwards reimburse itself by an assessment." But why should a judgment be allowed at all against the municipality, as the contractor or warrant holder has a right to proceed against the officers, or the property perhaps, and enforce the assessment? Why subject the city to the primary liability? The property in some instances might not bring enough to reimburse the city, if that is to be the controlling idea. In *Elliott, Roads & Streets*, at pages 436 and 487, it is said: "The doctrine that a breach of duty will render the public corporation liable to pay for an improvement which has conferred a special benefit upon a property owner has a very slender support in principle, if, indeed, it has any support at all, unless it is limited to cases where the public corporation secures and misappropriates the money collected on the assessment. It is not just to compel the citizens generally to pay for a special benefit, and this is done by taking money out of the corporate treasury to pay a local assessment. Public corporations are instrumentalities of government, and their officers are public officers with defined and limited authority; and the contractor ought to satisfy himself that the assessment can be collected from those who are benefited, and this he can do by looking into the law, and examining public records which are open to inspection. The officers who fail in

their duty are not the corporation, for that is composed of the citizens of the locality, and the corporate officers are as much the representatives of the citizens specially benefited as of any of the others. If these officers fail to do their duty they can be coerced by mandate, and to this remedy the contractor should be confined, for it is far more just and reasonable to impose upon him the duty of watching the proceedings than it is to impose it upon the citizens generally, who, having no special interest in the proceedings, have a right to presume that the officers have done their duty. It is for those especially interested to secure obedience to law, and not for those who are citizens having no peculiar or special interest in the proceedings. Those only who are lacking in vigilance and diligence should suffer, and not those resting under no duty, demanding diligence and occupying no position requiring vigilance. If the money taken out of the corporate treasury to pay for the improvement came from the derelict officers alone, there would be much justice in holding the public corporation liable for their default. It does not, however, come from them, but from the citizens who constitute the governmental corporation. It is just enough to make the officers do their duty, but it is an unjustifiable burden to impose upon all the citizens the payment of money for an improvement which specially benefits specific property."

For the reasons hereinbefore stated, we have given the case before us extended attention. The question goes much beyond the interests at stake here, and hardships are bound to result, however the principles are settled. On the one hand, we have the rights of the general city taxpayer to consider. He may have paid like assessments with reference to his own property, and it is certainly a hardship to call upon him to make good a failure on the part of some other property holder to pay such an assessment, especially where the threatened burden is so excessive, in view of the high rule of property valuations prevailing in assessing for tax levies, and the liberal public debt limits allowed. In some instances it would come near the confiscation of his property. It is not a satisfactory answer to such a man to say that he must be bound by the negligence of men elected to act in a governmental capacity over a town wherein he may be residing, for it leaves him small chance of escape. Under the present civilized conditions, he is compelled to live in the society of his fellow men, and to subject himself to some form of government, and it is a hard matter to take his property away from him when he has had no direct voice in the proceedings. On the other hand, the warrant holders have parted with value for these obligations, either in performing the work where the warrants are held by the original parties, or in the amount paid for purchasing them in the case of subsequent holders. As a matter of justice, they are entitled to payment, and we have their interests to consider. Of course, if they should fail in collecting the amounts equitably due them, such failure will not be the first in the history of government, but it is desirable to make such instances as few as possible. After all that can be said and done, however, as a matter of right and law, where

one of two parties must suffer, the loss should fall upon the one who has had the best opportunity to protect himself, and is the most at fault. It is apparent that if, by delay upon the part of the council to provide a special fund, the claim can become a general charge against the city, it would be directly to the interest of the warrant holder to have the proceedings delayed, in order that he might obtain the greater security, and avoid the possibility of loss through a failure of the property, or any of it, to bring the amount assessed against it, and such instances are not unheard of. It must also be borne in mind that he was a voluntary contractor, and was not put in the helpless condition of the general taxpayer outside of the district. While, perhaps, such general taxpayer might have compelled the city officers to act after the work was done, and the danger of loss to him imminent, the contractor or warrant holder had this same right, and the courts have all the time been open to him. By force of the contract, such officers should be held to be more directly his agents or representatives than the agents of the general taxpayers for the purposes of the assessment, if they were such taxpayers' agents at all in the premises. By the contract, the contractor has, in effect, adopted the machinery provided for raising his money through the acts of such officers.

From our investigation of the cases and textbooks, we are of the opinion that the decided weight of authority is against allowing a recovery of the city upon such matters at all, in the absence of an express lawful contract to that effect, or in cases where the money has been collected on the assessments, and is in the city treasury. However, it is not necessary to go that far in this case, at least at this time. But we desire to reaffirm the doctrine laid down in *Stephens v. Spokane*, 14 Wash. 298 and 303, that there can be no recovery of the city at all while the assessment plan can be enforced in any way; and the case of *McKwan v. Spokane* is in that respect overruled. No case has been presented to us so far involving the right to recover of the city where the power to enforce the assessments has been lost by lapse of time, in consequence of the negligence of the city officers or otherwise, and where it has been a mooted point, and discussed and decided, unless it is in the case of *Baker v. Seattle*, 2 Wash. 576, which will be further noticed. The case of *Bank of British Columbia v. Port Townsend* has before been sufficiently explained. Expressions bearing on this question may be found in a number of the opinions. For instance, in *Stephens v. Spokane*, 14 Wash. 298 and 303, in referring to *Soule v. Seattle*, it was said, in effect, that the city could not be liable unless it had failed to take any steps for the collection of the special fund upon which the warrants were drawn, or it had been guilty of such negligence in what it had attempted to do that the right to cause such fund to be created had been lost; and similar expressions may likely be found in other cases, which, of course, indicate that there might be a liability in such event, but go no further than an intimation. In *Baker v. Seattle*, 2 Wash. 576, however, somewhat the same principle seems to have been involved and decided. Like that in *Paret v.*

Bayonne, 40 N. J. L. 383, referred to, it was much stronger on the facts in favor of the claimants, and yet the holding was against them. It was said there, in substance, in discussing the principle, that, if the city officers failed to make the collection, it was for the unpaid claimants to compel them to proceed, and that the negligence of such officers did not place their claims in the category of the city's general indebtedness; that the claimants must look to the source provided by law for their reimbursement; that the duty laid upon the city was not the payment of the awards, but the levy and collection of the assessments. But it was intimated that the city might be liable where its officers had been fully moved to proceed, and had failed in such instances. In view of this and the subsequent expressions noticed in later decisions, we desire to regard the express point above mentioned as not definitely settled or passed upon here, except in so far as it sustains the complaint in the *Port Townsend Case*, alluded to, and which may have been incidentally held as the law of that case, but which case, under the circumstances given, should not have force beyond that. As the lower court in this case found that the right to proceed in enforcing the assessments was lost, and as the respondent may have attached no importance to this finding in briefing and arguing the case, in view of our holding in the *McKoon Case*, we feel in duty bound, considering the conflict in the cases alluded to, to allow the respondent to present it in a petition for a rehearing, if it is involved here. By taking that course, the rights of the parties can be fully considered, and, doubtless, counsel on the respective sides can further enlighten us. The great importance of the question to their clients and the public will certainly be a sufficient incentive. Then, if there is to be such an ultimate liability established, on what ground is it to be placed? Must there have been negligence on the part of the city officers in failing to provide the fund? If so, what is to constitute such negligence? Or must the right to recover be limited to cases where a general liability was expressly contracted, in harmony with the charter provisions on that subject? Or is a mere failure for any reason to provide the fund sufficient to sustain a recovery, and the city thus placed in the position of a guarantor or insurer of the success of the assessment scheme?

One further question requires some notice. It appears that the city council undertook to provide for payment of the assessments in instalments extending over a period of years. If these assessments were in substance the property of the warrant holders, it is evident that the council had no right to postpone their payment as against them, and they at all times had the right to compel the city officers to proceed diligently to collect such assessments, notwithstanding the attempt to postpone payment. The city could not thus interfere with their rights in the premises. *Re Heilbron's Estate*, 14 Wash. 536, 35 L. R. A. 602.

As this case now stands, the judgment will be reversed, and the cause remanded, with instructions to dismiss it; but no judgment will be entered until the time for filing a petition for a

rehearing has expired, nor, of course, until the petition, if filed, is disposed of.

Anders, Gordon, and Reavis, JJ., concur:

Dunbar, J., dissenting:

I dissent. While I have not read the most of the cases cited in the majority opinion, I am satisfied they did not involve a contract like the contract upon which this action is based. But why, say the majority, should a judgment be allowed at all against the municipality, as the contractor has a right to proceed against the officers, and enforce the assessments? Why subject the city to the primary liability? I answer, for the very best of reasons, *viz.*, because it contracted to assume the primary liability, and the citation from the contract in the opinion shows this conclusively. It expressly covenants that it will prosecute the business of collecting this assessment without delay. It was upon this provision of the contract that the contractor, no doubt, relied. Why should the city not be compelled to respect its contracts? The essence of the whole controversy is this: A contract has been made, plain and specific in its terms. That contract has been violated by the appellant, to the injury of the respondent; and I think it a most excellent idea to compel the performance of a contract by a city, the same as by a private individual. The only other question is, Did the city have the authority to make such a contract? I think it did. The city councilmen are the agents and trustees of the taxpayers of the city, and not of the parties with whom they are contracting; and the improvements of streets, while they may be paid by local assessment, are matters which affect the interest of the whole city, and every taxpayer in the city, and are matters falling especially within the general jurisdiction of the city council. The judgment should be affirmed.

GERMAN SAVINGS & LOAN SOCIETY, *App't.*,

v.
C. F. WEBER *et al.*

(16 Wash. 36.)

Standing finish, consisting of window and door sashes, jambs, trimmings, wainscoting, baseboards, mantel piece without the tiling, and doors, including glass and hardware, when placed in a mortgaged building under a contract with the mortgagor by which the contractor retains title until he is paid, do not become a part of the real estate so as to defeat the contractor's right to remove them, when they are attached to the building by screws only, and can be removed without injury to the building.

(December 8, 1896.)

NOTE.—For note on effect of agreement to prevent fixtures from becoming a part of the realty, see *Muir v. Jones* (Or.) 19 L. R. A. 441.

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to determine the right of defendants to certain fixtures which had been affixed to a building under an agreement that they might be removed. *Affirmed.*

The facts are stated in the opinion.

Mr. Cyrus Happy, for appellant:

Whether an agreement shall preserve the character of personality in things so affixed to the freehold, as that but for such agreement they would become part of the realty, depends upon their essential character and the mode in which they are annexed, *e. g.*, whether they can be removed without serious damage to the freehold or substantially destroying their own qualities and value.

Ewell, Fixtures, 68.

Can it be said in this case that the banking building would not be seriously damaged by tearing all the doors, both inside and out, from their hinges; all the windows from their casings; tearing to pieces all the window frames and casings, door casings and door jambs and trimmings, leaving nothing but the rough ragged edges of the building (stone or brick); by removing the wainscoting and baseboards from the walls, leaving the rough brick between the floor and the plastering which extends only to the top of the wainscoting?

Ford v. Cobb, 20 N. Y. 348; *Voorhees v. McGinnis*, 48 N. Y. 287.

Even if it is possible for a mortgagor or materialman by agreement or fiat, as between themselves, to so vaccinate with personality attributes the material about to be wrought into a building that it will not catch the real estate after it has become a part and parcel of it, this wonderful power cannot affect the mortgagee without his consent.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 460, 20 L. ed. 199; *New Orleans & O. R. Co. v. Mellen* ("United States v. New Orleans R. Co.") 79 U. S. 12 Wall. 362, 20 L. ed. 434; *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254, 17 L. ed. 584; *Porter v. Pittsburgh Bessemer Steel Co.* 122 U. S. 267, 30 L. ed. 1210; *Bass Foundry & Mach. Works v. Gallentine*, 99 Ind. 525; *Frankland v. Moulton*, 5 Wis. 1; *McFadden v. Allen*, 134 N. Y. 489, 19 L. R. A. 446; *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 598; *Adam v. Beadle*, 47 Iowa, 439, 29 Am. Rep. 487; *Preston v. Briggs*, 16 Vt. 124; *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Ogden v. Stock*, 34 Ill. 527, 85 Am. Dec. 832; *Salter v. Sample*, 71 Ill. 430; 1 Jones, Mortg. 4th ed. §§ 28, 29, 44; *Cherry v. Arthur*, 5 Wash. 787; *Chase v. Tacoma Box Co.* 11 Wash. 377.

Messrs. Forster & Wakefield and Everett C. Ellis, for respondents:

The law of fixtures is in derogation of the original rule of common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule instead of being an exception.

2 Kent, Com. 7th ed. 402; *Dubois v. Kelly*, 10 Barb. 496.

Three tests have been employed in determining

what is a fixture, *viz.*: (1) Real or constructive annexation of the article in question to the realty; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.

Ewell, Fixtures, 22; *Hubbell v. East Cambridge Five Cent Sav. Bank*, 132 Mass. 447, 43 Am. Rep. 446, 4 Cent. L. J. 22; *Allen v. Mooney*, 130 Mass. 155; *Wheeler v. Bedell*, 40 Mich. 693; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *Perkins v. Swank*, 43 Miss. 349; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Hutchins v. Masterson*, 46 Tex. 651, 26 Am. Rep. 286; *Taylor v. Collins*, 51 Wis. 123; *Hill v. Wentworth*, 28 Vt. 428.

The agreement prevented the fixtures from becoming part of the realty.

New Chester Water Co. v. Holly Mfg. Co. 3 U. S. App. 264, 53 Fed. Rep. 19; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Skinkle v. Essex Public Road Board*, 47 N. J. L. 93; *Harlan v. Harlan*, 20 Pa. 303; Ewell, Fixtures, 66; *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33; *Western U. Tel. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 7; *Hunt v. Bay State Iron Co.* 97 Mass. 283; *Sword v. Low*, 123 Ill. 487; *Henkle v. Dillon*, 15 Or. 610; *Fratt v. Whittier*, 58 Cal. 128, 41 Am. Rep. 251; *Foster v. Prentiss*, 75 Me. 279; *Brearley v. Cox*, 24 N. J. L. 287; *Sampson v. Graham*, 96 Pa. 406; *Smith v. Waggoner*, 50 Wis. 155.

As between the parties an agreement that a chattel shall remain personality is conclusive.

This depends, however, upon whether they can be removed without serious damage to the freehold or substantially destroying their own qualities and values.

Ewell, Fixtures, 68; *Ford v. Cobb*, 20 N. Y. 344; *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33; *Sword v. Low*, 123 Ill. 487.

Can it be held that in this case the character of the chattels is such that personality cannot be predicated of them.

Can the real-estate mortgagee, whose mortgage was obtained before any building was erected on the mortgaged land by the mortgagor, claim that chattels are covered by his real-estate mortgage, which chattels were originally personal in their nature, were put in after the building was completed, affixed to the building in a very slight manner only concerning which chattels the vendor and mortgagor have made a written agreement before they were annexed, that they should remain personal property, which chattels can be removed without injury to themselves, and which the mortgagee expressly stipulates can be removed without injury to the realty. This proposition must be answered in the negative.

New Chester Water Co. v. Holly Mfg. Co. 3 U. S. App. 264, 53 Fed. Rep. 19; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 587; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *New Orleans & O. R. Co. v. Mellen* ("United States v. New Orleans R. Co."), 79 U. S. 12 Wall. 362, 20 L. ed. 434; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Binkley v. Forkner*, 117 Ind. 176, 3 L. R. A. 33; *Eaves v. Estes*, 10 Kan. 814, 15 Am. Rep. 345; *Tibbets v. Moore*, 23 Cal. 208; *First*

Nat. Bank v. Elmore, 52 Iowa, 541; *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1; *Myer v. Western Car Co.* ("Myer v. Car Company"), 102 U. S. 1, 26 L. ed. 59; *Sisson v. Hubbard*, 75 N. Y. 542; *Henkle v. Dillon*, 15 Or. 610; *Sheldon v. Edwards*, 85 N. Y. 279; *Henry v. Van Brandenstein*, 12 Daly, 480; *Sword v. Low*, 122 Ill. 487; *Miller v. Wilson*, 71 Iowa, 610; *Hart v. Sheldon*, 34 Hun, 38; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Maguire v. Park*, 140 Mass. 21; *Godard v. Gould*, 14 Barb. 662.

Dunbar, J., delivered the opinion of the court:

This case is submitted upon an agreed statement of facts. The facts were about as follows: That on the 27th day of May, 1892, A. M. Cannon and Jennie F. Cannon, his wife, who were the owners in fee simple of certain lots in Spokane Falls, for a valuable consideration executed and delivered to the plaintiff (appellant herein), the German Savings & Loan Society, a mortgage upon said lots, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining. This mortgage was duly recorded on the 2d day of June, 1892, and none of the indebtedness for which it has been given has been paid. That upon a portion of said lots, Cannon and wife erected a building for the purpose of carrying on a banking business. That said building has never been occupied, but that said Cannon contracted with the respondents C. F. Weber & Co., to put in said building what is known as the "standing finish," consisting of window and door sashes, jambs, and trimmings, wainscoting, entrance doors, side door, two small doors in rear, including glass and hardware, baseboards and wainscoting, mantel piece with-out tiling and footings,—in all amounting to \$3,667.82. That in pursuance of said contract said C. F. Weber & Co. manufactured and shipped to Spokane said standing finish, and that they then learned that said Cannon was unable to pay for the same; and thereupon the said Cannon and his wife entered into an agreement on the 1st day of July, 1893, with the said C. F. Weber & Co., to the effect, in brief, that C. F. Weber & Co. should retain possession of said property and said buildings, as aforesaid, until they were fully paid for according to the terms of their contract, or until other arrangements were made, satisfactory to the said C. F. Weber & Co., and in the meantime the ownership and possession of said property were to remain with the said C. F. Weber & Co. That under said agreement, C. F. Weber & Co. placed their said property in the bank building. That the glass had been put in the sash, and the sash put in the windows. That the jambs and trimmings had been fastened to the building by screws, and the wainscoting and other finish had been fastened to the building by screws, the wainscoting being screwed to a furring strip running horizontally around the said building at the top of the wainscoting. That the room was only plastered down to the top of the wainscoting, and behind the wainscoting, baseboards, etc., was plain brick. And the agreement further provides that all of said

property described in said Exhibit C could be removed without damage or injury to the building other than the loss to the realty, if it should be determined that it is such a part of the realty that the said parties would have no right to remove it. It is the contention of the respondents that C. F. Weber & Co., under the terms of the contract, have the right to remove said property, as shown in Exhibit C, referred to above, by leaving the building in substantially the same condition that it was in before the said property was placed in said building; and the German Savings & Loan Society (the appellant here) claims that said property has become a part of the realty, that it is covered by its mortgage, and that the said parties have no right to remove it. The judgment of the court was in favor of C. F. Weber & Co., and from such judgment an appeal is taken to this court.

The history of litigation on the subject of fixtures and annexations is to the effect that it has always been considered largely a mixed question of law and of fact, depending upon the relations of the parties, the character of the fixtures, and the manner of the annexation, very largely in each particular case. It cannot be denied, however, that the old common law in relation to fixtures, being construed as a part of the realty, has been greatly modified in modern times by reason of the changing conditions of trade, and for the purpose of protecting traffic in building fixtures. The contention of the appellant in this case is twofold: First, that, as between the parties to this contract, the goods supplied here became a part of the real estate, and that they had no right to stipulate or agree that real estate was personal property, and that such agreement could not be carried into effect by the court; and, second, that, even conceding the efficacy of such an agreement between the parties, the mortgagee in this case could not be bound by the agreement, and consequently his rights would not be affected thereby, and that the question of intention could not be made to apply against his interests. We are satisfied that the trend of modern authority is to the effect that the intention of the contracting parties should be allowed to control; and that intention will control, even so far as the rights of the former mortgage is concerned, subject to the limitation that the fixtures which, outside of stipulation, would have, under the law, been regarded as real estate, can be removed only when such removal can be effected without injury to the real estate or to the building to which they are attached. We think this is the almost unbroken current of modern authority, and is even borne out by most of the cases cited by the appellant. The appellant, on page 10 of his brief, cites the following from Mr. Ewell in his work on Fixtures (p. 68): "A limitation to the rights of the parties to change, by their agreements, the status of property from that which the law would assign to it in the absence of a special agreement, has, however, been made in some cases, and the rule has been stated to be, that whether an agreement shall preserve the character of personality in things so affixed to the freehold, as that, but for such agreement, they would become part of the realty, depends upon their

essential character, and the mode in which they are annexed: *e. g.*, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value." Applying this test to the case at bar, it does not appear that any damage would be done to the freehold by the removal of these fixtures,—in fact, it is stipulated that no damage would be done other than loss to the realty of the value of the fixtures,—and they are of such a nature that it seems to us that their value would not be destroyed as merchandise. Therefore, the rights of the mortgagee have not been deleteriously affected by the removal of these fixtures, for the building upon which his lien attached has lost nothing in value, and his security has been in no way affected by reason of the entering into this contract between his mortgagor and C. F. Weber & Co. This limitation to contract with reference to fixtures, is even severely criticised by Mr. Ewell in the section above referred to, excepting where it affects the rights of third parties. The author, continuing, says: "Where the rights of third parties intervene, the propriety and necessity of such a limitation will be very readily conceded; but, as between the immediate parties to the agreement, the limitation seems, to say the least, sufficiently strict: and where, as in the case of a house, the materials might be of value after severance, no more reason is perceived why such an agreement should not be effectual as between the parties, than in the case of a fixture that might be removed uninjured, the difference between the two cases being, not one of principle, but simply degree, one of more or less." Mr. Ewell, to sustain this proposition, cites the case of *Ford v. Cobb*, 20 N. Y. 344, also cited by the appellant in this case, where Judge Denio, in rendering the opinion for the court, said: "It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot, in general, be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed." Of course it would not, for under such circumstances the realty would be more or less injured or destroyed; and the court in that case proceeds to verify this idea, for it says: "Thus, a house or other building, which, from its size, or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel, by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support; it is impossible that they should, by any arrangement between the owners, become chattels." But the court emphasizes the test which we have above referred to by proceeding to say: "But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are con-

nected; though their connection with the land or other real estate is such that, in the absence of an agreement or of any special relation between the parties in interest, they would be a part of the real estate." And that court cited approvingly *Fryatt v. Sullivan Co.* 5 Hill, 116, stating that that case was decided upon this distinction. That case was where a certain steam boiler and engine were leased, and the lessees took them and affixed them so firmly to the freehold that they could not be removed without destroying the building in which they were placed. The case of *Ford v. Cobb*, 20 N. Y. 344, is in point in all particulars, for there, as here, the right of a prior conveyancer was brought in question. *Binkley v. Forkner*, 19 N. E. 755 [117 Ind. 176, 8 L. R. A. 38], is a well considered case, and there it was held that "where one purchasing machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, and the realty to which it is afterwards attached by him will not be injured by its removal, the machinery will be considered as personal property, as against a prior mortgagee of the realty." And the cases relied upon by the appellant in this case are distinguished in that case. Thus, where the case of *Campbell v. Roddy*, 44 N. J. Eq. 244, is quoted, the court made use of the following language: "Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty notwithstanding their annexation." After citing cases, the court goes on to say: "But when chattels are of such a character as to retain their identity and distinctive characteristics after the annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattes shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement." It was held there that "a prior mortgagee cannot occupy the attitude of an innocent purchaser. The interests and rights of the holder of a chattel mortgage upon property which is annexed to real estate upon which there is an existing mortgage must be determined by the practical application of equitable principles to the rights of the respective parties. Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real-estate mortgagee as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it cannot be removed without diminution

ing or impairing an existing mortgage thereon." This is only announcing the rule which we announced at the outset,—that an agreement by which fixtures should be considered personal property can be carried into effect if the removal of the same could be effected without injuring the real estate, or, applying it to this case, without diminishing the security of the mortgagee. In *Tift v. Horton*, 53 N. Y. 377, 18 Am. Rep. 537, it was held: "Where chattels are annexed to real estate with the intent that they shall not thereby become part of the freehold, as a general rule the intent will control; to preserve their character as personalty, a concurrent intent, on the part of a prior mortgagee of the real estate, is not necessary; and neither a prior nor subsequent mortgagee of the lands can claim, as subject to the lien of his mortgage, chattels brought upon and affixed to the lands under an agreement between the owner of the fee and the owner of the chattels that the character of the latter as personal property is not to be changed, and that they

are subject to a right of the owner to remove them." This case squarely decides all the points that there are raised in the case at bar. It is a well considered case, and has been cited by nearly all the cases that have been adjudicated on this subject since its decision. We think it announces the overwhelming weight of authority that the security of the appellant in this case has not been diminished by the agreement which was entered into and executed by the mortgagor and the respondents C. F. Weber & Co., and that there is no reason which can be sustained by either legal or equitable principles why the respondents in this case should not have the benefit of the contract which they made with the Cannons.

The judgment will be affirmed.

Scott, Anders, and Gordon, JJ., concur.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

**N. K. FAIRBANK & CO., *Piffs. in Err.*,
v.
CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY.**

(47 U. S. App. 744.)

1. **Exemptions in favor of a common carrier** in bills of lading are to be strictly construed against the carrier, and any doubt or ambiguity therein is to be resolved in favor of the shipper.
2. **General and comprehensive words of exemption** following an enumeration of particular damages or risks in a bill of lading are to be construed to embrace only particular occurrences *ejusdem generis* with those enumerated unless there is a clear intent to the contrary.
3. **Those devices and parts of a car which have no physical operation and connection with the locomotive** except by means of the cars of the train and the couplers between them, such as the axles of the car, are not within the term "machinery" in the phrase "accidents to boilers and machinery," as used in the exemption clause in a bill of lading, evidently intended to apply either to water or rail transportation.

(May 17, 1897.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio, Western Division, to review a judgment in favor of defendant in an action brought to recover the value of certain oil lost while in defendant's possession for transportation through defendant's alleged negligence. *Reversed.*

Before *Taft and Lurton*, Circuit Judges, and *Bammond*, District Judge.

NOTE.—On the question what is to be considered machinery within the meaning of an insurance policy the above case seems to have fully reviewed the authorities.

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Statement by Taft, Circuit Judge:

The action below was brought by N. K. Fairbank & Co. against the Cincinnati, New Orleans, & Texas Pacific Railway Company to recover damages for the loss of four tanks of oil alleged to have been destroyed while in transportation over the defendant's railroad. On May 4, 1889, the Southern Cotton-Oil Company shipped from Atlanta, Georgia, consigned to N. K. Fairbank & Co., at Chicago, Illinois, five tank cars loaded with cotton-seed oil. All of them were shipped under bills of lading of the same form issued by the East Tennessee, Virginia, & Georgia Railway Company, providing that they should be carried over the East Tennessee, Virginia, & Georgia Railway, the Cincinnati, New Orleans, & Texas Pacific Railway, and other roads. The bills of lading provided that the oil should be carried by "the East Tennessee, Virginia, & Georgia Railway to, . . . thence by connecting rail or other carrier *via*, . . . until they reached the station or wharf nearest their destination." The bill of lading contained the following provisions which have a bearing in this case: "It is mutually agreed, in consideration of the rates herein guaranteed, that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. No carrier, or the property of any, shall be liable for . . . nor for any loss or damage arising from any of the following causes, *viz.*: Fire from any cause, on land or water, or while awaiting shipment, transshipment, or delivery, or during transportation; jettison; ice; freshets; floods; weather; pirates, robbers, or thieves; acts of God or of the country's enemies; riots, strikes, mobs, or combinations; collisions; explosions; accidents to boilers or machinery; stranding; straining; any accident on or perils of the seas or other waters, or of

steam or inland navigation; restraints of government; legal process; claims of ownership by third parties; detention or accidental delay; want of proper coöperage or mending; insufficiency of package in strength or otherwise; rust; dampness; loss of weight; leakage; breakage; sweat; blowing; bursting of casks or packages from weakness or natural causes; evaporation; vermin; frost; heat; smell; contact with or proximity to other goods; natural decay or exposure to weather; nor for the condition of baling of hay, hemp, or cotton or country damage to cotton, or for loss or damage of any kind on goods whose bulk or nature requires them to be carried on open cars or on deck, or for the condition of packages or any deficiency in the contents thereof if receipted for by consignees as in good order." The bill of lading contained this further provision: "This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by, and have the benefit of, all the provisions thereof as if signed by it, the shipper, owner, and assignee." The cars, after being loaded, were hauled to Chattanooga, and were delivered to the defendant company on May 6. At about 2 o'clock on the morning of May 7 the train containing these cars was wrecked on the defendant's line, and four of the tank cars were so damaged that the oil contained therein was totally lost. The market value of the lost oil at the time was agreed to be \$5,270.53. This suit was brought to recover this amount. The third defense of the answer set up the conditions in the bill of lading heretofore stated, and averred that the loss of the oil was solely due to an accident to certain machinery, to wit, the axle of a car in defendant's train in which said four tanks of oil were being transported, which axle, without any fault or negligence on the part of this defendant, failed and broke down, under said car, whereby said four cars, being in the rear thereof, were derailed, and the contents thereof were lost. The case was twice tried. In the first trial the court directed a verdict for the plaintiff. The trial court was of opinion that it had erred in directing a verdict for plaintiff, and on motion granted a new trial. In the second trial the court directed a verdict for the defendant, and entered judgment upon the verdict. This writ of error is prosecuted to reverse the judgment. At the trial, there was no evidence tending to show that defendant was guilty of a want of care in the matter of the axle. It broke because of an internal defect in the material which external examination could not have discovered.

Messrs. Ramsey, Maxwell, & Ramsey, for plaintiff in error:

A car axle is not machinery within the meaning of the bill of lading.

Hutchinson, Carr. § 275; *Gleadell v. Thomson*, 56 N. Y. 198; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179.

Exceptions in a bill of lading are to be construed most strongly against the shipowner; and when they form, in the contract, part of long enumerations of excepted causes of damage, all the rest of which relate to matters sub-

sequent to the beginning of the voyage, they must be treated as equally limited in their scope.

The Caledonia, 157 U. S. 124, 39 L. ed. 644.

Even if the word be held to relate to the machinery employed in transportation by rail as well as by sea, it can have but one meaning in both cases, viz.: machinery used for generating and distributing propelling power through the agency of steam.

Porter, Bills of Lading, § 203.

The breaking of an axle solely on account of its defective condition, and without any external provoking cause, is not an accident within the meaning of these bills.

The Glenfruin, L. R. 10 Prob. Div. 103; *Tattersall v. National S. S. Co.* 12 Q. B. Div. 297; *The Caledonia*, 157 U. S. 124, 39 L. ed. 645; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Talcott v. Commercial Ins. Co.* 2 Johns. 124, 3 Am. Dec. 406; *Work v. Leathers*, 97 U. S. 379, 24 L. ed. 1012; *Kopitoff v. Wilson*, L. R. 1 Q. B. Div. 377; *Steel v. State Line S. S. Co.* L. R. 3 App. Cas. 72; *The Rover*, 38 Fed. Rep. 616; *Chadwick v. Deniston*, 41 Fed. Rep. 58; *De Rothschild v. Royal Mail Steam Packet Co.* 7 Exch. 784; *Cream City R. Co. v. Chicago, M. & St. P. R. Co.* 63 Wis. 98, 53 Am. Rep. 267.

Was not the breaking of the axle merely a link in the chain of causation, the proximate and efficient moving cause being the defect? Was the breaking of this axle any more the cause of the loss than the breaking of the tank valves through which the oil escaped?

Clyde v. Richmond & D. R. Co. 59 Fed. Rep. 394; *Ransier v. Minneapolis & St. L. R. Co.* 33 Minn. 381; *Lilly v. New York C. & H. R. R. Co.* 107 N. Y. 566; *Waldhier v. Hannibal & St. J. R. Co.* 87 Mo. 37.

The common-law liability of the carrier with reference to defective cars for transportation by rail is not different from that of the shipowner with reference to his obligation to furnish a seaworthy vessel.

Story, Bailm. §§ 509, 571a, 592; *Alden v. New York C. R. Co.* 26 N. Y. 102, 82 Am. Dec. 401; *Alabama & V. R. Co. v. Searles*, 71 Miss. 744; *Sharp v. Grey*, 9 Bing. 457; *Camden & A. R. & Transp. Co. v. Burke*, 13 Wend. 611, 28 Am. Dec. 438; 8 Wood, Railway Law, p. 1898, § 430.

Messrs. Judson Harmon, Edward Colston, A. W. Goldsmith, and George Hoadly, Jr., for defendant in error:

There are no authorities holding that an axle may not be machinery in this case, while the few authorities there are which give a definition of the word "machinery" in its legal import are all in favor of the view that an axle is machinery.

Seavey v. Central Mut. F. Ins. Co. 111 Mass. 540; *Louber v. Le Roy*, 2 Sandf. 202; *Com. v. Lowell Gaslight Co.* 12 Allen, 75; *Georgia P. R. Co. v. Brooks*, 84 Ala. 140; *Benedict v. New Orleans*, 44 La. Ann. 798.

Having shown that the accident was due to the breaking of an axle, and having shown that this axle was machinery, its breaking would appear to be an accident to machinery.

The burden of proof of negligence is on the plaintiff, and the plaintiff has not merely not established that there was negligence, but the

defendant has affirmatively established that there was none.

Clark v. Barnwell, 53 U. S. 12 How. 280, 13 L. ed. 988; *Western Transp. Co. v. Donner*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *The Montana*, 17 Fed. Rep. 877; *E. O. Stanard Mill. Co. v. White Line Cent. Transp. Co.* 123 Mo. 258.

Taft, Circuit Judge, delivered the opinion of the court:

The learned judge of the circuit, finding from the undisputed evidence that the loss of the oil had been occasioned by the breaking of an axle, held that such a cause was an accident to machinery, within the exemption of the bill of lading, and so directed a verdict for the defendant. The construction thus put upon the exemption in the bill of lading presents the only question which we deem it necessary to consider. It is well settled that exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and that any doubt or ambiguity therein is to be resolved in favor of the shipper. *Black v. Goodrich Transp. Co.* 55 Wis. 319, 42 Am. Rep. 718; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 524; *Norman v. Binnington*, L. R. 25 Q. B. Div. 475, 477; *Taylor v. Liverpool & G. W. Steam Co.* L. R. 9 Q. B. 546, 549; *Burton v. English*, L. R. 12 Q. B. Div. 218, 224; *Cream City R. Co. v. Chicago, M. & St. P. R. Co.* 68 Wis. 98, 53 Am. Rep. 267. "And when the particular dangers or risks against which the carrier has specifically guarded himself in this receipt are followed by more general and comprehensive words of exemption, the latter are to be construed to embrace only occurrences *ejusdem generis* with those previously enumerated, unless there be a clear intent to the contrary. *Hutchinson*, Carr. 2d ed. §§ 275, 276; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *The Caledonia*, 157 U. S. 124, 39 L. ed. 644. It is perfectly manifest from a reading of a bill of lading and the exemption thereof that the bill was designed as a contract for both land and water transportation, for the clause runs: "Fire from any cause, on land and water, or while awaiting shipment, transshipment, or delivery, or during transportation; jettison; ice; freshets; floods; weather; pirates, robbers, or thieves; acts of God or the country's enemies; riots, strikes, mobs, or combinations; collisions; explosions; accidents to boilers or machinery; stranding; straining; any accident on or perils of the seas or other waters, or of steam or inland navigation," etc.

Light is thrown upon the meaning of the phrase "accidents to boiler and machinery" if we consider it as applied to a ship as well as to a freight train. The juxtaposition of the words "boiler" and "machinery" certainly suggests that machinery refers to the group of mechanical parts connected with the boiler and steam supply by which power is generated and applied, and the vessel is propelled through the water. And the term must have the same limitations when applied to a train of cars. In this light, "machinery" only includes the mechanical instrumentalities present in the engine room of the steamer or the locomotive of the train. The cars and their appurtenances are the things which are being moved or drawn by

the machinery. Parts of the car are not, in our opinion, in the common acceptance of the term, embraced within the term "machinery," especially when that is associated with the term "boilers." It is true, it may be difficult to draw the line as to certain devices used upon the cars which are directly connected with the engine, as, for instance, the appliances necessary to the operation of the Westinghouse air brake. These are directly connected with the engine, and yet are a permanent part of the car. But, while doubtful cases may be suggested, we are very clear in our opinion that those devices and parts of a car which have no physical operation and connection with the locomotive except by means of the cars of the train and the couplers between them are not within the meaning of the term "machinery" in the phrase "accidents to boilers and machinery," any more than the plates on the hull of a steamship can be said to be part of its machinery. The wheels and axle are necessary to the movement of the car, just as the hull and plates on the ship are necessary to its progress through the water; and in a wide sense they are a part of the machinery necessary to render the transportation of the train or ship possible. But they certainly would not be so construed except in cases where the most liberal rule of construction is to prevail. There is very little authority upon this question, although the form of the bill of lading herein seems to have been a very old one.

In Porter on the Law of Bills of Lading (§ 203) it is said that "the phrase 'damage from machinery' will not cover a loss caused by the breaking of tackle used to discharge cargo. The word 'machinery,' it has been said, includes only the machinery by which the vessel is propelled." In support of this, the author cites *The Galley of Lorne*, 31 Mitchell's Mar. Reg. 188, and Leggett, Bills of Lading, p. 179.

We do not think that the cases cited by the counsel for the appellee, and which were relied on by the learned judge at the circuit, support the conclusion reached, because in them the term was used with reference to a subject-matter quite different from that in the case at bar. In *Georgia P. R. Co. v. Brooks*, 84 Ala. 138, the question was whether an injury in the eye, received by a railroad employee, caused by a scale flying from the iron rail of the track when struck with a defective hammer, was not an injury caused by reason of a defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, and so within the statute to define the liabilities of employers or workmen for injuries received by the workmen while in the service of the employer. The court held that the hammer was not a part of the machinery within the statute, but in the course of the discussion it gave a wide definition to the term "machinery,"—a definition certainly wide enough to include the axles of cars in a train. The judge said: "In construing words used in a statute, reference should be made to the subject of legislation, and if they have acquired a defined, popular signification when referable to such subject, the presumption is that they were used in such sense by the legislature. A machine is a piece of mechanism, which, whether simple or com-

pound, acts by a combination of mechanical parts, which serve to create or apply power to produce motion, or to increase or regulate the effect. As used in the patent act, it has been defined to be 'a concrete thing, consisting of parts, or of certain devices or combination of devices.' *Burr v. Duryee*, 68 U. S. 1 Wall. 581, 17 L. ed. 650. Primarily, machinery means the works of a machine,—the combination of the several parts to put it in motion. But we do not understand that the term was used in the statute in its primary sense, but, having a more enlarged signification, should be construed as so used, nothing appearing to show that it was intended to be used in its primary or restricted sense. Thus understood, the term 'machinery' embraces all the parts and instruments intended to be and actually operated from time to time exclusively by force created and applied by mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam, or other inanimate agency. *Seavey v. Central Mut. F. Ins. Co.* 111 Mass. 540. The carding, spinning, and weaving machines, together with the instrumentality by which the prime motive power is created or applied, constitute the machinery of a cotton mill. When cars, though used at times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business."

The association of the word "machinery" with the words "ways and plants" was quite enough to justify the court in giving the term an enlarged signification in the case cited, but the reasoning of the court shows that in a case where the rule of construction is a narrow one the term would not embrace either the car body, car wheels, or the car axles, but only that combination of mechanical parts connected with the locomotive and boiler for the propelling of the train

In the case of *Seavey v. Central Mut. F. Ins. Co.* 111 Mass. 540, the question was of the construction of a contract of insurance in which the property insured was described as "the engine and machinery contained in a two-story frame building for the manufacture of tinware," etc. The issue was whether this language included 642 forming and cutting machines, which were dies made of iron or steel, and used to give form to the various utensils made in the business. These dies were capable of being removed from the press, and others were substituted in their place as often as the product of manufacture was to be varied. It was decided that in such a policy

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the word "machinery" might fairly be held to cover all the implements intended to be operated by the machinery in the business of the insured, and which were usually operated in the regular and ordinary prosecution of the business described in the policy. It will be observed that in this case the rule of construction was favorable to the assured, and that the words "for the manufacture of tinware" justified a broad interpretation of the word "machinery."

In *Com. v. Lowell Gaslight Co.* 12 Allen, 75, the question was whether, under a tax law which imposed taxation upon the market value of the capital stock of the gas company, but permitted this amount to be reduced by deducting the value of the real estate and machinery for which the corporation was assessed in the town or city in which it was established and carried on its business, the mains or pipes laid down in the streets to distribute the gas, and the gas meters were to be regarded as machinery of the corporation; and it was held that they were, the court saying: "Indeed, in a broad, comprehensive, and legitimate sense, the entire apparatus by which gas is manufactured and distributed for consumption throughout a city or town constitutes one great integral machine, consisting of retorts, station meters, gas holders, street mains, service pipes, and consumers' meters, all connected and operating together, by means of which the initial, intermediate, and final processes are carried on from its generation in the retort to its delivery for the use of the consumers."

It is hardly necessary to point out that the almost figurative sense in which the term "machinery" is here used in favor of the taxpayer, and to support a reasonable construction of the statute, can have no application to the case at bar in which the word "machinery" is to be given a specific and restricted meaning.

Our conclusion upon this point renders it unnecessary for us to consider the remaining argument pressed upon us by counsel for the plaintiff, to wit, that a common carrier by train is held to an implied warranty of the sound condition of the cars in which the merchandise transported is carried, analogous to the implied warranty of seaworthiness to which the common carrier by sea is held, and that in such cases the exception as to accidents from machinery in the bill of lading applies only to accidents after the transportation has begun, and does not include those which arise from defects, though hidden, if in existence before shipment commences.

The judgment of the court below is reversed, with directions to order a new trial

PENNSYLVANIA, SUPREME COURT.

Re Vacation of a Portion of MELON STREET in the City of Philadelphia.

APPEALS by Jacob L. STADELMAN, William H. BOWER, Sarah Ann EDDOWES *et al.*, Caroline LEVERING *et al.*, and Harriet PERKINS.

(188 Pa. 397.)

Owners of property abutting on that portion of a street which is not vacated, but which is left a *cul de sac* by vacating another part of the street, if the market value of the property is lessened thereby, are entitled to damages under act April 21, 1858, § 6, giving the owner of land injured by the vacation of a street the same right to damages as if it was injured by the opening or widening of a street.

(October 11, 1897.)

A **PPPEALS** by petitioners from a judgment of the Superior Court reversing judgments of the Court of Quarter Sessions for Philadelphia County which confirmed the report of viewers assessing damages for injuries to petitioners because of the vacation of a portion of a street. *Reversed.*

The facts are stated in the opinions.

Following is the opinion of the superior court by WILLARD, J.:

The first, tenth, and twelfth assignments of error raise the question squarely whether the proceedings in the court below were properly instituted under the provisions of the 6th section of the act of April 21, 1858.

The contention of the appellant is that the court of quarter sessions of the county of Philadelphia was without jurisdiction in the premises, and this involves the question whether the act of April 21, 1858, has been repealed or not. The appellant claims that by the provisions of the act of May 8, 1889, and of May 16, 1891, the act of April 21, 1858, was repealed. This leads us to a consideration, first, of the act of May 16, 1891. At the time this act was passed extensive municipal improvements had been commenced and were in process of construction in the city of Pittsburgh, under the provisions of the act of June 14, 1887. By a decision of the supreme court that act was declared unconstitutional (*Engel's Appeal*, 187 Pa. 494), and the city of Pittsburgh was powerless to collect assessments for work completed or to prosecute other contemplated municipal improvements. On May 16, 1891, three acts of assembly were approved, one of them entitled "An Act to Authorize the Ascertainment, Levy, Assessment, and Collection of the Costs and Damages and Expenses of Municipal Improvements, Including Grading, Paving, Macadamizing, or Otherwise Improving of Any Street, Lane, or Alley, or Part Thereof, Completed or in Process of Completion; and also the Costs, Damages, and Expenses of the Construction of Any Sewer Completed or now

in Process of Completion, and Authorizing the Completion of Any Such Improvement." Pub. Laws 1891, p. 71. The second act is entitled "An Act in Relation to the Laying Out, Opening, Widening, Straightening, Extending, or Vacating Streets and Alleys and the Construction of Bridges in the Several Municipalities of This Commonwealth; the Grading, Paving, Macadamizing, or Otherwise Improving Streets and Alleys; Providing for Ascertaining the Damages to Private Property Resulting Therefrom, the Assessment of the Damages, Costs, and Expenses Thereof upon the Property Benefitted, and the Construction of Sewers and Payment of the Damages, Costs, and Expenses Thereof, Including Damages to Private Property Resulting Therefrom." Pub. Laws 1891, p. 75. The third of these acts (Pub. Laws 1891, p. 80), is an act repealing fifteen special or local acts relative to streets, alleys, bridges, sewers, etc., in the city of Pittsburgh.

The second of these acts, as its title indicates, provided a code for every municipality in the commonwealth relative to opening, widening, straightening, extending, or vacating streets and alleys. It provides for the presentation of petitions by the proper parties to the courts of common pleas of the proper county, and for the appointment of three freeholders as viewers. By the 9th section of said act it is provided that municipal corporations shall have power to open, widen, straighten, or extend streets or alleys, and to vacate the same, upon petition of a majority in number and interest of owners of property abutting on the line of the proposed improvement. In connection with the other two acts above cited, approved at the same time, it is evident that these acts were passed for the relief of the city of Pittsburgh in view of the unconstitutional legislation under which municipal improvements had been made, and which at the time of the passage of these acts were stayed for want of appropriate and adequate legislative authority. The act of May 16, 1891, Pub. Laws, 71, was passed to remedy and provide for the mischief done under the provisions of the act of June 14, 1887, declared unconstitutional. The act of May 16, 1891, Pub. Laws, 80, repeals certain acts and parts of acts concerning streets and sewers in the city of Pittsburgh. These acts and parts of acts, as above stated, were fifteen in number, and were applicable to the city of Pittsburgh. It was thus clearly indicated by the legislature that no special or local act was intended to be repealed by the act of May 16, 1891, Pub. Laws, 75, except the acts and parts of acts mentioned in the repealing act above cited. Said act contains no repealing clause. The act approved May 8, 1889, Pub. Laws, 129, entitled "An Act Fixing the Number of Road and Bridge Viewers," whether intended to apply to country or city, contains this express exception: "This act shall not apply to counties having local acts inconsistent herewith."

If the act of April 21, 1858, is a special or local act, then the act of May 16, 1891, above cited, did not repeal its provisions, as a general statute without negative words will not repeal

NOTE.—As to compensation to abutting owners for vacation of a part of a street, see *note* to *Belden v. Jacksonville* (Fla.) 14 L. R. A. 370; *Levee District No. 9 v. Palmer* (Cal.) 23 L. R. A. 388.
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a previous local statute, even though the provisions of both are inconsistent with each other.

The question, then, of jurisdiction hinges upon whether the act of April 21, 1858, is a special or local act. That act is entitled "A Further Supplement to the Act Incorporating the City of Philadelphia." The 6th section of the act pertains to the question we are considering, and is here inserted:

"Sec. 6. That it shall be the duty of juries selected to assess damages for the opening, widening, or vacating roads or streets within the said city, to ascertain and report to the court: First, what damages the parties claiming the same are entitled to; and, second, to assess and apportion the same among and against such owners of land as shall be benefited by such opening, widening, or vacating any such road or street; and when such report shall be affirmed by the court, upon notice to all such parties, and the damages paid or secured by the parties among and against whom it shall be so assessed and apportioned, the chief commissioner of highways shall proceed to open, widen, or vacate such road or street accordingly: *Provided, however,* That it shall be lawful for councils, when, in their judgment the public interests shall require it, to provide for the payment of such damages out of the city treasury: *And further provided,* That two thirds of the members of each branch of councils present at the passage of such ordinance consent thereto and the yeas and nays on the passage thereof shall be entered on the journals."

That this section applies only to the city of Philadelphia is too plain for argument. The act of April 1, 1864, Pub. Laws, 206, entitled "An Act Relating to the Opening of Streets and Payment of Damages Therefor in the City of Philadelphia," while it provides a new method of assessing damages for the opening of streets, in no way modifies or repeals that part of the act of April 21, 1858, as to vacation. As to the mode of appointing viewers under the act of June 13, 1836, Pub. Laws, 566, the 76th, 77th, 78th, 79th, 80th, and 81st sections of said act provide a peculiar method of selecting viewers in the city of Philadelphia. By the provisions of the act of March 16, 1866, Pub. Laws, 224, the above-quoted sections were expressly repealed, together with the proviso to the 1st section of said act, and in lieu thereof it was enacted as follows: "And hereafter, in all cases relating to the opening of streets upon the plans of the city of Philadelphia, and of view, review, and assessment of damages for and in relation to roads, bridges, or property otherwise taken for public use, the persons appointed to view, review, and assess all damages shall be appointed by the court of quarter sessions of the county of Philadelphia, in the same manner with the same qualifications, and to have the like powers and perform the like duties, as is provided by the general laws of this commonwealth." The 6th section of the act of April 21, 1858, in connection with the act of March 16, 1866, provided a system for the vacation of streets peculiar to the city of Philadelphia; a system perfect in its operation, local in its application, and as such has been resorted to from the date of its 38 L. R. A.

passage in all proceedings for the vacation of streets in the city for which it was intended. That the 6th section of the act of 1858 was in full force and operation before the passage of the acts of 1869 and 1891 above referred to was fully settled by Mr. Justice Mitchell, in *Vacation of Howard Street*, 142 Pa. 601. As it is perfectly clear that the act of 1858 is a local and special act, so far as it provides for the assessment of damages and benefits in the vacation of streets and proceedings for that purpose, the act is not repealed, and the court of quarter sessions of Philadelphia had full jurisdiction of the proceedings in that court. Therefore it follows that the first, tenth, and twelfth assignments of error must be overruled.

The second, third, fourth, ninth, and eleventh assignments of error raise the principal question in this case. The appellant's case is founded upon exceptions to the report of the jury of view. The first exception filed in the court below is as follows:

"1. Because it appears by the said report that none of the claimants to whom damages are awarded by the said report is the owner of property abutting upon the portion of Melon street vacated."

This exception goes to the very root of the controversy. The first duty imposed upon the jury of view by the act of assembly, under the provisions of which they were acting was "to ascertain and report to the court, first, what damages the parties claiming the same are entitled to."

Our first duty in considering this question is to inquire whether the parties claiming are entitled to any damage. On a careful examination of the record we find that Melon street from the west side of Ninth street to Ridge avenue had been for many years (prior to its partial vacation) a public highway and street. That the councils of Philadelphia, by ordinance duly approved on July 14, 1891, revised that portion of the city plan of streets comprised between Ninth, Tenth, and Wallace streets, and Fairmount avenue, in the Thirtieth ward of the city of Philadelphia, by striking therefrom that portion of Melon street lying between the west line of Ninth street and a point 132 feet 14 inches west thereof on the south side of Melon street, and a point 122 feet 64 inches west of Ninth street on the north side of Melon street. It further appears that the properties of all the parties to whom damages were awarded did not abut on the part of Melon street vacated, but commenced at the point of vacation, extending westward toward Tenth street from No. 912 to 924 on the south side of Melon street, and from 913 to 925 on the north side of said street, Nos. 913 and 913 being nearest to the vacated portion and Nos. 924 and 925 most distant therefrom. It further appears from the viewers' report that before the vacation complained of Melon street was an open public highway from Ridge avenue to the west side of Ninth street between Fairmount avenue and Green street, in the city of Philadelphia. It further appears, from the revised plan referred to in the petition and report of viewers thereon, that the properties Nos. 912 and 913, measuring from the center of each property, are 141 feet from Ninth street and 250 feet from Tenth street; that the

properties Nos. 924 and 925, from the centers thereof, are 240 feet from Ninth street and 151 feet from Tenth street; that the properties Nos. 918 and 919, measuring from the centers thereof, are 192 feet from Ninth street and 199 feet from Tenth street. It further appears from said revised plan that Melon street is about 49 feet in width, including sidewalks, and from curb to curb is about 25 feet in width. It further appears, in the language of the report of the jury of view, "that the damage to the claimants' properties upon Melon street is caused by the closing up of Ninth street and Melon street in manner aforesaid, thus depriving them of an outlet eastward by way of Ninth street to the general system of streets in the city of Philadelphia. Their outlet to the westward is not in any way impaired." From these facts disclosed by the record we have this proposition: Are the owners of thirteen lots abutting on the portion of Melon street not vacated, situated about equidistant between Ninth and Tenth streets, entitled to damages by reason of the vacation of Ninth and Melon streets, thus depriving them of an outlet eastward to the general system of streets while their outlet westward to and through Tenth street to the same general system of streets is unimpaired?

In discussing this proposition, in order to sustain the contention and claim of the appellee it must clearly appear that these thirteen owners of properties on Melon street have sustained injury distinct from that of the public in general. It is for the court to instruct the jury, as matter of law, what constitutes special injury, and the jury to find the amount thereof. In this case, under these facts, can it be said, as matter of law, that the properties Nos. 924 and 925 have been specially injured and Nos. 926 and 927 on the same street have not? No such rule can be established, and no attempt to establish such a rule has ever been successfully made. Properties abutting on the vacated portion of a street are specially injured because access to such properties is essential to the enjoyment thereof and is so coupled with the properties as to be a part thereof. So, when the vacation of part of a street actually destroys or renders impracticable access to properties on the same street, but not abutting on the vacated portion, there is a special injury on the same principle. By adhering to this rule it is easy to declare what constitutes special injury. By departing from it how can juries be instructed where special injury begins and ends? The language of the act of 1858 is as broad as the provisions of the 8th section of article 16 of the Constitution, and the decisions of our supreme court, in construing the constitutional provision, can be safely resorted to in deciding the question of injury in this case. In *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472, where the erection of the company's elevated tracks on the opposite side of the street did not in any way prevent free access to the plaintiff's property, it was held that there was no such injury thereto as would entitle him to recover. In *Chester County v. Brower*, 117 Pa. 647, where the county had erected a bridge over a creek in the borough of Phoenixville, and in the construction of abutments or approaches to the bridge had

built a wing wall in front of the plaintiff's house and only 7 feet distant therefrom, thereby seriously interfering with his access thereto and his reasonable use and enjoyment of the same, it was held that the plaintiff was entitled to recover. In *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, the facts were that the elevated railroad of the Pennsylvania Railroad Company was built on the south side of Filbert street, and in its construction in no way prevented free access to the plaintiff's property. Chief Justice Paxson distinguished the case from *Pennsylvania R. Co. v. Duncan* [111 Pa. 352], where access to the property was destroyed. In *Gold v. Philadelphia*, 115 Pa. 184, where the city authorities left the street in front of plaintiff's property in such bad condition as to be almost impassable, and all persons who could do so avoided it, whereby plaintiff's business as an innkeeper was greatly reduced, because of the fact that her ingress to and egress from the property were not prevented, she was held not to have suffered such a special injury as to entitle her to maintain her action. The court said, in affirming the court below: "The learned referee ruled this case upon the familiar and well-settled principle that one who is injured by a public nuisance, either in his person or in his property, cannot have his remedy by action unless he can show a damage which is peculiar to himself, and different in kind and degree from and beyond that which is sustained by the general public." In *Dooner v. Pennsylvania R. Co.* 143 Pa. 86, among other facts agreed upon was the following: "That the premises of the plaintiff consist of a lot of ground and a three-story brick messuage thereon erected, situate on the north side of Filbert at the distance of 34 feet east of Nineteenth street, containing in front on Filbert street 16 feet and extending in depth 117 feet to Cuthbert street. The said Filbert street is 51 feet wide, and the entire width thereof intervenes between the plaintiff's premises and the defendant's road at the point where the said elevated railroad passes in front of the plaintiff's premises." It was held that the plaintiff could not recover, and that the case was governed by *Pennsylvania R. Co. v. Lippincott*.

In *Pennsylvania S. Valley R. Co. v. Walsh*, 124 Pa. 544, and *Pennsylvania S. Valley R. Co. v. Ziemer*, 124 Pa. 560, the plaintiffs were awarded damages on the ground that access to their properties was cut off, and in his opinion Chief Justice Paxson, in the former case, says: "The track was laid close to the curbstone on the side of the street next to the plaintiff's property, by means of which the access thereto, if not actually cut off, was rendered dangerous."

In *McGee's Appeal*, 114 Pa. 470, the city of Pittsburgh, under legislative authority, vacated a portion of Washington street and allowed the Pennsylvania Railroad Company to occupy the same. McGee owned property abutting Washington street beyond the vacated portion, and applied for an injunction to restrain the city and railroad company from vacating the street. The injunction was dissolved on the ground that "public streets and highways belong to the commonwealth, and when the government sees fit to vacate them the consequential loss,

if there be any, must be borne by those who suffer it."

The cases from other states cited by appellant's counsel in their exhaustive and able argument are strikingly in point.

Smith v. Boston, 7 Cush. 254, was a petition for assessment of damages alleged to have been done to the plaintiff in his property by the discontinuance of a portion of Market street, in the city of Boston, by the order of the mayor and aldermen.

The discontinuance complained of was all that part of Market street covered by the Boston & Maine Extension Railroad, the proprietors of which had been permitted by their charter to extend their road through part of the city. The petitioner owned several lots on or near Market street, and offered to prove that the value of each had been lessened and the rent of one or more of them diminished, but it appeared that no one of the parcels bounded on that part of the street which had been discontinued, and that all were accessible by other public streets. The presiding judge ruled that the petitioner was not by law entitled to prove and recover any damages, because neither of his estates abutted on that part of Market street which was discontinued, and by his direction a verdict was entered for the respondents. Upon exception to this ruling the case was heard in the supreme court.

The Massachusetts Revised Statutes, chap. 24, § 11, provides for payment if any damage shall be sustained by any person in their property by the laying out, altering, or discontinuing of any highway.

Shaw, Chief Justice, in overruling the exceptions, said: "He [plaintiff] may feel it [the inconvenience from shutting up of the street], more in consequence of the proximity of his lots and buildings, still it is a damage of like kind, and not in its nature peculiar or specific.

... Though a man who lives near it [an obstruction in a highway] and has occasion to pass it daily, suffers a damage altogether greater than one who lives at a distance, he can have no private action, because in its nature it is common and public."

The damage complained of in this case, though it may be greater in degree in consequence of the proximity of the petitioner's estate, does not differ in kind from that of the other members of the community who would have occasion, more or less frequently, to pass over the discontinued highway. The petitioner has free access to all his lots. The burden of his complaint therefore is that in going to some of his houses in some directions he may be obliged to go farther than he otherwise would. So must the inhabitants of the south end of the city, or the citizens of other towns, with their teams or carriages, who have a right to use the discontinued highway.

To the same effect are *Davis v. Hampshire County Comrs.* 158 Mass. 218, 11 L. R. A. 750; *Hammond v. Worcester County Comrs.* 154 Mass. 509; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 691.

In *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598, it was proposed to vacate a street, and a property owner three and one-half blocks away filed a bill to prevent it, 38 L. R. A.

leging that it would thereby suffer great damage to its property. The supreme court reversed the decree of the lower court, granting the prayer of the bill, on the ground that no special or peculiar injury was shown, since it could not be reasonably claimed that the closing of the street in any degree interfered with access to its lot or its use and enjoyment. Though this property had been specially assessed as benefited by the opening of the portion of the street now to be vacated, it was held that this gave it no special property in that part of the street.

In *Kimball v. Homan*, 74 Mich. 699, petition for certiorari to review action of commissioner discontinuing Centre street from Hall street to Home street. Plaintiff claimed to own land on the south side of Home street and east side of Centre street. Notice of proceedings was given only to landowners on that portion of street discontinued. The Michigan statute, which allowed highways or parts of highways to be discontinued, required notice to be given to owners and occupants of land through or adjoining which it was proposed to discontinue; and also that the commissioner should view the premises, determine the necessity of discontinuing the highway, and appraise the damage on account thereof, if any is claimed. It was held that the meaning of this was to confine the adjacency to the part discontinued, and that the only persons who can complain must be such as are directly affected in their convenience of access to their property, and who are liable to lose their immediate means of communication, and that plaintiff, who had another mode of access to his property, had no interest in the proceeding.

In *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 504, plaintiff was an owner of land upon a street, another part of which was unlawfully obstructed by the defendant. Held, that the injury suffered by plaintiff in consequence of the obstruction was an injury in common with the public at large, the only difference in the injury suffered by him and that suffered by the public being a difference in degree, not in kind. The court said: "What might be the plaintiff's rights, if the obstructions had the effect to cut off access to his land, we need not inquire, since both the diagram and the testimony in the case show that he has that access, through other streets, without the necessity of passing over the obstructed portion of Washington street."

In *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41, where the question of obstructing access arose, the court held that the owner of land abutting on a public street has, as such, a special interest in the street, different from that of the general public, as to entitle him to maintain a private suit for damages against the party who wrongfully obstructs the street in front of or near his property so as practically to cut off public access to it.

Re Vacation of Centre Street, 115 Pa. 247, does not sustain the right of property owners on the same street not abutting on the part vacated to recover special damages. By an examination of the case in the court below, reported in 17 W. N. C. 809, it appears that the plaintiff's property abutted on Centre street.

Re Vacation of Howard Street, 142 Pa. 601,

decides that the act of 1858 is constitutional, and was in full operation in the city of Philadelphia on January 25, 1889, and does not touch the question under consideration.

It is claimed by the appellees that *Mellor v. Philadelphia*, 160 Pa. 614, rules this case, and fully sustains the court below on the question of injury and damage. To this proposition the writer of this opinion and the majority of this court do not assent. The facts in *Mellor v. Philadelphia*, as stated by the reporter, are as follows: "At the trial it appeared that the sixteen plaintiffs owned houses and lots on Trenton avenue, a narrow street running east and west along the Pennsylvania Railroad in Frankford. Ten of the properties were between Orthodox street and Margaret street. Six of the properties were to the west of Orthodox street. The first group of ten properties had ingress and egress by Trenton avenue to enter Orthodox street or Margaret street. The second group of six properties had ingress and egress by Trenton avenue to Orthodox street or Oxford street, which was 850 feet further west. Councils of the city of Philadelphia, deeming it desirable to do away with grade crossings, passed an ordinance to lower the grade of Orthodox and Margaret streets and thus carry them under the railroad. In carrying out this work, the streets were depressed about 15 feet, cutting off access by vehicles to and from the first group of ten properties, and also cutting off access by way of Orthodox street to the second group of six houses." In his charge, speaking of the western group of six properties, Judge Thayer said: "If you find that the cutting down of Orthodox street has materially impaired the facilities which the owners of these properties had before for getting into and out of their property, that Oxford street cannot afford them the facilities which they had before because the road between Oxford street in front of these houses and Orthodox street is so narrow that wagons and carts cannot conveniently enter and turn round, if you find that the property has been materially damaged by that, and that they now have only one way of egress from their properties, which is in itself a defective way, putting them to great inconvenience and affecting the value of the property, then I charge you that such an injury is within the protection of the Constitution, and you should find for the plaintiffs for whatever damages the properties have actually sustained in consequence of the altered grade."

Under the facts thus stated and found the jury assessed damages in favor of the owners of both groups of properties, on the principle that where access to properties is practically destroyed a special injury results, though the property does not abut on the street or part of street vacated or changed.

In the case last above cited, two streets running at right angles to Trenton street were so changed in grade by depression as to render Trenton avenue impossible of access between the two streets, and on account of the narrowness of Trenton street on the city plan, it being so narrow between Orthodox and Oxford streets that wagons and carts could not conveniently enter and turn round, there was no difference

in the degree of injury, and, under the peculiar facts of the case, both groups of properties received special injury by being deprived of the means of egress and ingress.

In this case no such facts exist. That the properties in question on Melon street were deprived of their outlet eastward is undisputed. It is equally undisputed that Melon street, before the vacation, was an open public highway from Ridge avenue to the westerly side of Ninth street; that it was 49 feet wide, including sidewalks, and 25 feet wide from curb to curb. And it is also undisputed that their outlet westward was not in any way impaired. The western half of the properties were some of them as near Tenth street as Ninth street, and the extreme easterly property was only about 100 feet nearer Ninth than Tenth street. The most that can be said is that these property owners were inconvenienced in being deprived of an additional outlet; but, under the facts in this case, they suffered no special injury which the general public did not suffer in common with them, and they are therefore not entitled to damages.

The distinction between the case of *Mellor v. Philadelphia*, 160 Pa. 614, and the case under consideration is obvious. In the former case the municipal authorities, when they depressed the grade of Orthodox street, knew, from the plan of streets in the vicinity, that Trenton street was so narrow between Orthodox and Oxford streets that access by way of Oxford street was practically destroyed, and that a special injury to every property between these streets must result. This element of damage pervaded the case and was fairly submitted to the jury at the trial, and the judgment was affirmed. In the case under consideration the appellees were inconvenienced, and the facts clearly show that their access to the plan of general streets by way of Tenth street is open, ample, unobstructed, and unimpaired, and from the facts thus established it follows that the appellees have sustained no special injury. In the former case a *cul de sac* resulted that could not be used. In the case under consideration a *cul de sac* also resulted, but no owner of property abutting thereon is deprived of free access to his property.

In *Laurence v. Philadelphia*, 154 Pa. 20, we have the proposition of the owner of thirteen adjoining houses and lots, four of which fronted on Second street, in the city of Philadelphia, four adjoining on Venango street, and five others adjoining on Cooper street. Second street crossed Venango street and Cooper street at right angles. The grade of Second street was raised 9 feet, and this change of grade cut off access to the properties on Venango and Cooper streets absolutely by way of Second street. Under the facts thus stated the court held that the plaintiff could recover damages to his property fronting on Second street caused by the change of its grade, but could not recover as to his properties on Venango and Cooper streets. In the report of that case the facts do not fully appear, but the plaintiff could have been denied the right to damages to his property on Venango and Cooper streets only on the ground that he had free access thereto through other streets con-

necting with the general system of streets in the city of Philadelphia. Thus explained, this case fully supports the appellant's position.

It is urged by the appellees that because the jury of view gave special damages to each of the thirteen property owners, it therefore follows, by implication, that their finding was based upon some facts warranting the giving of such damages. But such implication is rebutted, and must fall in connection with the undisputed facts which the record discloses, to wit, that before the vacation Melon street was an open public highway, nearly 50 feet wide, and the outlet through this open highway to Tenth street was not in any way impaired by the vacation. Under this view of the case it follows that the second, third, fourth, ninth, and eleventh assignments of error must be sustained.

The fifth, sixth, and seventh assignments of error are overruled. While the jury of view, under the terms of the petition filed in the court below, had no right to ascertain and report any damage caused by the vacation of Ninth street, yet, having done so, in connection with the damage caused by the vacation of Melon street, if we were to affirm the court below this court could order the filing of a proper and sufficient release on the part of the appellees as to all damage caused by the vacation of Ninth street, so as to thoroughly protect the rights of the appellant.

In considering the eighth and twelfth assignments of error, we must first notice the character of the question submitted to the jury of view on the subject of benefits. By the provisions of the act of 1858, we have seen that the first duty of the jury of view was "to ascertain and report to the court what damages the parties claiming were entitled to; and, second, to assess and apportion the same among and against such owners of land as shall be benefited by such opening, widening, or vacating any such road or street."

This statutory provision, if followed, was a sure guide to the jury of view in assessing, apportioning, and reporting benefits. They were commanded to ascertain the owners of land benefited and report the same to the court. Like any other statutory submission, their award must be in conformity with the statutory requirements, and if it fails in that respect it cannot be sustained. In their report the jury found that all the land abutting on both sides of the portion of Melon street vacated belonged to the Philadelphia & Reading Railroad Company. The jury further found "that in the construction of the Philadelphia & Reading Terminal Railroad and its necessary works that company had entered upon and occupied a portion of Ninth street so stricken from the city plan, and also that portion of Melon street which has been stricken from the city plan, as aforesaid." And further, "that the Philadelphia & Reading Terminal Railroad Company is specially benefited to an amount not less than \$9,750."

Nowhere in the viewer's report does it appear that the Philadelphia & Reading Terminal Railroad Company was the owner of any land benefited at the time the report was made and filed. If that company was not the owner of

land benefited, it was not liable to assessment for benefits; if it was, then it was the imperative duty of the jury to affirmatively find and report that fact to the court. Such is the command of the statute.

In *Reistenbaugh v. Cheater Valley R. Co.* 21 Pa. 105, Mr. Justice Woodward says: "But to enable the court to determine in every case whether the viewers have confined their assessment of damages to the subject-matter provided for in the general law, or in special acts of incorporation, it is apparent the report should exhibit the grounds of the assessment."

In this case the jury have reported that the Philadelphia & Reading Terminal Railroad Company is benefited, but they did not find another equally important fact prescribed by the statute, to wit, that the said company was the owner of land benefited. We are asked by the appellees to find the necessary ownership of land in the Reading Terminal Railroad Company from the viewers' report by implication; if we do, the implication must be a necessary implication. Does it follow of necessity that because the appellant was in actual occupancy of a portion of Melon street vacated, it was therefore the owner of land as contemplated by the statutory provision? Whether the company is there in possession of the vacated street for one year or one hundred years, whether as lessee or licensee, does not appear. From the fact of occupancy, ownership does not follow by necessary implication.

It is also urged that from the fact that the jury found that the appellant was benefited in the sum of at least \$9,750, therefore, by implication, it follows from the finding of that fact that the company must have been the owner of land, or the jury would not have found it was benefited. Such a proposition answers itself, for the fact that the jury found the appellant benefited in no way implies its ownership of land.

In *Re Vacation of Centre Street*, 115 Pa. 247, the report of the jury stated that in consequence of the vacation of the street the petitioners had received special damage, and that the land owned by the Pennsylvania & Schuylkill Valley Railroad Company in the locality of said portion of said street had received special benefit from said vacation. This was held a sufficient description of property and ownership, and warranted the jury in assessing the benefits against the company. That case, however, is not an authority sustaining the position of the appellees; in fact, it is to the contrary. The assessment and apportionment of benefits not appearing to be against the owner of land in the report of viewers filed in the court below, said report therefore cannot be sustained. The eighth and twelfth assignments of error are sustained.

The judgment is reversed, and the report of the jury of view set aside at the cost of the appellees.

RICE, P. J., dissenting:

The appellant's counsel contend that there cannot be any recovery by the claimants, because none of them was the owner of property within that part of Melon street which was vacated. They do not claim that they were not damaged—and in the face of the report of

viewers, unappealed from, cannot do so—but do contend that there must be, not only damage, but injury in the legal sense must exist.

To this latter proposition I give my unqualified assent, but I am not prepared to concede that the loss which the claimants have sustained in consequence of the closing up of Ninth street and the eastern end of Melon street is *damnum absque injuria*.

The right to compensation for loss sustained by a property owner in consequence of the vacation of a street is, in Pennsylvania, purely statutory. It was clearly decided in *Paul v. Carter*, 24 Pa. 207, 64 Am. Dec. 649, that the legislature has power to vacate streets and highways which, in its judgment or that of the municipal authorities to whom the power is delegated, are useless, inconvenient, or burdensome, and this without providing compensation to the owners of land incidentally injured.

Judge Black said, "Surrendering the right of way over a public road to the owners of the soil is not taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation."

This doctrine was in harmony with the ruling in *O'Connor v. Pittsburgh*, 18 Pa. 189, that "the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but," added Chief Justice Gibson, "it follows not that the omission may not be supplied by ordinary legislation."

The injustice which constantly resulted from the ruling in this case—an injustice which Chief Justice Gibson thought so great that it ought to be remedied by appropriate legislation—was, to some extent, provided against by § 10, art. 1, and § 8, art. 16, of the Constitution of 1874; but it has been held, for reasons which in no way affect the present case, that an injury caused by the vacation of a street is not within these constitutional provisions. No private property is "taken or applied to public use" within the meaning of the section first referred to, or "taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements" within the meaning of the section last mentioned. *McGee's Appeal*, 114 Pa. 470.

But it is too plain for argument that a property owner may suffer injury in consequence of the vacation of a street, not only different in degree, but different in kind, from that suffered by the general public. It is the same kind of an injury which he suffers from a change of grade; and, upon the same principles of justice and equity which were recognized in *O'Connor v. Pittsburgh*, and which led to the adoption of the constitutional provisions above referred to, the state, although as the sovereign having power to inflict it without compensating him, may give such compensation, and provide for its payment by the state or the municipality, or its apportionment amongst the persons or properties benefited. This was expressly decided in the construction of the very act under which the present proceedings were had. *Re Vacation of Centre Street*, 115 Pa. 247.

"That the Commonwealth was under no constitutional obligation to pay for the dam-

age caused by vacating a street was decided in *Paul v. Carter*, 24 Pa. 207, 64 Am. Dec. 649, and is so held under the present Constitution. *McGee's Appeal*, 114 Pa. 470. But it has never been held, nor, so far as I am aware, seriously contended, that the legislature might not put such obligation on the Commonwealth or its agents by statute. The principle of compensation was extended by the present Constitution so as to include, in certain cases, not only property taken, but property injured. This provision might have been, and to some extent was, in fact, anticipated by statutes providing for such compensation by assessments in the nature of special and local taxation." *Vacation of Howard Street*, 142 Pa. 601; *Hare v. Rice*, 142 Pa. 608, Mitchell, J.

The legislature, in the exercise of its undoubted power, having guaranteed compensation for injury caused to private property by the vacation of a street, the question arises whether the right is limited to properties abutting on the portion of the street vacated. No one could or does contend that an unqualified affirmative answer to this question would be justified upon any principle. If, for illustration, Ninth and Tenth streets had been vacated, we think no one would say that the properties of the claimants abutting on that portion of Melon street lying between the two streets vacated would not suffer injury in a legal sense, or that the legislature did not intend to give compensation for the kind of injury which those properties would sustain. Undoubtedly the legislature might refuse compensation in such a case, but has not done so.

But it is said that in the case supposed access to the property of the claimants would be wholly destroyed, while in the case in hand access by way of Ninth street only is taken away. But why should the statute be construed to give a right to compensation in the one case and not in the other? What authority is there for saying that a claimant must show that he has been wholly deprived of access to his property in order to entitle him to recover damages? Take the case in hand. The claimants may still go to and from all parts of the city by way of Tenth street, but are now compelled to go further to reach points to the eastward. This is an inconvenience, and by the diversion of travel may cause a depreciation in the value of their property; but it is generally held to be the same kind of inconvenience as that which all the inhabitants of the city traveling that way must suffer. It is an interference with the right of passage over the street which was before enjoyed, and is not of itself a legal wrong for which a private suit at common law could have been sustained.

It may be conceded that it is not an injury for which the claimants would be entitled to recover damages under the statute; but, in addition to the right of passage which they enjoyed in common with the general public, was their right or interest in the street as a mode of access to their properties, and there may result from a destruction or impairment of access a special injury which would not be sustained by the other members of the general public. It would seem to be manifest that the conversion of an open highway connecting with another street into a *cul de sac* would, as to the

properties thus deprived of one mode of ingress and egress, be evidence of a special injury, possibly differing in degree, but not in kind, from that resulting from closing up both ends of the street.

A variety of special circumstances—the width of the street upon which the properties abut, the grade, the kind of traffic, the distance—would enter into the determination of the amount of damages sustained. In some cases they might be very trifling; but cases may very readily be imagined where they would be very serious; and I am not prepared to say that the mere fact that the properties do not abut on the portion of the street vacated would be conclusive upon the legal question—whether such an act would be an injury.

The learned counsel for the appellant frankly concede that the question is a new one in Pennsylvania. Therefore, we are not prevented by authoritative precedents from giving that interpretation to the statute which will carry out the manifest intention of the legislature to remedy an injustice, which *Paul v. Carver* showed was possible under the law as it stood before.

I agree that some well-defined principle ought to control the assessment of damages; but there is a difficulty in laying down a general rule applicable to all cases, and the rule contended for seems to derive its chief support from the supposed inconveniences that would result if it is not adopted.

This argument is not without force, but it seems to me that it is given too much weight. It is said if the rule contended for is not established, where will be the limit to claims for damages? Questions like this can be addressed with much more force to the legislature than to the courts; but, after all, the difficulties which would arise from a more liberal interpretation of the statute are more imaginary than real; they are not greater than those which might have been, and indeed were anticipated from the introduction into the fundamental law of the principle of compensation for the injury and destruction, as well as the taking, of private property in the exercise of the right of eminent domain. It is not to be supposed that the legislature were ignorant of the difficulties which are now urged upon our consideration, but they were not of sufficient gravity to deter them from enacting a law broad enough in its terms to secure compensation to these claimants, if, in fact, they have suffered substantial injury of a special nature. It is as broad as the constitutional provision; the injury is of the same kind as that caused by a change of grade; there is no reason for a stricter rule in one case than in the other; and there is no authoritative decision which requires us to make a distinction.

If I am correct in this, then the language of Chief Justice Sterrett, in *Mellor v. Philadelphia*, 160 Pa. 614, construing the constitutional provision and applying it to a case of damages caused by a change of grade, might appropriately have been written for this case. "Defendant's contention was that this provision is inapplicable to any of the cases under consideration, because neither of the properties fronts or abuts on either of the streets the grade of which was changed. This would,

indeed, be a very narrow and unreasonable construction of the words above quoted, especially in view of the history and object of the constitutional provision. . . . There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway, or improvement, by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it and were never intended to be there."

The case is like this in so many parts that it seems to me that it might be regarded as ruling it. There access to the properties by way of Orthodox street was destroyed by lowering the grade of the latter street; but Trenton avenue, upon which the properties abutted, and Oxford street, which it intersected, remained as before. Here access to the properties by way of Ninth street was destroyed by the vacation of that street and the eastern end of Melon street; but the portion of the latter street on which these properties abut and Tenth street, which intersects, are unchanged. The outlet in that direction remains as before. In neither case was access to the properties wholly destroyed, but in both cases the conversion of the highway in front of them into a blind street was evidence of an impairment of access to the properties which might be proper to submit to a jury under appropriate instructions of the kind given in the cited case.

Whether the injury was as great in this case as in that it is impossible to say without having a knowledge of all the facts which would have been brought before the court if an appeal had been taken, as was done in the case cited, but cannot come before the court on exceptions to the report. It is true we have the undisputed facts—that the properties do not abut on the part of the street vacated; that the street is nearly 50 feet wide; and that the outlet to the westward is the same as before. If these facts are sufficient in law to base a conclusion that the claimants have not sustained an injury which would entitle them to recover the damages allowed by the viewers—if, in other words, we can say, as a matter of law, that access to their properties has not been impaired—then the report ought to have been set aside. But this is what we must declare if we sustain the appellant's second, third, fourth, ninth, and eleventh assignments of error, and I do not think we can do so and at the same time harmonize our decisions with the just principle upon which a recovery was allowed in *Mellor v. Philadelphia*.

It is argued that an affirmation of the judgment of the quarter sessions in this case will be in the face of every authority upon the question. I have endeavored to show that such a ruling would be in entire harmony with the principle enunciated in *Mellor v. Philadelphia*, and, if time and space permitted, I think that it could be shown that it is not in conflict with the great weight of authority. It is true, some of the cases do lay down the rule that where a part of a street is vacated those whose property does not abut upon the vacated portion, and who have access to their

property by the remaining portion of the street, cannot complain.

In some of the states, especially in Massachusetts, this rule has been adhered to with great strictness, but even there the principle was thus explained in one of the latest cases: It is not enough to show that a shop has suffered by the diversion of travel, or that the owner finds travel less convenient at a distance from his place, if the access to the system of public streets remains substantially unimpaired. *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591. In that case the court said that the means of access were ample, and in the leading case in that state, *Smith v. Boston*, 7 Cush. 254, the court said: "The petitioner has free access to all his lots by public streets."

Are we prepared to declare in this case that access to the claimants' properties has not been impaired? Can the court say to these claimants "one opening to your properties is sufficient for your purposes, therefore no legal injury has been done to you by closing the other?" Could we say that if their properties fronted on two parallel streets, or were on the corner of two streets, one of which was vacated? Is it not more in accord with sound principle to say that their right of access was not limited by the frontage of their properties, but extended to the two intersecting streets, and that it is for the jury to say whether, under all the circumstances, the claimants have suffered substantial damages in consequence of the closing of one mode of access?

A learned text-writer, after reviewing the authorities, says: "It has been held that the vacation and closing of one street afforded no ground of complaint when access remained by other streets, but we should doubt this proposition as universally applicable." Lewis, Em. Dom. § 134. Another writer says: "But the more liberal opinion is that the fact that access may be had from another direction is not conclusive evidence that there is no legal injury to property." Randolph, Em. Dom. § 411. He cites *Gargan v. Louisville, N. A. & C. R. Co.* 89 Ky. 212, 6 L. R. A. 340, as deciding that "if a convenient way be cut off, leaving only a decidedly inconvenient one, the abutting owner may have compensation."

If we leave out of consideration the cases which are based wholly on a construction of constitutional provisions like ours, and cases where the statutes under consideration were held not to contemplate the recovery of consequential damages, it will be found that the cases in which it has been held that the rigid rule, as stated by the appellant, applies, where the street was converted into a *cul de sac*, are very few, although I do not say that there are none.

In *Chicago v. Union Bldg. Assn.* 102 Ill. 380, 40 Am. Rep. 598, the part of the street to be vacated was three and one-half blocks, $\frac{1}{4}$ of a mile distant, and the only injurious consequences were that persons passing from the claimant's property down the street would have, on arriving at the obstruction, to go a little further and make a slight detour—precisely the same injury that would be sustained by every person having to pass by that route.

In *East St. Louis v. O'Flynn*, 119 Ill. 200, 38 L. R. A.

59 Am. Rep. 795, the question decided was, as stated by the court, "Can defendant, as a matter of law, be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets,—the vacation being in another block in the city than that in which plaintiff's property is situated?"

So, in Michigan, it was held that a petitioner had no interest and was not entitled to notice of proceeding because he could not reach the discontinued way without crossing a public street (*Kimball v. Homan*, 74 Mich. 699); but where the discontinuance of a highway leaves the way to a landowner's house a *cul de sac*, he is directly interested in the proceedings and is entitled to notice. *Goss v. Westphalia Twp. Highway Comrs.* 63 Mich. 608.

In *Whitsett v. Union Depot & R. Co.* 10 Colo. 243, none of the lots of the plaintiff abutted on those portions of the streets or alleys vacated, but all were on other blocks; hence the court properly held that the access to and egress from his lot is not affected by the vacating ordinances passed by the city.

The same was the case in *Glasgow v. St. Louis*, 107 Mo. 198, and the court held that the case was not within the constitutional provision because there was no physical interference with the plaintiff's property and no right of easement connected therewith or entrance thereto was affected.

In the other Missouri case cited by the appellant (*Bailey v. Culver*, 12 Mo. App. 175), the point decided was that "the substitution of a deflected alley for a straight one does no more than to change the direction of their exterior communications, and this being at a point beyond the confines of their property, is as harmless to their absolute rights as if it were in any other part of the city."

The case was precisely the same in principle as those in which the street vacated was in another block, and was put upon the same ground, namely, that being compelled to travel further to reach other points it was an inconvenience which the claimants would suffer in common with the general public.

Neither of the Minnesota cases cited (*Shaubert v. St. Paul & S. C. R. Co.* 21 Minn. 502, and *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41), is parallel to the present one. The first is not because the obstruction was in another block, and the second is not because access was wholly cut off. Both are in point, however, because they recognize the general principle that the right of access gives an abutting landowner a special interest in the street, even beyond the limits of the frontage of his property.

The case of *Coater v. Albany*, 43 N. Y. 399, is sometimes cited in support of the proposition that the vacation and closing of one street affords no ground of complaint where access remains by other streets; but a careful reading of that case, I think, shows that it was decided upon a construction of the statute which confessedly cannot be given to our statute, namely, that it did not give the right to consequential damages.

It is sometimes said that the right of an abutting landowner in an open street is coextensive only with the necessities of the case;

but this doctrine cannot be sustained upon any sound principle, nor by the weight of authority where a statute as broad as ours is in force.

In *Duke Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, cited in *Randolph on Eminent Domain*, § 411, the right of access to the river Thames was held to appertain to every foot of the adjacent land of the plaintiff, though access had been habitually gained at a single point only. The same principle was held to apply where the tract in question abutted on more than one street. The deprivation of access to one street is an injury, although another street affords egress. *Fort Scott, W. & W. R. Co. v. Fox*, 42 Kan. 490.

I have made this review of the cases, most of which were cited by the learned counsel for the appellant, not to show that they expressly decide that a recovery can be had in such a case as this, but to show that it is not decided by the great weight of authority that there cannot be a recovery.

Coming back to a consideration of the case upon general principles, and assuming that a property owner can recover such damages only as are special to him, and that this includes only damages consequent upon a deprivation or impairment of access to his property, I would hold that the facts set forth in this report, whether taken singly or together, do not raise a presumption of law or of fact that the claimants have not suffered such damage, and the report being in due form is sufficient to sustain the assessment.

Is the omission of the viewers to report specifically that the appellant is an owner of land benefited by the vacation a fatal defect?

In *Re Vacation of Centre Street*, 115 Pa. 247, it was decided that the assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by the vacation of streets is a species of taxation, and within the power of the legislature. It was also held that under the act of 1858 now under consideration, the assessment might be made against the owner of the land benefited personally. Chief Justice Sterrett said: "While it is perhaps true that such assessments are generally against the property benefited, and not against the owner thereof personally, the fact that the legislature has authorized them to be made against the owner, as in this case, cannot affect the constitutionality of the law. The object, in either case, is to provide a mode of collecting the assessment, and that is wholly within the discretion of the legislature. *Desty, Taxn. 286.*"

It is nevertheless true that the assessment can only be made against the owner of the land, and that the assessment cannot exceed the benefit to the land. Both of these facts should appear expressly or by necessary implication in the report; but it seems that an omission to describe the land is not a fatal defect. *Re Vacation of Centre Street*, 115 Pa. 247. But the ordinance annexed to and made part of the petition, and referred to in the report, contains this clause: "Provided, That the Philadelphia & Reading Terminal Railroad Company shall pay all expenses and damages arising from the said revision, and that it shall enter into a contract with the city of Philadelphia, in a form to be approved by the city 88 L. R. A.

solicitor, covenanting to pay all such expenses, and damages, and to indemnify the city of Philadelphia from any liability for or on account of the said revision."

It may be fairly inferred that the contract was entered into in compliance with the condition, for the report states that the revision of the city plans contemplated by the ordinance was made and duly confirmed by the board of surveyors, and that the appellant, in the construction of its necessary works, had entered upon and occupied those portions of Ninth and Melon streets stricken from the city plan as aforesaid.

The report further sets forth "the vacation of Melon street on account of the closing of Ninth street for the benefit of the Philadelphia & Reading Terminal Railroad Company was part of a general scheme or plan for the revision of plans of the city streets in the vicinity of Philadelphia & Reading Terminal Railroad Company, made necessary by the building of its elevated railroad to its new terminal station at Twelfth and Market streets, in the city of Philadelphia."

Under these circumstances may not a fair presumption of such ownership of land as would make the appellant liable to assessment arise from the occupancy of it by works of the permanent character referred to in the petition and report? It is said that no such presumption can arise, because the report shows that all the land abutting on that part of Melon street stricken from the city plan belongs to the Philadelphia & Reading Railroad Company; but it by no means follows that this is the only land which would subject the owner to assessment, nor am I convinced that the ownership contemplated by the statute must be in fee simple.

It appears with sufficient certainty that the appellant is in the actual occupancy of land which might subject the owner to assessment for benefits thereto, with works of a permanent nature, namely, an elevated road connecting with its terminal station at Twelfth and Market streets; that the ordinances were passed for the benefit of the appellant, and upon condition that it would pay the expenses and damages caused by the vacation of the streets; that it had actually received, and is in the enjoyment of, the benefits which were intended, and it may be fairly inferred that it has complied with the condition by entering into the contract required by the ordinance.

These facts, taken together, take the place of a formal and specific averment of the ownership of land. But, say the counsel for the appellant, the roadbed of a railroad company cannot be assessed with benefits for such an improvement, and cite the sidewalk and paving cases in support of the proposition. But, as has been seen, this is not an assessment against the roadbed, but against the owner. The cases referred to were decided principally upon the ground that the improvements then under consideration could not, from their very nature, be a special benefit to the roadway of a railroad company, but the vacation of a street may be, and manifestly was in this case, a benefit; and when we come to the question of ownership it makes very little difference whether the appellant owns the roadbed in fee

or has only the right of way. *Junction R. Co. v. Philadelphia*, 88 Pa. 424.

I would therefore hold that the omission referred to in the assignment of error under consideration was not, under the circumstances, fatal to the report. In order to prevent misunderstanding, however, it should be stated that this is not put upon the ground that the contract referred to in the ordinance, even if entered into by the appellant, would entitle the claimants to recover damages if their property is so situated that it has not, or could not, receive legal injury in consequence of the vacation of the streets in question. The fact is referred to simply in connection with the facts as to the occupancy of the land as bearing upon the question raised by the assignment of error under consideration.

For these reasons, in connection with the reasons assigned by the majority of the court upon the other two questions raised in the case, I would affirm the judgment of the court below.

BEAVER, J., concurs in the foregoing dissenting opinion.

Messrs. Frank M. Cody, M. Hampton Todd, and William H. Staake, for appellant Jacob L. Stadelman:

It is not necessary to state in terms upon the record that the case involves the construction or application of the Constitution, if the record otherwise shows that fact.

Miller v. Nicholls, 17 U. S. 4 Wheat. 811, 4 L. ed. 578; *Chicago L. Ins. Co. v. Needles*, 118 U. S. 574, 38 L. ed. 1084.

This case is identical with *Mellor v. Philadelphia*, 160 Pa. 614, and is ruled by the principles laid down in that case.

For the assessment of benefits upon the Philadelphia & Reading Terminal Railroad Company we rely upon the case of *Re Vacation of Centre Street*, 115 Pa. 247.

Under the earlier constitutional provisions this court has uniformly held that the word "taken" was to be interpreted literally.

Case of Philadelphia & T. R. Co. 6 Whart. 25, 36 Am. Dec. 202; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 282; *O'Connor v. Pittsburgh*, 18 Pa. 189; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101.

To remedy this evil, to suppress this mischief, the clause of the section under consideration was adopted, the words "injured or destroyed" being added to cover the cases of consequential damage not included and relieved against by the word "taken" as construed by the court.

8 Meredith, Const. Debates, 597; *Pusey v. Allegheny*, 98 Pa. 532; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 473; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541.

If the property of a citizen had been injured and depreciated in value by the act of another citizen by obstructing a highway or otherwise injuring his property, the party injured would have an action to recover his damages, and if the nature of the injury was such that one verdict would compensate for all time, then the measure of damage was the total loss, present and future.

Miller v. Wilson, 24 Pa. 114; *Palmer v. Sil-*

verthorn, 83 Pa. 65; *Com. v. Passmore*, 1 Serg. & R. 217; *Serly v. Alden*, 61 Pa. 802, 100 Am. Dec. 642; *Duffield v. Rosenzweig*, 144 Pa. 520; *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649.

The legislature has imposed the liability on the city of Philadelphia by the act of 1858 to make compensation for the damage done by the vacation of a street, and the constitutional phrase under consideration likewise gives a right of action for injuries of this character.

Rigney v. Chicago, 103 Ill. 64.

For a state to depreciate the value of the property of a citizen by agencies which at common law would have sustained an action between private individuals without making compensation is a deprivation of property inhibited by the Constitution of the state and the Constitution of the United States.

Hare, Am. Const. Law, p. 357; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166, 20 L. ed. 557; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 817, 27 L. ed. 739; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 507, 12 L. ed. 585.

Messrs. William W. Porter, Frederick J. Geiger, George Q. Horwitz, and Edward Brooks, Jr., for appellant William H. Bower:

Where access to private property has been injured or destroyed by the vacation of a street in Philadelphia, and there has been a consequent depreciation in the value of the property, the owner is entitled to compensation therefor.

Prior to 1858 no damages whatever could be recovered for injury to property arising from the vacation of a public road.

Paul v. Carver, 24 Pa. 207, 64 Am. Dec. 649.

The law, as it existed prior to 1858, was, so far as the city of Philadelphia is concerned, entirely changed by the act of April 21, 1858, which establishes the right of parties claiming the same to damages occasioned by the vacation of streets in Philadelphia.

Re Vacation of Centre Street, 115 Pa. 247; *Vacation of Howard Street*, 142 Pa. 601; *Philadelphia & R. Terminal R. Co.'s Appeal*, 1 Pa. Super. Ct. 63.

In the case of the opening of a street it is not necessary that a property shall have occupied a portion of the land actually comprised within the limits of the street opened in order that its owner may be entitled to compensation.

Snyder v. Lancaster, 20 W. N. C. 184.

By reason of the similarity of the acts providing for compensation in cases of change of grade, the same rule as to damages must apply to the vacation of streets.

Geiger v. Norristown, 6 Mont. Co. L. Rep. 157; *Mellor v. Philadelphia*, 160 Pa. 614.

In order that an owner may recover damages for injury to access to property, consequent upon a change of grade, his property need not abut upon the street the grade of which has been changed, nor need the access be entirely destroyed.

The omission of a jury of view, appointed to assess damages among the owners of land benefited by the vacation of a street, to find in express terms in their report that the person against whom the damages are assessed is the

owner of land benefited by the vacation, is not a fatal defect in the proceedings.

Re Vacation of Centre Street, 115 Pa. 247; *Mt. Pleasant v. Baltimore & O. R. Co.* 188 Pa. 865, 11 L. R. A. 520; *Philadelphia, McCann, v. Philadelphia & R. R. Co.* 177 Pa. 292, 84 L. R. A. 564.

Mr. Edward Thippen for appellants Sarah A. Eddowes *et al.*

Messrs. John G. Lamb and Thomas Hart, Jr., for appellee:

Unless a case involves public interest, or the decision is likely to be of importance as a precedent, or a decision of the supreme court is important to settle a matter upon which there is a diversity of opinion in other courts, the supreme court will not trench upon the final character of a judgment of the superior court.

Kraemer v. Guarantee Trust & S. D. Co. 178 Pa. 416; *Ex parte Lau Ow Bew*, 141 U. S. 583, 35 L. ed. 888; *Re Woods*, 148 U. S. 202, 36 L. ed. 125; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486.

Appeals to this court should not depend upon the very partial view of an unsuccessful party in the superior court that a constitutional question is involved.

Where a plaintiff below has had a free and fair trial, and where his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all in like condition, even if he can be considered deprived of his property by an adverse result, the proceedings so resulting were in "due process of law" as that phrase is used in the Constitution of the United States.

Marchant v. Pennsylvania R. Co. 158 U. S. 880, 38 L. ed. 751.

It must appear from the record that the validity of the act of Congress or the constitutionality of the state law was drawn in question.

Miller v. Nicholls, 17 U. S. 4 Wheat. 811, 4 L. ed. 578.

The opinion of a court in rendering its decision is not a part of the record.

England v. Gebhardt, 112 U. S. 503, 28 L. ed. 811; *Cathcart v. Com.* 87 Pa. 108.

The benefit conferred, on the basis of which an act assessing the costs of a municipal improvement can only be held to be constitutional, must be a benefit to property.

Allegheny City v. Western Pennsylvania R. Co. 188 Pa. 375.

Local assessments can be made only for improvements which confer peculiar local benefits upon property which adjoins the improvement, and it is not competent to assess the cost of improving a part of a street of a city upon property not situated upon the street to be improved.

Morewood Avenue, 159 Pa. 20; *Fifty-Fourth Street*, 165 Pa. 8; *Park Avenue Sewers*, 169 Pa. 433; *Witman v. Reading*, 169 Pa. 375.

In a petition of this kind there must be set out the particular thing on account of which it is claimed the damage arises. It cannot be tolerated that under a petition claiming damages for the vacation of one street, damages for the vacation of some other street, even though it may be connected with the former, can be recovered.

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Elliott, Roads & Streets, p. 253; *Bean's Road*, 85 Pa. 280; *Road in Lower Merion*, 58 Pa. 66; *Re Damages of Porter*, 1 Pearson (Pa.) 158; *Road in Ross Twp.* 86 Pa. 87; *Chartiers Township Road*, 48 Pa. 814.

It is nothing to say that the vacation of Melon street was part of the same general scheme as moved the vacation of Ninth street, and that both were for the same purpose.

If this petition had been drawn in terms for the vacation of Ninth street, the petitioners would not have been permitted to recover therefor.

Lawrence v. Philadelphia, 154 Pa. 20.

If a private individual had obstructed Melon street precisely as it has been vacated, it is beyond controversy that according to the law of Pennsylvania an owner of property on the part of the street not vacated, who still enjoyed full access to his property by means thereof, would not be entitled to sue.

Knowles v. Pennsylvania R. Co. 175 Pa. 623.

The utmost that can be claimed for the act of 1858 is that it thereby provided compensation for property peculiarly or specially injured by the vacation of streets.

In the present case, however, no such special damage is averred, nor can there be such damage.

The legislature has the power to vacate a public street, and the consequential loss, if any there be, must be borne by those who suffer it.

Paul v. Carter, 24 Pa. 207, 64 Am. Dec. 649.

The effect of the passage of the act of 1858 is to give damages in the case of the vacation of streets to those who had suffered such special damage as would have entitled them to recover in an action at common law had the act of vacation been an unauthorized one.

1 Hare, Am. Const. Law, p. 417; *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Union Bldg. Assn.* 102 Ill. 380, 40 Am. Rep. 598; *McCarthy v. Metropolitan Bd. of Works*, 48 L. J. C. P. N. S. 885; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541.

Damage of the kind alleged here is not such special damage.

Black v. Philadelphia & R. R. Co. 58 Pa. 249; *Cox v. Philadelphia, W. & B. R. Co.* 10 W. N. C. 552; *Cox's Appeal*, 11 W. N. C. 571; *Heffner v. Com.*, Kline, 28 Pa. 108; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 91, 88 Am. Dec. 534; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Gold v. Philadelphia*, 115 Pa. 184; *Dooner v. Pennsylvania R. Co.* 143 Pa. 36; *Hobson v. Philadelphia*, 155 Pa. 131; *Jones v. Erie & W. V. R. Co.* 151 Pa. 30, 17 L. R. A. 758; *Lawrence v. Philadelphia*, 154 Pa. 20; *Knowles v. Pennsylvania R. Co.* 175 Pa. 629.

The right of action for an obstruction in a highway can never be determined by the distance at which a party resides from it.

Pierce v. Dart, 7 Cow. 609; *Higbee v. Camden & A. R. Co.* 19 N. J. Eq. 278; *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 503.

The very question presented in this case has been decided in a number of other states.

Ooster v. Albany, 48 N. Y. 399; *Kimball v. Homan*, 74 Mich. 699; *Gerhard v. Seekonk River Bridge Comrs.* 15 R. I. 384;

Whitsett v. Union Depot & R. Co. 10 Colo. 248; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 798; *Chicago v. Union Bldg. Assn.* 102 Ill. 879, 40 Am. Rep. 598; *Bloomington Highway Comrs. v. Quinn*, 186 Ill. 604; *Bailey v. Oulver*, 12 Mo. App. 175; *Glasgow v. St. Louis*, 107 Mo. 198; *Smith v. Boston*, 7 Cush. 254; *Davis v. Hampshire County Comrs.* 158 Mass. 218, 11 L. R. A. 750; *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591; *State, Kean, v. Elizabeth*, 54 N. J. L. 462; *Kings County F. Ins. Co. v. Stevens*, 108 N. Y. 411.

All the text-books agree with these decisions. Elliott, *Roads & Streets*, 1890, p. 663; Lewis, *Em. Dom.* § 134; Mills, *Em. Dom.* § 318; 24 Am. & Eng. Enc. Law, p. 120; Randolph, *Em. Dom.* § 411.

The Constitution of 1874 made no change in the character of the property for which damages could be recovered; it merely has enlarged the right of recovery from taking to injury or taking.

Secker v. Philadelphia & R. T. R. Co. 177 Pa. 252, 35 L. R. A. 583; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *McKeen v. Delaware Division Canal Co.* 49 Pa. 440.

Except on proof of negligence, the lawful use by a railroad company of a lawful erection entirely upon its own property is not the subject of damage, either at common law as a nuisance, or under § 8, art. 16, of the Constitution.

Pennsylvania R. Co. v. Lippincott, 116 Pa. 472; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L. R. A. 642; *Pennsylvania R. Co. v. Marchant* (one of the Filbert Street cases, see 119 Pa. 641); *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751.

Fell, J., delivered the opinion of the court:

These appeals were taken from judgments of the superior court without special allowance on the filing of an affidavit that the cases involved the construction or application of the Constitution of this state. It does not appear from the record that any constitutional question is raised, and an appellant cannot be permitted to decide for himself whether he is entitled to an appeal without allowance. Unless it clearly appears from the record that the cases come within one of the exceptions named in the 7th section of the act creating the superior court, there must be an allowance of the appeal; and the petition therefore should set forth clearly and specifically what constitutional question is involved, and in what manner it is raised. As, however, the question of practice is new, and has not been provided for by rule, and as the cases are of public importance, and the judgments were rendered by a divided court, we overrule the motion to quash, and will consider the appeals as if before us by allowance of this court.

The proceedings in the quarter sessions were under the 6th section of the act of April 21, 1858 (Pub. Laws, 886), which places the owner of land in Philadelphia which has been injured by the vacation of a street upon the same footing to claim damages as the owner of land which has been injured by the opening or widening of a street. *Hare v. Rice*, 142 Pa. 608. This act was said by Mitchell, J., in the opinion in *Vacation of Howard Street*, 142 Pa. 89 L. R. A.

601, to extend the system long established in Philadelphia for the assessment of benefits for local improvements, and the application of the money so raised to compensate others whose property has been taken, to consequential injuries caused by the vacation of streets, and to anticipate the provision of the new Constitution, which secures compensation for consequential damages where property has been injured. Before the adoption of the new Constitution, the commonwealth was under no obligation to make compensation for damages caused by the vacation of streets. *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649. And for the purpose of this argument it may be conceded that upon its adoption no such duty is imposed by the provision that compensation shall be made for property taken, injured, or destroyed, and that the right to recover damages for injuries so resulting exists only by virtue of special legislative provision: *McGee's Appeal*, 114 Pa. 470. But the right to recover damages caused by the vacation of streets in Philadelphia has been conferred by the legislature, and the real question raised by these appeals is whether the claimants are within the right conferred. They are not owners of properties which abut on the part of Melon street which has been vacated, but by the vacation of a part of the street their properties are shut off from direct access to the system of streets to the east. The properties are left in a *cul de sac* and their market value is lessened thereby. The plaintiffs have sustained a loss, for which they are entitled to recover, unless the right to recover for injuries caused to private property by the vacation of a street is limited to those whose properties abut on the part of the street vacated. The question raised is an important one, as affecting not only proceedings under the special act of 1858, but also those instituted under the general act of May 16, 1891 (Pub. Laws, 75). For the loss or inconvenience caused by the vacation of a street which those who own properties abutting thereon share in common with the community at large there can be no recovery. Where their loss does not differ in kind from that sustained by all others who have occasion to use the street for the purpose of travel, it is *damnum absque injuria*. But the owners of properties which have depreciated in value by reason of the closing of the street have sustained an injury in their property rights which is peculiar to themselves, and which is different in kind from the injury sustained by those who use the street for travel only. The injury is not of the same kind, differing in degree only. It is an additional injury, caused by the impairment of an entirely distinct right,—the special right of ingress and egress. The interest of a public in a highway consists wholly in the right of passage, with the incidental right to do all acts necessary to keep it in repair. The owner of land fronting on a highway has an additional interest, which must be regarded as property, and which, when the right to recover has been given by the state, will sustain a claim for compensation. Such an owner, where the street has been laid out or established by his grantor, is a purchaser by implied covenant of the right that the street shall remain open; and the vacation of the street by the municipal authori-

ties will not divest his right to have the space left open as a street. This private right of way as appurtenant to the land is wholly distinct from the public right of passage. Notes to *Doraston v. Payne*, 2 Smith, Lead. Cas. Eq. [8th ed.] 167. Where the street has been established by the municipality, and a part of the land of the adjoining owner has been taken without compensation, except the consequential benefit to the remainder, and he has made expenditures in the faith that the street will remain open, he has a right or privilege which partakes of the nature of property. In *Hare*, Am. Const. Law, pp. 376, 377, it is said by the learned author: "The whole argument may be summed up in the general proposition that the opening or mapping out by the state or by an individual of land as a street is a pledge that it shall not be closed or appropriated to a different and less beneficial purpose, which cannot be violated without a breach of faith to subsequent purchasers and builders. We may therefore believe that the right of the owner of a shop or dwelling to the use of the adjacent streets, or, at all events, of that on which the building is situated, is, if not an easement or incorporeal hereditament, an incident or appurtenance without which the building would be valueless, and of which he cannot justly be deprived without compensation; or, as the principle was accurately stated in another case, besides the public right of way or passage, there is a private right in the owners of the land on either side, resulting from an implied agreement that the street shall be kept open as a means of transit, and for the unobstructed access of light." Where the part of a street in front of a property is vacated, the owner's right to compensation is conceded, but it is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right, no distinction can be drawn between a partial and a total deprivation of access. The impairment of the right is a legal injury, differing in degree only from its total destruction. If the street is vacated on both sides of his property, so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire street were vacated. If the street is vacated on one side only, and his property is left at the end of a *cul de sac*; if the street is decreased in width, so as to be impassable to vehicles; or if one means of access is taken away by the closing of a back street or alley,—his injury may be less, but the difference is one of degree only. In either case he has sus-

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tained a loss by the destruction of an important element in the market value of his property, and he has been injured in a legal sense.

There seems to be but one answer to the questions propounded by the learned president judge of the superior court in his dissenting opinion: "Are we prepared to declare in this case that access to the claimant's properties has not been impaired? Can the court say to these claimants, 'One opening to your properties is sufficient for your purposes; therefore no legal injury has been done to you by closing the other.' Could we say that if their properties fronted on two parallel streets, or were on the corner of two streets, one of which was vacated? Is it not more in accord with sound principles to say that their right of access was not limited by the frontage of their properties, but extended to the two intersecting streets, and that it is for the jury to say whether, under all the circumstances, the claimants have suffered substantial damages in consequence of the closing of one mode of access?" We have the distinct finding by the jury, approved by the court of quarter sessions, that the appellants' special right of access to their properties has been impaired by the vacation of a part of Melon street and that they have sustained a property loss thereby. The act of 1858 provides a remedy for loss occasioned the owner of land in Philadelphia by the opening, widening, or vacation of streets. We do not see how the court could say, as matter of law, that the claimants' means of access to their properties were not seriously impaired, or how it could, on principle, deny them the right to recover for the loss they sustain because their properties did not front on the part of the street which was vacated. All that can be said for or against the right claimed has been so well said in the opinions filed by the learned judges of the superior court that further discussion of the subject is unnecessary. The precise question raised has not been decided in any of our cases, and because of the difference in legislative and constitutional provisions but little aid can be had in its consideration from the decisions in other states; but we believe that the conclusion which we have reached is in harmony with the trend of our decisions and with the weight of authority elsewhere. On principle, the cases under consideration are almost parallel with *Mellor v. Philadelphia*, 160 Pa. 614, which has been so fully discussed in the opinions filed. Indeed, it is difficult to see how that case can stand as an authority unless these appeals are sustained. In *Pennsylvania S. Valley R. Co. v. Walsh*, 124 Pa. 544, the property was at the corner of two streets, one of which was obstructed. In *Pennsylvania S. Valley R. Co. v. Ziemer*, 124 Pa. 560, damages were awarded for injuries to a property fronting on a cross street; and in *Snyder v. Lancaster* (Pa.) 20 W. N. C. 184, damage were awarded to the owner of a property not fronting on the street opened.

The difficulty in defining the limits where the right to compensation shall end cannot be urged as a valid objection to the claims of the appellants. To entitle the owner of land to recover, the loss must be one which he, as owner, has suffered by reason of the depreciation in value of his land. The basis of his claim for compensation is that his land has

been lessened in value, not that he has suffered in common with others, or to a greater extent than others, because of something peculiar to himself. The difficulty in assessing damages is no greater than that which a jury meets in all such cases in ascertaining the extent to which properties in the vicinity have been benefited, and in making assessments therefor. To sustain the right of a claimant to compensation because of the vacation of a street, it must appear that the loss results from the depreciation in value of his land because of the change in the street; and his loss must be direct and proximate, and so obvious and substantial, as to admit of calculation.

As to the failure of the viewers to report specifically that the Philadelphia & Reading Terminal Company was the owner of the land benefited, it is sufficient to say that the report, as a whole, contains enough to supply the want of that formal averment. Reference is made in the report to the general scheme or plan of revision to enable that company to construct its elevated road; the ordinances providing for the same are recited; and it is further stated that, "in the construction of the Philadelphia & Reading Terminal Railroad and its necessary works that company has entered upon and occupied a portion of Ninth street so stricken from the city plan, and also that portion of Melon street which has been stricken from the city plan as afore-

said." In *Re Road in South Abington Twp.* 109 Pa. 128, it is said: "The presumption is that the requirements of the statutes have been complied with by the viewers, and therefore it is not necessary specially so to state in the report, unless specially required by the acts regulating the subject." In that case it was held that it was not necessary for the report to show that notice had been given to the landowners, or that the viewers had endeavored to obtain releases, or that they had taken into consideration the advantages accruing to the landowners from the opening of the street. It was also presumed that the route of the road was within the jurisdiction. For these reasons, in connection with those stated in the dissenting opinion of the learned president judge of the superior court, we think that the judgments of the court of quarter sessions should have been affirmed.

It was error on the part of the jury to include in their awards damages caused by the vacation of a part of Ninth street. As suggested in the opinion of the superior court, this error may now be corrected by the filing of releases. *The judgments are reversed*, and the records are remitted to the court of quarter sessions of Philadelphia, with direction to enter judgments for the appellants in the filing of proper releases.

Rehearing denied November 8, 1897.

NORTH CAROLINA SUPREME COURT.

Re Will of Sutton DAVIS, Deceased.

(120 N. C. 9.)

1. A will jointly executed by husband and wife cannot be proved as the will of both during the lifetime of one of them.

2. As the separate will of the husband, an instrument executed by husband and wife as their joint will may be proved and take effect after his death during the wife's lifetime, and, unless in some way revoked, it may, upon her death, be again probated as to her property mentioned therein.

NOTE.—Probate of joint or mutual will.

- I. *Two wills in one instrument.*
- II. *Right to revoke.*
- III. *Joint wills to operate on survivor's death.*

I. *Two wills in one instrument.*

This note is intended to present the authorities as to the validity of a joint or mutual will for the purpose of being admitted to probate. This is distinct from questions as to the effect of the will when it has been probated, and from questions of the effect of contracts of the testator with respect to such will.

It is now fully established, in accord with *RE DAVIS*, that two persons may unite in making a valid will by a single instrument, although some of the cases hold (and this is not inconsistent with the majority of the other decisions) that such a will in order to be valid must be capable of taking effect immediately on the death of any testator so far as it relates to that testator's property, and that the will cannot be upheld if its provisions are such that on the death of one of the testators his testamentary disposition of his property is suspended or in abeyance until the death of the other comaker of the will. But if the will can be given effect on the death of either testator, so far as his property is concerned, it is at once entitled to probate to that

extent and may be successively proved as the separate will of each maker.

In order to make a mutual will the instrument or instruments must be executed by both parties under an agreement to make such a disposition of the property of each that the survivor will be entitled to the property of the one first dying, or the disposition of the property must be in the instrument executed by both parties. *Driscoll v. Van Den Henden*, 17 Jones & S. 508.

The fact that by the same instrument husband and wife devise reciprocally to each other, or, in other words, that it is a mutual will, does not deprive it of validity. The instrument operates as the separate will of whoever dies first. *Re Diez*, 60 N. Y. 88.

A will jointly executed by two persons, giving all the property to the survivor, is held to be in the nature of two separate and distinct wills which can be proved in favor of the survivor on the death of one of them without revoking it. *Lewis v. Scofield*, 36 Conn. 452, 68 Am. Dec. 404; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

A will in which two persons have united, but which is in effect the separate will of each, is properly admitted to probate on the death of either as the separate will of that person, but if not proved until both are dead it can be probated as the will

(February 16, 1897.)

A PPEAL by proponent from a judgment of the Superior Court for Beaufort County affirming the action of the clerk of the court refusing to admit to probate a paper alleged to be the last will and testament of Sutton Davis, deceased. *Reversed.*

The facts are stated in the opinion.

of both. *Betts v. Harper*, 39 Ohio St. 641, 48 Am. Rep. 477; *Re Raupp*, 10 Misc. 800.

Owners of personal property in severalty, who also own real estate as tenants in common, may unite in making their wills and include them in a single instrument by which each bequeaths his own personal property and his own share of the real estate. Such instrument is in effect the separate will of each, and either can revoke his own part of it. *Betts v. Harper*, 39 Ohio St. 641, 48 Am. Rep. 477.

A conjoint or mutual will is not void as contrary to public policy, and when two or more persons united in such a will it may be proved as the separate will of each. *Ex parte Day*, 1 Bradf. 478.

A mutual will giving the property to the survivor with bequests, if there should be anything left at the death of the latter, to certain persons, was admitted to probate as the will of the survivor on the latter's death without having made any revocation or alteration of the instrument. *Goods of Lovegrove*, 2 Swab. & T. 453, 31 L. J. Prob. N. S. 87, 8 Jur. N. S. 442, 6 L. T. N. S. 131.

An instrument by which two sisters "covenant and agree" for the love they bear each other, whichever may be the longest lived shall be the heir of the other, is held, in *Evans v. Smith*, 23 Ga. 98, 73 Am. Rep. 751, to be a will, and on the death of one of them provable as her will in favor of the survivor.

A mutual or conjoint will executed in a Danish colony according to Danish law by residents of that place is sustained in *Ex parte McCormick*, 2 Bradf. 199, as the will of the husband, although it was not executed in conformity to New York law.

Under the Roman Dutch law prevailing in the Cape of Good Hope it is held, in *Denyseeu v. Mostert*, L. R. 4 P. C. 236, 41 L. J. P. C. N. S. 41, 20 Week. Rep. 1017, 8 Moore, P. C. C. N. S. 502, that a mutual will made by husband and wife having community of goods, providing for payments of debts with provision for children and grandchildren and nominating sole and universal heirs, may, after the husband's death, be revoked by the widow so far as it affects her property, and that she may be thus entitled to claim her half of the inheritance as if no will had been made. This case was approved in *Dias v. DeLivers*, L. R. 5 App. Cas. 123, 49 L. J. P. C. N. S. 26, 42 L. T. N. S. 287. In this latter case it is said that a mutual will is in effect two wills, the disposition of each sharer being applicable to his or her half of the joint property. Therefore, in interpreting such a will it is held that on the death of one of the makers the will as to his share of the property only becomes operative. Therefore, when one of the beneficiaries survived one of the joint makers of the will, but died during the lifetime of the other, it was held that his interest under the gift from the former was vested, but that as to the share of the property of the other maker there was presented the case of the death of the beneficiary before the will took effect.

An instrument signed by two brothers, saying: "In case one of us should die our money shall fall to the one who is living,"—was held to be a double will revocable by both. *Re Vogel*, 27 Pittsb. L. J. N. S. 80.

Where sisters made a joint will bequeathing to the survivor certain property inherited by them 33 L. R. A.

Mr. Charles F. Warren, for appellant:

The script is entitled to probate as the separate will of Sutton Davis.

The court is requested to overrule *Clayton v. Liverman*, 2 Dev. & B. L. 558.

The opinion of the court is based upon a misconception of *Hobson v. Blackburn*, 1 Add. Ecll. Rep. 274. The dissenting opinion of Judge Daniel in *Clayton v. Liverman* presents

from a brother, and after the death of the survivor to certain others, and one of them subsequently made a separate will, with an express exception of the former will, disposing of the property inherited from the brother, the executors of the latter on her death were denied probate of that will alone but were given liberty to apply for probate of both wills, reserving the rights of the executors of the former will. *Goods of Fletcher*, L. R. 11 Ir. Eq. 359. Nothing is said in the report about the death of the other sister.

A will jointly executed by husband and wife is admitted to probate as her will after her death without being revoked. *March v. Huyter*, 30 Tex. 243.

A will by husband and wife which is declared "to be our last will," and providing that "after the payment of all our just debts and funeral expenses we direct that all our moneys," etc., be used for certain bequests to their children, with an appointment of executors of "this our joint will," and the attestation clause of which describes the will as executed by both, was held, in *Goods of Stracey*, 1 Deane & S. Ecll. Rep. 8, 1 Jur. N. S. 1177, to be provable as the separate will of each. It was offered after the death of both, but the court said: "The paper should have been proved as the will of Lady Stracey upon her decease, but that cannot affect the right of the executors now."

A will of a married woman duly executed by her and to which her husband's name also is signed was sustained in *Myers v. Esquer*, 6 Houst. (Del.) 342, where some witnesses testified that he signed it in token of his assent thereto, and one witness testified to an impression that each was making a will in favor of the other.

A joint will of husband and wife to take effect "in case we should be called out of this world at one and the same time and by one and the same accident" was held inoperative where that condition did not happen. *Goods of Huzo*, L. R. 2 Prob. Div. 73, 46 L. J. Prob. N. S. 21, 36 L. T. N. S. 518, 25 Week. Rep. 396.

Mutual wills of husband and wife executed in separate instruments were in question in *Lansing v. Haynes*, 95 Mich. 16, but the question decided was that there was an implied revocation of the husband's will growing out of the fact of their divorce and settlement of property interests.

A deposit to the joint account of husband and wife which he makes by transferring his own separate account to the joint account is held to be merely a convenient provision for managing the estate and to leave the property as a part of his estate on his death. *Marshall v. Crutwell*, L. R. 20 Eq. 328, 44 L. J. Ch. N. S. 504.

A mutual or joint will of husband and wife owning community property directing that the survivor shall pay certain legacies does not, on the death of the husband, make such legacies a legal obligation to the wife, but the conveyance by her to satisfy them will, as to creditors, be deemed voluntary and without consideration. *Wyche v. Clapp*, 48 Tex. 544.

A will jointly executed by husband and wife, disposing of property of which he was the sole owner, was sustained in *Rogers*, Appellant, 11 Me. 303, as a valid will of the husband alone. The court says she was a mere cipher in the transaction. An ex-

with great force the position that it is the separate will of each devisor. This contention is supported by the currents of authority in the United States and in England.

1 Schouler, Wills, § 456, note 4, §§ 457, 459; *Goods of Lovegrove*, 81 L. J. Prob. N. S. 87; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477; *Re Diaz*, 50 N. Y. 88; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; 1 Redf. Wills, 182,

183; Theobald, Wills, 12; 1 Jarman, Wills, 201, note 81, note 5.

No counsel for appellee.

Faireloth, Ch. J., delivered the opinion of the court:

On July 27, 1893, Sutton Davis and wife, Henrietta Davis, jointly executed an instrument of writing, regular in all respects, pur-

pression of Lord Mansfield that "there cannot be a joint will," which is said to have been made in the discussion of joint powers, is commented on as follows: "It is true that joint tenants cannot make a will which can operate jointly; for the instant either dies, the principle of survivorship vests the whole estate in the survivor; and if such a will can have any operation in law (and it seems it cannot, 4 Kent, Com. 360) it cannot be as a joint will."

Other cases also hold that a will which is in form the joint will of husband and wife, but which only disposes of property of which he is the sole owner, is sustained as the husband's separate will, and she is held to be a mere cipher in the transaction. *Allen v. Allen*, 28 Kan. 18; *Chaney v. Home Frontier & F. Missionary Soc.* 28 Ill. App. 621; *Kunnen v. Zurline*, 2 Cin. Sup. Ct. Rep. 440. But in *Chaney's Case* it appeared that the wife merely signed the will for the purpose of showing her assent to it, and that it was not done in execution of the paper, nor was her signature attested.

An instrument executed by husband and wife was held to be valid as a will in *Mosser v. Mosser*, 25 Ala. 551, where the property was the separate estate of the wife. The question was as to the nature of the instrument as a deed or will, and not as to its being a joint will.

The ecclesiastical court refused probate of a conjoint or mutual will of three persons leaving property to the "longest life or lives while continuing single," with a provision that it should go, on certain conditions, to their brothers and sisters. The court said: "An instrument of this nature is unknown to the testamentary law of this country; or, in other words, that it is unknown, as a will, to the law of this country at all." It was said, if valid at all, it was as a contract and not as a will, and therefore that court had no jurisdiction. *Hobson v. Blackburn*, 1 Add. Ecol. Rep. 274.

But it appears in this case that after the death of one of these persons without having altered or revoked his part of the mutual wills probate thereof was in fact granted as to his effects. This appears in the statement of facts, and is not mentioned in the opinion of the court. The offer of the will as a joint will was made after the death of another of the makers who had made a separate later will which was inconsistent with the mutual will, and it was on that offer that the decision was rendered.

This case of *Hobson v. Blackburn* was misconceived by some of the early cases and taken to be a decision against the validity of a will executed by two or more persons. But the decision, as pointed out in *Ex parte Day*, 1 Bradf. 478, was based on the fact that the joint will had been revoked by the subsequent separate will of the decedent for whom it was offered for probate, and that it had actually been admitted to probate by the same court as the last will and testament of another maker who died without altering or revoking his part of the mutual will.

II. Right to revoke.

The cases generally agree that either of the co-makers can at any time revoke his part of the will. This is assumed, if not decided, in nearly all the cases on the subject.

But a mutual will of husband and wife jointly executed by them, which is proved by her after the 88 L. R. A.

husband's death and the benefits thereof accepted by her, is held, in *Dufour v. Pereira*, 1 Dick. 419, to be irrevocable because confirmed by her, and she cannot by a subsequent will prevent the operation of the mutual will. The court takes occasion to say in this case that while the will might have been revoked by both jointly or separately, provided notice was given by the one intending to revoke it to the other, "I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties, which cannot be rescinded but by the consent of both." But inasmuch as there was the effect of the wife's confirmation after the husband's death, the language quoted is in a certain sense *obiter*.

So, in Kentucky a joint will of husband and wife executing a power given them to dispose of the estate by their last will and testament was held, in *Breathitt v. Whittaker*, 8 B. Mon. 534, to be beyond the power of the wife to revoke by her separate act. The court declares: "If a joint power is given to two to do a particular act, and the same to revoke at pleasure, both must concur in the revocation."

But most cases hold that there is at all times a power of revocation even if this makes an actionable breach of contract.

The fact that a conjoint or mutual will may constitute an irrevocable compact does not prevent either party from revoking it as a will by a subsequent testament. *Ex parte Day*, 1 Bradf. 478.

Mutual wills executed pursuant to a contract are not irrevocable in such sense that one of the makers cannot make a subsequent valid will which will be entitled to probate, although the remedy for breach of the agreement may be enforceable in a court of equity. *Re Keep*, 17 N. Y. S. R. 612, citing *Hopper v. Reed*, 22 Daily Register, No. 99, October 20, 1897.

A contract that mutual wills shall be unalterable and irrevocable was held valid in *Reformed Church v. Wise*, 3 Ohio Dec. 567, but in that case, as in many other cases not here considered, the question was as to the contractual liability or its enforcement rather than the right to probate the will.

A double will executed by brother and sister giving to the survivor all the property of the other for life with a remainder to others was involved in *Cawley's Estate*, 162 Pa. 530. In that case the brother died first. Afterwards the sister made a new will changing the remainderman and executor. After her death the double will was probated but on appeal it was held that this was revoked by her later will.

A joint will made by brothers owning property jointly is properly probated as the separate will of each successively, if they die without any revocation of the instrument. *Hill v. Harding*, 32 Ky. 76. The court holds that either had the right to revoke the will in so far as it applied to his interest in the property, but that if he did not do so it was valid.

The right of persons who have made mutual wills to revoke them is also declared in *Albery v. Sessions*, 2 Ohio N. P. 237, although it is held that they may be bound by contract which may be specifically enforced.

It is expressly provided by statute in California

porting to be their last will and testament, giving several tracts of land to Fanny Roberson and others and their heirs and assigns. On July 15, 1896, Sutton Davis died. Henrietta is still living. The executor named in the will offered to prove the paper writing as the joint will of the signers, also to prove it as the separate will of Sutton Davis, and to qualify as executor. The clerk refused the motion, and on appeal his honor affirmed the judgment of the clerk. The executor appealed, assigning error: (1) The refusal of the court to declare said writing to be the joint will of Davis and wife; (2) the refusal of the court to declare said writing to be the will of the husband alone, and to order the clerk to qualify him as executor thereof.

This case is somewhat novel, and presents a question which, so far as we have discovered, has not been brought to the attention of this court except in one case: First. Can the paper writing be probated as the joint will of the signing parties? Second. If it cannot, may it be proved as the separate will of the deceased husband? The record fails to disclose whether the property belonged to one or partly to each of the devisors, but we are informed by counsel that some parts of the land belonged to each. We shall assume such to be the fact, as that is the strongest view against the executor. The paper professes in plain language a joint purpose to dispose of the property in a single instrument, and to have one executor. There is no intimation of survivorship on the death of

one, or when the devise shall become operative, whether upon the death of one as to his or her part, or upon the death of both as to the whole property. The question, then, must be answered upon these plain words: "We give and bequeath to Fanny Roberson, colored, and her daughter Adelia Roberson, and their heirs and assigns, a certain tract or parcel of land, bounded and described as follows," etc.

We omit from our consideration the first error assigned, for in no view can the instrument be proved as the will of both, the wife now living. If established in any way, it must be as the separate will of the deceased husband. The text-books to which we were referred on this subject treat of joint wills, conjoint wills, compacts, and mutual wills, etc., all of which would fall under the first error assigned. There is nothing from which it can be implied even that there was any agreement that, if one should devise to these devisees, the other would do so, or that, if one should afterwards revoke, the other would do so. Either had the right to do so, and without notice to the other. It is not like the case of a mutual will, in which, after the husband's death, by which event the wife's estate was much increased, she makes another will, and diverts the husband's property from the course intended and agreed upon by them at the execution of the joint will. In such case the probate court was unable to control and prevent the wrong, but a court of equity takes hold on the ground of preventing a fraud. So,

(Cal. Civ. Code, § 1279) that "a conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner with any other will."

Where two sisters under twenty-one years of age made separate wills each in favor of the other, it was held that the marriage of one of them did not revoke the will of the other, although the court deems it a hard case and thinks it might have been the supposition that both wills were made inoperative by the marriage. *Hinckley v. Simmons*, 4 Ves. Jr. 160.

III. Joint wills to operate on survivor's death.

While declaring that two or more persons may execute a joint will which will operate as if executed separately by each, and will be entitled to and will require a separate probate on the decease of each as his will, the court in one case said: "But if the will so provides, and the disposition of the property requires it, the probate should be delayed until the death of both, or all, of the testators." This is said in *Schumaker v. Schmidt*, 44 Ala. 454, 34 Am. Rep. 185, but it is *obiter* and cannot be regarded as supported by the decisions, although there is some intimation in favor of this doctrine in *Goods of Raine*, *infra*.

A will jointly executed by two sisters making certain devises and bequests and providing that the residue shall go to the survivor, and that the will shall not be offered for probate until both are dead, is held to be contrary to the policy of the law that every will shall be propounded for probate as soon as may be after the testator's decease. And it cannot be held operative although proved without objection or appeal by the surviving testator. *State Bank v. Bliss*, 67 Conn. 317.

A will by which husband and wife, who severally own property in their individual right, not only give the property of the one first dying to the survivor but treat the property as a joint fund, making a joint devise of the wife's real property and

joint legacies out of the personality of both, without designating the proportion in which the personality of either shall contribute, is an attempt to make a joint will and not a separate will of each, and it is invalid. *Walker v. Walker*, 14 Ohio St. 157, 82 Am. Dec. 474. Although there were some saving provisions in the will, it was held that the most important ones were joint and the whole will must fail.

A will jointly executed by which two persons give their property, not to the survivor, but to third persons, and appoint an executor "of this our last will and testament," cannot be sustained either as a joint will or as the separate wills of the makers. It cannot be established as a joint will because "if conjoint, then it is either irrevocable except by the act of both—which would deprive each testator of the power of altering his intentions in regard to the disposition of his own property—or it is revocable by the act of either, which would give to one the power of changing the disposition of another's property." And it cannot be established as the separate will of either because it does not purport to be such, but is wholly a joint will. *Clayton v. Liverman*, 2 Dev. & B. L. 558.

This case is distinguishable in some respects from *RM DAVIS*, but the court in the latter case seems to intend to overrule the former, and not merely to distinguish it.

A joint will providing that the bequests and devises shall be postponed as regards use and enjoyment until the death of both makers of the instrument, with a reservation of right in the survivor to have the sole control, management, and disposal of all the property during her life, so that all that is subject to the provisions of the will is the balance that may remain undisposed of on the death of the survivor, is invalid. *Hershey v. Clark*, 36 Ark. 17, 47 Am. Rep. 1, *Otting* 1 Jarman, Wills, p. 27; *Clayton v. Liverman*, 2 Dev. & B. L. 558.

But the fact that persons who make separate wills and testaments in the same instrument de-

the rights of parties in a court of probate are essentially different from their rights after probate, which are to be administered in another jurisdiction. Then, why may not a husband and wife convey their separate property by will as well as by deed? The irrevocability in the latter case, and the revocability in the former, necessarily so as long as the party lives, can make no difference, because the act must be as valid at the time it is done in the one case as the other. Third parties are interested in contracts (as deeds), whereas no one can acquire any interest in a devise until after the testator's death. We find nothing in the statute of wills in conflict with this view. If each had made a separate will at the same time, giving the same property to the same devisees, there could be no doubt of the validity of each, with the power to revoke at any time. Can the fact that they did so by one joint act change the character of the transaction? The intent of both is equally manifest, and the intent is the controlling element, both in the execution and construction of wills.

In *Clayton v. Liverman*, 2 Dev. & B. L. 558, the majority of the court held that a will jointly executed by two sisters could not be probated, either as a joint will or as their separate wills. They died within a few days of each other, and the will was not offered for probate until after the death of both. The decision was upon the ground that it was a very singular case, and that such an instru-

ment, as a will, was unknown to the law of this country, and relied upon *Hobson v. Blackburn*, 1 Add. Eccl. Rep. 274. Daniel, J., in his able dissenting opinion, combats the whole argument of the court, and insists that the court misapprehended the judge's opinion in *Hobson v. Blackburn*, 1 Add. Eccl. Rep. 274. On a close reading of the case, we think the court did misconceive the question at issue in *Hobson's Case*, and we approve the conclusion in the dissenting opinion. As the question was so ably discussed in *Clayton v. Liverman*, 2 Dev. & B. L. 558, we are not disposed to repeat it, but only give the conclusion. We find in the books and cases cited below that the current of opinion in the states is contrary to that in *Clayton v. Liverman*, 2 Dev. & B. L. 558, and we think the reason and common sense of the question are the same way. 1 Schouler, Wills, § 456, note 4. §§ 457, 459; *Goods of Lovegrove*, 31 L. J. (1858-1862) Prob. N. S. 87; 1 Redf. Wills, 182, 183; Theobald, Wills, 13; 1 Jarman, Wills, 201, note 31, note 5; *Retts v. Harper*, 39 Ohio St. 639, 641, 48 Am. Rep. 477; *Re Dies*, 50 N. Y. 94; *Evans v. Smith*, 28 Ga. 98, 78 Am. Dec. 751.

Our conclusion is that the instrument offered for probate may be proved now as the separate will of Sutton Davis as to his property described therein, and that, unless in some way revoked, it may, upon the death of his wife, be probated as to her property mentioned therein.

Reversed.

clare that it is "our joint wish and will" does not make the will invalid. *Re Raupp*, 10 Misc. 800.

But a will made by brothers who were partners in farming business and joint tenants, by which they declare they make "this our last will and testament," and say: "We give and bequeath" certain property to a nephew, is held, in *Goods of Raine*, 1 Swab. & T. 144, to be such an instrument as cannot be probated during the life of either brother. The court distinguishes it from *Hobson v. Blackburn*, 1 Add. Eccl. Rep. 274, and *Goods of Stracey*, 1 Deane & S. Eccl. Rep. 6, 1 Jur. N. S. 1177, and says: "Two persons profess to make their will, and neither gives anything without the other; and the instrument is to have no effect until after the death of both," adding in conclusion: "I cannot grant probate of this paper during the life of either." This intimates that it might be probated on the death of both makers, but does not say so.

Raine's Case is disapproved and declared inconsistent with the other authorities in *Goods of Miskelly*, 4 Ir. Eq. Rep. 62, 18 Week. Rep. 215, where a joint will of brothers who were joint tenants of a freehold and carried on a farming business jointly was offered for probate as the will of one of them while the other was living. The will disposed of no property except the freehold, but it was held entitled to probate on the ground that it appointed executors, and that a will appointing executors is, without more, entitled to probate.

In *Goods of Powell*, 15 L. T. 323, a will of husband and wife of their joint interest in a farm to a son was held invalid and probate refused on the husband's death.

A contract or settlement in contemplation of marriage to which was subsequently added what was called on the face of it a codicil was offered for 38 L. R. A.

probate in *Goods of Stoddard*, 2 Swab. & T. 356, 31 L. J. Prob. N. S. 195. The document was made by the parties in Scotland, but was offered in England in which they subsequently became domiciled. The court refused to grant probate thereof, saying: "You don't show me that the document of which you ask probate would be a good testament according to Scotch law."

The note of a recent case (*Goods of Smyth*, 104 L. T. N. S. 32) says probate on husband's death was allowed of will in which wife joined giving property to survivor with further provision if survivor should not alter it.

A review of the authorities shows it to be well established now that a single instrument may include the wills of several persons if its provisions are such as to constitute or include a separate will for each of them. As to instruments which attempt to make a joint disposition of property there is more difficulty. But a majority of the cases seems to agree in holding that a will cannot be made by two or more persons unless it can be regarded as the separate will of each of them so that it may be probated separately for each without regard to the fact that another maker is still living.

Contracts of mutual wills have been considered in many cases which are not here discussed or collected, as the question in those cases is altogether different from that of the right to probate a joint will actually executed. The same may be said of many cases involving the effect of mutual wills separately executed as in *Lord Walpole v. Lord Orford*, 3 Ves. Jr. 402. Some questions arise as to the contractual nature of those instruments, but except so far as the cases relate to the right to probate such a will as distinguished from its binding effect they are not here considered. B. A. R.

RHODE ISLAND SUPREME COURT.

Peter CARR

v.

John A. BROWN *et al.*

(.....R. L.....)

A statute authorizing administration upon the estate of a person who has left home and not been heard from for seven years is unconstitutional, since the administration upon the estate of a living person deprives him of property contrary to the law of the land or without due process of law.

(July 26, 1897.)

ON DEMURRER to answer in an action brought to recover money which had come into defendant's hands through administration proceedings upon the estate of plaintiff during his absence from home. *Demurrer sustained.*

The facts are stated in the opinion.

Mr. A. B. Crafts, for plaintiff:

The appointment of administrator on the estate of a live person is null and void.

Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896; *Moore v. Smith*, 11 Rich. L. 569, 78 Am. Dec. 122 and note, 126; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Johnson v. Beasley* (Mo.) note to 27 Am. Rep. 286; *Deslin v. Com.* 101 Pa. 273, 47 Am. Rep. 710; 19 Am. & Eng. Enc. Law. pp. 184, 186; *D'Arment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; *Melia v. Simmons*, 45 Wis. 384, 30 Am. Rep. 746, and note, 751; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Reid v. Holmes*, 127 Mass. 826; *Waters v. Stickney*, 12 Allen, 18, 90 Am. Dec. 122; *McPherson v. Cunliff*, 11 Serg. & R. 422, 14 Am. Dec. 643; *Stockbridge, Petitioner*, 145 Mass. 519; *Thomas v. People, Joiner*, 107 Ill. 517, 47 Am. Rep. 458 and note 465; *Ex parte Maxwell* (Ala.) note to 79 Am. Dec. 65; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 585.

Mr. Nathan B. Lewis, for defendants:

At common law administration granted on the estate of a living person was wholly void. Our statute makes two exceptions to the general rule. One is in case of a person convicted of crime and sentenced to a term of imprisonment of not less than seven years. The other exception is where a person has been absent from his home or place of domicile and unheard of for a period of seven years.

Such absence raises a presumption of death.

The statute is founded in the principles of the highest justice; for it is more reasonable for one to suffer loss who has neglected, shirked, and avoided the natural and ordinary obligations of a kinsman or the more definite duties of a debtor, rather than innocent persons who have acted in good faith toward him.

Administration of an estate is a proceeding *in rem*.

1 Woerner, *American Law of Administration*, p. 337; *Kieley v. McGlynn* ("Broderick's Will"), 88 U. S. 21 Wall. 503, 22 L. ed. 599.

NOTE.—As to the effect of administration on the estate of a living person, see *note* to *Bolton v. Fehriever* (N. Y.) 18 L. R. A. 242; also *Springer v. Shavender* (N. C.) 38 L. R. A. 772.

38 L. R. A.

Administration of an estate by the court of probate cannot be attacked collaterally, for, although courts of probate are courts of limited jurisdiction, yet their jurisdiction to grant administration is general and exclusive within their respective limits.

Roderigas v. East River Sav. Inst. 63 N. Y. 468, 20 Am. Rep. 555; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 288.

A finding, conviction, or judgment by a court having jurisdiction of the subject-matter is, if no defect appear on the face of it, conclusive of the facts stated in it.

Brittain v. Kinnaird, 1 Brod. & B. p. 432.

It unalterably binds the parties and pronounces the law which defines and determines their rights in that particular case.

Shultz v. Sanders, 38 N. J. Eq. 154.

The granting of administration upon the estate of a living person is not a taking of his property without due process of law.

Oppenheim v. Wolf, 3 Sandf. Ch. 571; *Cropsey v. McKinney*, 30 Barb. 47.

Due process of law is not necessarily process according to the course of common law, but process according to the course of proceedings applicable to the subject-matter and conformable to those general rules that affect all persons alike.

6 Am. & Eng. Enc. Law, p. 46; *Happy v. Mosher*, 48 N. Y. 817; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691.

Tillinghast, J., delivered the opinion of the court:

This is an action of assumpsit to recover money which came to the hands of the defendants from the plaintiff's estate, which has been administered upon during his lifetime. The defendants have filed special pleas in bar, in which they set up that more than seven years before letters of administration were taken out on plaintiff's estate he had left his home in South Kingstown, where he was a domiciled inhabitant, and that during all of said time he had not been heard from, either directly or indirectly; that notice of intention to apply for letters of administration by Bridget McGuire, a sister of the plaintiff, was given for the period of three months; that further notice by publication was afterwards ordered and given by the probate court, and that thereupon, upon proof to the satisfaction of said court that notice had been given for three months as aforesaid, and also that said additional notice had been given as ordered, it was adjudged that the petition be granted; and the defendant John A. Brown was thereupon appointed administrator on the estate of the plaintiff. The pleas further set up that said Brown thereupon proceeded to administer upon said estate in the usual way; that he settled his account with the probate court; and thereupon, after three years from the time when said administration was granted, he distributed said estate according to law. Wherefor he pays judgment, etc. To these pleas the plaintiff demurs on the grounds: (1) That the proceedings in the court of probate, recited in said pleas, were and are null and void, as the plaintiff was

then and now is living; (2) that to take and appropriate the estate of a living person, in the manner described in said pleas, would be to take private property without due process of law, and such a construction of the statute would be contrary to the Constitution of this state; (3) that said court of probate acquired no jurisdiction of the plaintiff's personal property and estate.

The action of the probate court, and the proceedings in connection therewith, were had in pursuance of R. I. Pub. Laws 1882-85, chap. 298, which is as follows: "Whenever it shall be proved to the satisfaction of the court of probate of any town that any person domiciled in such town at the time of his departure, has left his home and not been heard from directly or indirectly for the term of seven years, and that a notice of intention to apply for letters of administration or to prove the last will and testament of such person has been published for three months in each issue of some newspaper in the city of Providence, and also in each issue of some newspaper in the county in which he was domiciled, and been posted for three months in three or more public places in said town, and that such other notice as the court may deem best has been given to the relations and heirs, the last will and testament of such person may be proved and letters of administration may be granted on such person's estate as if he were dead. The notices shall contain a brief description of such person, his age, name, and such other characteristics as shall identify him, and no distribution of his estate shall be made until three years after administration has been granted under the provisions of this section." R. I. Pub. Stat. chap. 184, § 9, which is a continuation of the same subject, is as follows: "If such person shall afterwards return to this state, or shall constitute an agent or attorney to act in his behalf, the executor or administrator as aforesaid shall be accountable for, and shall deliver to such person or his lawful agent or attorney, all the estate of every kind which shall then be in his hands as executor or administrator as aforesaid, after deducting such sum or sums as the court of probate shall allow, in the settlement of his accounts, for any payments or disbursements which he may have legally made in his said capacity, or which such court of probate may think reasonable to allow for his personal trouble in executing the trust of executor or administrator as aforesaid." Although statutes of similar import have existed in this state for more than a century, no case of this sort has ever before arisen thereunder, so far as we are aware: and we are therefore called upon to decide the question raised without the aid of former adjudications, so far as our own state is concerned. For, although said statute was before the court in *Southwick v. Middle-town Probate Court*, 18 R. I. 402, yet it was only in connection with the question of the sufficiency of the notice to prove the will in question, and hence the decision in that case, has no bearing upon the question as to the constitutionality of the law. It will be observed that said statute does not require the probate court to find that the person whose estate is sought to be administered is dead before proceeding to exercise jurisdiction, but only that

he had been absent from his home without being heard from, directly or indirectly, for the period of seven years. This fact being made to appear, the court is given jurisdiction, after the required notice is given, to proceed as if the person were dead. The main question which is raised, then, is whether the general assembly has power to pass an act authorizing the estate of a living person to be administered upon as if he were dead. We think it is very clear, both upon reason and authority, that it does not have this power. To administer upon a person's estate while he is still living is to deprive him of property contrary to the law of the land, or, as it is ordinarily said, without due process of law; and hence is in violation of article 1, § 10, of the Constitution of this state, and also of article 14 of the Amendments to the Constitution of the United States. What is due process of law, within the meaning of constitutional provisions like these, has been many times expounded by the Supreme Court of the United States, and also by the highest courts of the various states; and the result of these interpretations may be briefly summed up by saying that the words "due process of law" mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *Pennoy v. Neff*, 95 U. S. 783, 24 L. ed. 573. Those rules require that there shall be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding, and that there shall be a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated. The words "due process of law in this place," as said in *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 23, 1 Fed. Rep. 641, "cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and, if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A and transfer it to B, they can take A himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be 'due process of law.'" The following terse exposition of this constitutional guaranty is furnished by the supreme court of New York in the case of *Taylor v. Porter*, 4 Hill, 145, 40 Am. Dec. 274. Mr. Justice Bronson there says: "The words 'by the law of the land,' as here used [i. e. in the state Constitution], do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, 'You shall be vested with 'the legislative power of the state,' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose;' [in other words: 'You shall not do

the wrong, unless you choose to do it.'" See also, *United States v. Cruikshank*, 92 U. S. 554, 23 L. ed. 592; *Walker v. Sauvinet*, 92 U. S. 92, 23 L. ed. 679; *Doyld's Petition*, 16 R. I. 538, 5 L. R. A. 859; *Cross v. Brown*, 19 R. I. —; Cooley, Const. Lim. 6th ed. p. 431; 6 Am. & Eng. Enc. Law, pp. 43 et seq. Tested by these rules, the statute aforesaid, under which a man's property may be taken without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, must be held to be clearly violative both of his constitutional and also of his common-law right. Indeed, the whole proceeding, so far as he is concerned, is *res inter alios acta*.

In *Lavin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 28, 1 Fed. Rep. 641, which was a case where the original letters of administration were issued by the court of probate of Cranston, in this state, under the statute in question, and where afterwards ancillary letters of administration were taken out in New York, the court, after holding that the payment by the defendant bank to said administrator there was no defense to the suit, said: "It is also claimed that, if the New York letters are void, the payment to the administrator may be justified under the Rhode Island letters, on the principle that, though a foreign administrator cannot sue here without obtaining ancillary letters, yet a payment to him is a good payment and discharges the debt. *Parsons v. Lyman*, 20 N. Y. 108. But it is clear that the Rhode Island letters have no greater validity than the New York letters. The Rhode Island statute undertakes to do directly what the New York statute aims to accomplish by the more indirect method of declaring a judicial decision conclusive against a person not a party to it. In Rhode Island the court does not go through the form of deciding that the person is dead, but, conceding that he is only absent, distributes his estate 'as if he were dead,' without the service of any notice or process upon him whatever. I do not see how any respectable argument can be made, that this is not depriving him of his property without due process of law, or how it can be necessary, or reasonably proper, for the proper government of the persons and the property within the jurisdiction of the state." This decision is cited with approval by the Supreme Court of the United States in *Scott v. McNeal*, 154 U. S. 49, 38 L. ed. 902.

The general question as to whether any court has, or can have, jurisdiction to grant letters of administration on the estate of a living person has been much discussed, and, while the authorities are not entirely harmonious, yet the great weight thereof is clearly against the existence of any such jurisdiction. The ground upon which most of the decisions rest is that, in order to confer jurisdiction upon a court to grant letters of administration upon a person's estate, that person must be in fact dead; and that, if he is not dead, there is no estate to administer upon, and hence no jurisdiction. Mr. Freeman, in discussing this question in his work on Judgments, says: "The question occasionally arises whether the grant of letters testamentary or of administra-

tion on the estate of a person in fact living, but supposed to be dead, is an act beyond the jurisdiction of the court, and therefore so utterly void that no person is protected in dealing with the executor or administrator while his letters remain unrevoked. The weight of authority is very decidedly to the effect that the decease of the supposed decedent is a prerequisite to the jurisdiction of the court, and that he is wholly unaffected by the proceedings for the settlement of his estate." In line with the doctrine here announced, it is said in *Melia v. Simmons*, 45 Wis. 384, 30 Am. Rep. 746: "The proceedings of administration, settlement, and assignment of the estate of the respondent, represented to have been dead, when he was and is still alive, are absolutely null and void, for all purposes whatsoever."

The county court of Dodge county, or any other court, had no jurisdiction in this particular case, or in such a class of cases. There is no class of cases which embraces the administration of the estates of living persons as if they were dead. The proceedings are void *ab initio* and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate, or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has, in respect to the administration of estates, is over the estates of dead persons. It would seem that the bare statement of such a proposition is enough, without citing authorities." In *Thomas v. People, Joiner*, 107 Ill. 521, 47 Am. Rep. 458, the supreme court of Illinois, in an able opinion by Mr. Justice Mulkey, takes the same view. The same doctrine has been either adjudged or recognized in Massachusetts in *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Waters v. Stickney*, 12 Allen, 1, 18, 90 Am. Dec. 128; *Day v. Floyd*, 130 Mass. 488; in Pennsylvania, in a series of cases beginning in 1824 (see *Devlin v. Com.* 101 Pa. 278, 47 Am. Rep. 710); in Texas, in *Withers v. Patterson*, 27 Tex. 499, 85 Am. Dec. 643; in Kentucky, in *French v. Frazier*, 7 J. J. Marsh. 426; in Tennessee, in *D'Arment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; in New Hampshire, in *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 218; in North Carolina, in *State v. White*, 7 Ired. L. 116; in Alabama, in *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; in California, in *Stevenson v. San Francisco City and County Super. Ct.* 62 Cal. 60; in Missouri, in *Johnson v. Beasley*, 65 Mo. 264, 27 Am. Rep. 276; and in many other states. See also, 1 Woerner, American Law of Administration, §§ 208 et seq., where the same view is taken, and our statute commented on; and note to *Bolton v. Schrieffer*, 18 L. R. A. 242, 135 N. Y. 65. To this array of authorities there are to be added the decisions of the Supreme Court of the United States in *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9, 3 L. ed. 471, and the recent case of *Scott v. McNeal*, 154 U. S. 49, 38 L. ed. 902, in which last-named case Gray, J., in an exhaustive and learned opinion, after discussing the entire subject, and reviewing all the cases, comes to the conclusion that administration cannot legally be granted on the estate of a living person, and that to deprive one of his property in a proceeding of

this sort is unconstitutional. The reasoning in that case is so cogent, and the result so authoritative, especially as to the constitutional question involved in the case at bar, that further citations would seem to be unnecessary.

Opposed to all this there is practically, so far as we are aware, but the single case of *Roderigas v. East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555, where the court, by a bare majority, held that, under the provisions of the statutes of that state conferring upon surrogates jurisdiction over the subject of granting letters of administration, the inquiry of the surrogate as to the death of the person upon whose estate administration is applied for is judicial in its nature, and that the surrogate has jurisdiction to determine it upon sufficient evidence; and also that letters issued by him upon due proofs are conclusive evidence of the authority of the administrator to act until the order granting them is reversed on appeal, or the letters are revoked or vacated, so far, at least, as to protect innocent persons acting upon the faith thereof. The decision in that case has been much criticised (see articles in 21 Alb. L. J. pp. 65, 84; *D'Arment v. Jones*, 4 Lea, 251, 40 Am. Rep. 12; 15 Am. L. Reg. N. S. 212; 1 Woerner, American Law of Administration, § 210), and, so far as we are aware, has never been followed outside of said state except in the case of *Scott v. McNeal*, in Washington territory, which, as we have already seen, has since been expressly overruled by the Supreme Court of the United States, although it was cited with approval in *Plumo v. Howard Sav. Inst.* 46 N. J. L. 230. In that case, however, it was not even surmised that the alleged decedent was not in fact dead. We are not unmindful of the rule that has been laid down in this state and elsewhere that the court should ponder well before declaring an act of the general assembly to be unconstitutional, and that it should resolve every doubt in favor of the validity of the act. *State v. District of Narragansett*, 16 R. I. 440, 3 L. R. A. 295. But if, having observed this rule, the court comes to the conclusion that the act is violative of some constitutional right, its plain and imperative duty is to declare it to be void. *Taylor v. Place*, 4 R. I. 364. The case was originally heard by the appellate division, which then consisted of three justices. Owing to the importance of the question, however, and in view of the fact before referred to that said statute has long been upon the statute book, it was thought proper to have the case resubmitted on briefs to the entire court, which has been done. And, after a full and careful consideration, we are all of the opinion that, in so far as said statute authorizes the estate of a living person to be administered upon, it is unconstitutional and void. We do not wish to be understood, in what we have said in this case, as expressing any opinion upon the validity of the statute which authorizes administration upon the estates of persons under imprisonment for crime.

Demurrer sustained, and case remitted to the common pleas division for further proceedings.

33 L. R. A.

Catherine SWEENEY

METROPOLITAN LIFE INSURANCE COMPANY.

(..... R. I.)

1. **Statements by an applicant for insurance are warranties**, where by the terms of the policy he warrants the answers strictly true and agrees that they shall form a part of the contract and that any untrue answer will render the policy void.
2. **The burden of proving the truth of answers by an applicant for life insurance** which are by the contract made warranties, rests upon the one seeking to recover the policy, although the burden may be lifted as to matters which only affect the right of action by the presumption in favor of honesty and against fraud until something appears to rebut it.

(September 16, 1905.)

APPLICATION by defendant for a new trial after verdict in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of life insurance. *Granted.*

The facts are stated in the opinion.

Messrs. Samuel R. Honey, J. Stacey Brown, and Frank F. Nolan for plaintiff.
Messrs. Andrew J. Jennings, James M. Morton, Jr., and Michael W. Callaghan for defendant.

Stiness, J., delivered the opinion of the court:

By the terms of the policies of insurance issued by the defendant, the answers and statements in the printed and written applications for the policies are made a part of the contract. The applicant declares and warrants that the representations and answers made are strictly correct, and wholly true; that they shall form the basis and become part of the contract of insurance, if any be issued; and that any untrue answer will render the policy void. Whether statements which obviously cannot lie within the knowledge of the applicant, and which both parties must know are to be given upon information and belief, must be taken to be warranties, is a question which we need not decide; but that the above provisions constitute a warranty of the truth of the statements in the application, so far as they rest upon the applicant's own knowledge, is beyond question. *Wilson v. Conway F. Ins. Co.* 4 R. I. 141; *Lyons v. Providence Washington Ins. Co.* 14 R. I. 109, 51 Am. Rep. 864; *Jerrett v. John Hancock Mut. L. Ins. Co.* 18 R. I. 754; *McCoy v. Metropolitan L. Ins. Co.* 133 Mass. 82; *Cobb v. Covenant Mut. Ben. Assn.* 153 Mass. 176, 10 L. R. A. 666; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661. Without multiplying citations, we quote the language of Mr. Justice Hunt in *Jeffries v. Economical Mut. Ins. Co.* 89 U. S. 23 Wall. 47, 22 L. ed. 833, "Many cases may be found which hold, that where false answers are made to inquiries

which do not relate to the risk, the policy is not necessarily avoided, unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract." The statements in question in this case being warranties, we are called upon to decide whether the trial judge correctly charged the jury that the burden of proof was upon the defendant to show the falsity of any answer set up in defense. There are many cases which lay down this rule upon the principle that the burden of proving an issue is upon the party who raises it. *Spencer v. Citizens' Mut. L. Ins. Assn.* 142 N. Y. 505; *Russell v. Fidelity & F. Ins. Co.* 84 Iowa, 98; *Sutherland v. Standard Life & Acci. Ins. Co.* 87 Iowa, 505; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810 *Mowry v. Home L. Ins. Co.* 9 R. I. 846, appears to be to the same effect, but that case related to the value of the plaintiff's insurable interest in the life of an uncle, for which he had taken a policy. The charge to the jury was that the plaintiff must show that he had an insurable interest in the life of the deceased, but, as the value of such interest was a matter of opinion and estimate, the burden was on the defendant to show that the alleged indebtedness and business relations out of which the interest sprung were no foundation for the estimate of the plaintiff, and the large amount of insurance obtained. Cases like those cited above rest upon a current principle when it is applied to defenses set up outside of the terms of the contract. But they leave out of view another equally correct and more pertinent principle—that a party cannot recover upon a conditional contract until he shows that he has complied with the conditions. To depart from this principle would be to make a new contract for the parties. The rule of law is well stated by Ames, Ch. J., in *Wilson v. Hampden F. Ins. Co.* 4 R. I. 159, as follows: "It is clear, however, upon principle, to use the words of Mr. Justice Washington, in *Craig v. United States Ins. Co.* Pet. C. C. 410, that where the assured has entered into a warranty, he cannot recover against the underwriters without first averring and proving performance of these stipulations; and see 2 Phillips, Ins. 2d ed. 753; 2 Arnould, Ins. 1235, 1262. The burden of proving the performance of all warranties made by him rests upon the assured, and although this burden may be lifted by presumption merely, as in case of the implied warranty of seaworthiness it is held to be, yet this cannot shift the burden, which remains, notwithstanding the prima facie case thus made out by the plaintiff, where the law first casts it, to the end of the trial." We think that this case lays down the correct rule. It is the rule which applies to all contracts, and a policy of insurance is a contract. Rules of evidence, however, involving only the mode of procedure in a case, must be largely within the discretion of the court, in order to be practicable; and so many things are allowed

to go by presumption, or with slight proof, to make a prima facie case, until something appears to controvert it. But this rule of convenience does not relieve a party from any of the obligations of his contract. Thus it has become common in suits on promissory notes simply to produce the note to make out a prima facie case; the presumption of signature, consideration, and other incidents following. The same presumptions are usually admitted with reference to a deed, and other like cases are readily conceived. When a man solemnly executes a paper upon which he is to base a contract, there is a natural presumption that what he says in it is true, in the absence of anything to contradict it. Rules of evidence are made to facilitate the trial of cases, and not to render a trial impossible; and many of the answers required, which lie peculiarly within the knowledge of the applicant himself, it would be unduly burdensome, if not quite impossible, for another to prove, after the applicant is dead. Some relate to ancestors and relatives, their ages and diseases; others to his own diseases, from childhood up. Now, while some of these, at any rate, may be warranties, it would be a great hardship to require full evidence of the truth of every answer, affirmative and negative, when many of them may not be in dispute at all. They may be sustained prima facie by the presumption of truth which attaches to a man's solemn acts and declarations in the course of a contract. "On the other hand," said Mr. Justice Miller, in *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610, "it is no hardship that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest; and, if he has any reasonable grounds to make such an issue, he can show the facts on which it is founded." This states a reasonable rule of procedure. The plaintiff must prove certain essential facts, like the issue of the policy, payment of premiums, death of the assured, notice as required, and the general performance of conditions; but to say, because answers are warranties, that the truth of every one must be proved by witnesses before recovery, as claimed by the defendant, would be manifestly unreasonable. Judge Miller pertinently asks, How can it be proved that a man who has lived forty or fifty years has never had dyspepsia or diarrhoea? In the case just cited he also said that the answers were warranties, but that the burden of proving them to be false was upon the defendant. We cannot agree with the last proposition. Notwithstanding our high respect for his decisions, we prefer his reasoning to his conclusion.

Judge Gray said, in *McLoon v. Commercial Mut. Ins. Co.* 100 Mass. 473, 1 Am. Rep. 129, "The nature and form of the warranty may affect the amount of evidence to be required of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proved by the plaintiff in order to maintain an action on the policy."

Properly analyzed, *Mowry v. Home L. Ins. Co.* 9 R. I. 846, is not opposed to the view

which we have taken. The charge of the trial judge, which was sustained, laid down the rule that the plaintiff must show that he had an insurable interest in the life of his uncle; that this would not be sustained by showing claims which were a mere pretext for insurance; but, as the value of the interest was a matter of estimate and opinion (which could not, therefore, have been understood by the company to be an absolute statement), the burden of showing that his estimate was fraudulent was upon the defendant.

While we are aware that there are many cases, as we have said above, which put the burden of proving the falsity of a warranty in insurance cases upon the defendant, we cannot follow them, because we believe such a rule to be contrary to the well-established law in regard to warranties in other cases. Doubtless, in some of them confusion has arisen from the rule in regard to the warranties of quality, etc., in cases of the sale of property. But, as pointed out by Shaw, Ch. J., in *Dorr v. Fisher*, 1 Cush. 271, this is a collateral stipulation, which does not prevent the vesting of title, nor the right to sue for the purchase money, because the contract is completed. The purchaser can sue for a breach of the warranty, and the burden would be upon him. To avoid circuity of action, he is allowed to set it up in defense under the same burden. But this rule does not apply to a warranty which is made a part of the contract. *Wilson v. Hampden F. Ins. Co.* 4 R. L. 159. To put the burden on the defendant practically reduces the warranty to a representation, and so modifies the contract of the parties. However much a court may disapprove of the form of a contract, it has no right to change it. In other cases the rule has, doubtless, been stated with the same meaning which we have indicated above, viz., that the defendant must first offer proof of the falsity of answers which are attacked. See *Crowninshield v. Crowninshield*, 2 Gray, 524.

Our conclusion is that the answers in the application are to be taken as warranties; that the burden of proving their truth rests upon the plaintiff, and that this burden may be lifted, not shifted, as to matters which only remotely affect the right of action, by the presumption in favor of honesty and against fraud until something appears to rebut it.

The answers objected to in this case related to the extent of use of intoxicating liquors by the deceased and to hemorrhages. The burden is upon the plaintiff to prove their truth, if they are attacked; and, as the jury were instructed to the contrary, a new trial must be granted.

William H. IRELAND

v.

GLOBE MILLING & REDUCTION COMPANY.

(.....R. L.....)

1. A contract to offer stock to a corporation at the lowest price at which the

NOTE.—For restrictions on the transfer of shares of stock by by-laws or articles of association, see *note* to *New England Trust Co. v. Abbott* (Mass.) 27 88 L. R. A.

holder is willing to sell before offering it to any other purchaser is not binding in favor of the corporation when it was made by proposed stockholders before the corporation was in existence as a legal entity.

2. A corporation cannot enforce a contract between proposed incorporators to the effect that they will not transfer their stock without giving the option of purchase to the corporation, but the remedy, if any, for breach of the contract would be a personal one against the offending stockholder.

3. The mere issue of certificates of stock by a corporation does not amount to a ratification by it of a contract made before it came into existence between the proposed incorporators to the effect that they would not transfer their shares without giving the company an option to purchase them.

(July 12, 1897.)

ACTION to recover damages for the refusal of defendant to permit a transfer upon its books of certain shares of its stock. On demurrer to additional pleas to the declaration. *Ruling in plaintiff's favor.*

The facts are stated in the opinion.

Mr. William H. Sweetland, for plaintiff:

The defendant corporation cannot deprive the transferee of stock in said corporation of the right to have transfer recorded and new certificate issued to him by reason of any agreement between prospective holders of stock in said corporation.

Such agreements are in restraint of trade and because all such agreements must have more than mutual promises to support them, there must be a special consideration paid to the promisor by the promisee.

Fisher v. Bush, 35 Hun, 641.

At most they are only personal agreements permitting an action for damages by the other incorporators against Stearns, if Stearns has violated them, but are not agreements that can be taken advantage of by the corporation, when formed, to deprive this plaintiff of the right to have transfer to him recorded.

Carmony v. Powers, 60 Mich. 26.

A corporation is not responsible for acts, nor bound by contracts, of its promoters, done or entered into before incorporation.

4 Am. & Eng. Enc. Law, p. 201.

In so far as the first plea alleges an agreement with the corporation, it cannot avail the defendant, because, at the time alleged the defendant had no power to make the alleged agreement, under the provisions of the statute permitting its creation.

Me. Rev. Stat. chap. 48, § 19.

Whatever be the mode prescribed by the act, substantial compliance with all the provisions of it is required before the corporation can be said to be *in esse*.

4 Am. & Eng. Enc. Law, pp. 197-199; *Richmond Factory Assn. v. Clarke*, 61 Me. 351; *Ulley v. Union Tool Co.* 11 Gray, 141; *Rigelow v. Gregory*, 73 Ill. 197; *Gent v. Manufacturers' & M. Mut. Ins. Co.* 107 Ill. 653.

Signers of certificates of formation do not

L. R. A. 271; also *Ireland v. Globe Milling & R. Co.* (R. L.) 29 L. R. A. 429; and *Victor G. Bloede Co. v. Bloede* (Md.) 33 L. R. A. 107.

become a body politic and corporate by making the certificates. It is only upon the reception of a license issued by the clerk of court as provided by the act, that they have a corporate existence. Any agreement between such parties is not binding on the corporation when formed.

Stowe v. Flagg, 72 Ill. 397; *Western Screw & Mfg. Co. v. Cousley*, 72 Ill. 531; *Unity Ins. Co. v. Cram*, 48 N. H. 636; *Carmodity v. Powers*, 60 Mich. 26.

A corporation cannot adopt or ratify a contract made before its incorporation.

Kelner v. Baxter, L. R. 2 C. P. 174; *Re Northumberland Avenue Hotel Co.* L. R. 83 Ch. Div. 16; *Abbott v. Haggood*, 150 Mass. 252, 5 L. R. A. 586; *Penn Match Co. v. Haggood*, 141 Mass. 148.

The act of the corporation in adopting such engagements is not a ratification which relates back to the date of making of the contract by the promoters, but is in legal effect the making of a contract as of the date of the adoption.

McArthur v. Times Printing Co. 48 Minn. 319; *Battelle v. Northwestern Cement & C. Pavement Co.* 37 Minn. 89.

The mere act of the officers of the corporation in issuing the certificates of stock to Stearns was not a ratification.

Chicago City R. Co. v. Allerton, 85 U. S. 18 Wall. 233, 21 L. ed. 902.

The laws of the state of Maine under which the defendant corporation was organized contain no provision authorizing the restriction upon the transferability of shares of stock in the manner provided in the agreement in defendant's plea alleged, and such agreement if made cannot affect the plaintiff's right.

Morawetz, Priv. Corp. § 164.

The stock issued by defendant corporation was not subject to the agreement in defendant's plea alleged unless said agreement restricting its transferability was expressed in the stock certificates issued by said company.

New England Trust Co. v. Abbott, 162 Mass. 148, 27 L. R. A. 271.

The agreement in defendant's plea alleged does not affect the right of plaintiff to have the transfer of stock to him recorded upon the books of the corporation, and to have new certificate of stock issued to him.

First Nat. Bank v. Lanier, 78 U. S. 11 Wall. 377, 20 L. ed. 174; *Leitch v. Wells*, 48 N. Y. 613; *Joslyn v. St Paul Distilling Co.* 44 Minn. 183; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616.

Power of attorney on back, authorizing its transfer to any person, renders stock transferable by delivery.

Winter v. Montgomery Gaslight Co. 89 Ala. 544; *Re Ottos Korje Diamond Mines* [1893] 1 Ch. 618, 41 Am. & Eng. Corp. Cas. 567; *Re Bahia & S. F. R. Co.* L. R. 8 Q. B. 585.

When there has been a fraudulent issue of stock certificates the bona fide holder of such certificates has a right to rely upon the certificates as securing to them the stock which they represented.

Bridgeport Bank v. New York & N. H. R. Co. 30 Conn. 270.

The corporation is estopped to deny the validity of certificates issued in proper form, even 38 L. R. A.

though fraudulently issued in the hands of the transferee.

Allen v. South Boston R. Co. 150 Mass. 200, 5 L. R. A. 716.

Messrs. Warren R. Perce and Irving Champlin for defendant.

Tillinghast, J., delivered the opinion of the court:

In the opinion heretofore given in this case it was held that the by-law of the defendant corporation providing for the right of preemption of the stock in question was invalid. Since the rendition of that opinion the defendant, by leave of court, has filed additional pleas, setting up that by virtue of an agreement entered into on July 27, 1892, between the subscribers to the stock of the then proposed corporation, and also of an agreement between said subscribers and the corporation on August 10, 1892, the stock in question could not be transferred without first giving to the corporation the option of purchase. Without referring to the voluminous pleadings in detail, it is sufficient to say that the main question now raised thereby is whether the alleged agreements had the effect to bind the plaintiff's vendor, William R. Stearns, who was one of said subscribers, to offer the stock in question to the defendant corporation at the lowest price at which he was willing to sell, before selling said stock to the plaintiff. The case shows that, although the defendant corporation was organized at Saco, Maine, on the 10th of August, 1892, under the laws of the state of Maine (see chapter 48, §§ 16-19, printed in connection with our former opinion), as alleged in defendant's pleas, yet that it did not become a corporation, so as to be able to transact business, until the 31st of August, 1892, at which time the certificate required by § 19 of said chapter was filed with the secretary of state. And, this being so, we fail to see any force in the alleged contract with the corporation prior to that time. In other words, the contract or agreement set up by defendant was made before the corporation was in existence as a legal entity. And it is hardly necessary to argue against the power of a person not in being (if, indeed, there can properly be said to be such a person) to make a contract. A corporation like the defendant is purely a creature of statute, and only exists, for the transaction of business, when all of the requirements prescribed for the creation thereof have been complied with. In *Thomp. Corp.* § 480, the learned author says: "The corporation must have a full and complete organization and existence as a legal entity, before it can enter into any kind of a contract or transact any business." In *Gent v. Manufacturers' & M. Mut. Ins. Co.* 107 Ill. 658, the court says: "That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident. This is unconditionally true, unless the act of incorporation authorizes the corporators to perform acts and enter into contracts to bind the company when it shall be organized. As well say a child in *ventre sa mère* may en-

ter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises, or facilities. For do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter." The supreme court of Maine has expressly decided that a corporation like the defendant does not become a corporation until the certificate of the attorney general be obtained as required by the provisions of said chapter 48, § 19, of the Revised Statutes of that state. *Richmond Factory Assn. v. Clarke*, 61 Me. 351. See also *Providence Albertype Co. v. Kent & S. Co.* 19 R. I. 56; *Utley v. Union Tool Co.* 11 Gray, 141; *Penn Match Co. v. Hapgood*, 141 Mass. 148; 4 Am. & Eng. Enc. Law, 197-199. It is to be observed, in this connection, that there is a manifest difference, as to the effect of omission of the requirements of the law in the organization of corporations, between a case where the corporation is created by special charter and there have been acts of user, and a case where individuals seek to form themselves into a corporation under provisions of the general law. In the latter case—which is the one before us—it is only in pursuance of the provisions of the statutes for such purposes that corporate existence can be acquired. *Bigelow v. Gregory*, 73 Ill. 197. But defendant contends that the case presented is not that of an agreement between the promoters of a corporation and other parties, but is that of an agreement between the incorporators themselves. But, suppose it is, how does that change the case? It is then only a contract between the incorporators, or rather the proposed incorporators, individually, and not one of which the defendant can avail itself. And therefore, even assuming that a contract between said proposed incorporators not to transfer their stock, when obtained, without giving the option of purchase to the corporation, would be binding on them as individuals, yet the only remedy for a breach of such contract would be a personal one against the offending stockholder. Thus in *Carmody v. Powers*, 60 Mich. 30, it is held that an agreement with individuals that when they become incorporated they will give plaintiff a certain amount of paid up stock, cannot, on any rule of law, be considered as a dealing with the corporation itself, or as one which would bind the future corporation when organized. The case of *Vanorndt v. Middlesex County Bank*, 26 Conn. 155, cited by defendant's counsel, is quite different from the case at bar. There the question arose as to whether the bank had a lien on the stock held by the insolvent stockholder for the amount of his indebtedness to the bank. The certificate of stock which he held expressly provided that the shares were subject to the indebtedness of the stockholder to the bank, and the court held that this provision was binding on him by his acceptance of the certificate, such an acceptance being tantamount to an agreement between him and the defendant that his stock should be subject to his indebtedness. The court, in referring to the terms of the certificate, said: "That provision is a qualification or restriction of the title of Smith to the stock, of which title it was the object of that certificate to furnish the legal evidence,

or rather of which the certificate was the consummating act; and, as the monument of Smith's title, we think that it must be treated as an entire instrument of which the qualification is a part, and that the latter therefore cannot be disjoined from it, or treated as of no validity. To consider it otherwise than as an agreement would be to disregard the plain intention of the parties, which courts will always, if possible, carry into effect, and to sanction the perpetration of a fraud on the defendants. Smith having received the certificate proffered to him by the defendants with that restriction, neither he nor his assignee should be permitted to deny his assent to it, and that would be sufficient to constitute an agreement." It will be observed that this was a case where the corporation was in existence, and fully competent to transact business, when the stock was issued and the lien thereon created. The case of *Morgan v. Bank of North America*, 8 Serg. & R. 86, 11 Am. Dec. 575, which is specially relied on by defendant, is very similar to the one just cited. There the court found that by a long usage and course of dealing, well known to and acquiesced in by the assignor of the stock in question, the bank had a lien on the stock for the indebtedness to it of its stockholders; and that the plaintiff, who was the assignee of Wain, and therefore stood precisely in his situation, was bound by the custom, usage, and well-known understanding, which was tantamount to a contract with the bank regarding said transfer. In this case, as in the other, it will be seen that there were two parties fully competent to enter into the contract in question. *McCreedy v. Rumsey*, 6 Duer, 576, is also similar to the cases just referred to, except that there, under the articles of association, no stockholder could transfer his shares while he was indebted to the bank. And the court held that the assignee of the stockholder, as his successor, and under the statute, took the stock subject to the same liabilities. *Re Dunkerson*, 4 Biss. 227, is a case where the articles of association expressly authorize the restriction on the sale of the stock which is contained in the by-law, and hence was properly held to amount to a binding contract between the subscribers and the bank. *Union Bank v. Laird*, 15 U. S. 2 Wheat. 890, 4 L. ed. 269, is a case where the act of incorporation provided that no stockholder should transfer his stock until his indebtedness to the bank was satisfied, unless the president and directors should direct to the contrary. In *Stebbins v. Phania F. Ins. Co.* 8 Paige, 350, also the act of incorporation prohibits a transfer of stock until the stockholder's liabilities to the corporation are satisfied.

We have examined the numerous other cases cited by defendant's counsel in his elaborate brief bearing upon the questions under discussion, but we do not find that they sustain the position taken. But, even admitting that they do, the decided weight of authority, as well as the better reason, is to the contrary. Even conceding, therefore, that the defendant's contention as to the validity and effect of such an agreement or contract as is set up in its pleas, when made between parties who are competent to enter into it, is correct, yet, as

no binding contract, and, indeed, no contract at all, is shown to have been made between Stearns and the defendant corporation regarding the restrictions on the transfer of the stock, as claimed, by reason of the fact that the defendant was not capable of making it; the entire defense, in so far as said pleas are concerned, necessarily fails. It is earnestly insisted by defendant's counsel, however, that the agreement in question, although made before the corporation was in existence, became operative upon the complete organization thereof by reason of the issuance of stock to the subscribers, including said Stearns. It is to be observed, incidentally, that the defendant does not allege in its pleas that any ratification of the contract said to have been made on August 10, 1892, ever took place. But, even assuming such an allegation therein, we do not think it would be of any avail, so long as there is no vote of the corporation in any way relating thereto; and we do not think that the mere act of the corporation in issuing the certificates of stock to Stearns, after the corporation was in fact in existence, amounted to a ratification by it of a contract made simply between the subscribers to the stock prior to the time when the corporation became a legal entity. In order to avail itself of the agreement alleged to have been made by the incorporators with the corporation before the existence of the corporation, the defendant must, as argued by plaintiff's counsel, show some new and positive act done after its complete organization ratifying said alleged agreement. The case at bar, in which the defendant seeks to avail itself of an agreement made before its incorporation, differs very materially from the case of a corporation which has accepted the benefit arising from a contract made

by its promoters, and is held to be bound by such contract. The English authorities hold that a corporation cannot adopt or ratify a contract made before its incorporation. *Kelner v. Baxter*, L. R. 2 C. P. 174; *Re Northumberland Avenue Hotel Co.* L. R. 38 Ch. Div. 16. This rule has been followed in Massachusetts. In *Abbott v. Hapgood*, 150 Mass. 252, 5 L. R. A. 586, Knowlton, J., says: "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it. . . . Such a contract must derive its vitality from the meeting of minds when both parties are in existence; until then, it can be nothing more than an offer by one party." *Penn Match Co. v. Hapgood*, 141 Mass. 148. Having thus come to the conclusion that the agreement set up in the defendant's pleas is invalid, and that the plaintiff is not bound thereby, any further consideration of the case at this time becomes unnecessary. We desire to add, however, that it has been brought to our notice in the amended pleadings, and also in the defendant's new brief, that there are certain other statutes in Maine in addition to chapter 46, § 6, relied on in our former opinion, relating to the power of corporations to pass by-laws. And the defendant now claims that under said statutes and the decisions of the supreme court of Maine, the by-law aforesaid is valid. As the case is only before us on the amended pleadings, however, and as this question is not discussed in the plaintiff's brief, we cannot now decide it. In view, however, of the importance of the question, and of the newly discovered statutes aforesaid, a motion for reargument of the original question would be entertained by the court.

MINNESOTA SUPREME COURT.

Matthew CZECH, *Resp't.*,
v.
GREAT NORTHERN RAILWAY COM-
PANY, *Appt.*

(.....Minn.....)

*1. The statute requiring the locomotive bell to be rung or the whistle sounded 80 rods from the place where a railway crosses a traveled road or street does not apply to private farm crossings.

*2. But it does not follow that a railway company never, under any circumstances, owes to the adjacent landowner the duty of giving a warning signal that a train is approaching his crossing. The question is to be determined on general legal principles, whether, under all

*Headnotes by MITCHELL, J.

the circumstances, reasonable care required the giving of such a signal.

*3. While, as a general rule, and under ordinary circumstances, a railway company owes no such duty, yet the crossing may be so peculiarly dangerous, and the speed of the train so great, that reasonable care would require the giving of such a signal.

*4. Held, that under the facts of this case, in view of the peculiarly dangerous nature of the crossing and the unusually high speed of the train, it was a question for the jury whether it was negligence on the part of the defendant not to give a signal of the approach of the train.

(April 26, 1897.)

APPEAL by defendant from an order of the District Court for Wright County denying a motion for new trial after verdict in favor of

NOTE.—On the question what crossings are meant by statutes providing for signals at crossings, see *note* to *Sanborn v. Detroit, B. C. & A. R. Co.* (Mich.) 16 L. R. A. 119; also *Chicago, B. & Q. R. Co.* 83 L. R. A.

v. Metcalf (Neb.) 28 L. R. A. 824; and *Reynolds v. Great Northern R. Co.* (C. C. App. 8th C.) 29 L. R. A. 695.

plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Mr. W. E. Dodge for appellant.

Mr. F. D. Larrabee, for respondent:

In this particular case, under the peculiar circumstances existing in this case, at this particular time and this particular place, the defendant owed a duty to this plaintiff.

Thornton, *Railway Fences & Private Crossings*, §§ 291, 292; *Thomas v. Delaware, L. & W. R. Co.* 8 Fed. Rep. 729; *Cordell v. New York C. & H. R. R. Co.* 70 N. Y. 119, 26 Am. Rep. 560; *Chicago & A. R. Co. v. Sanders*, 154 Ill. 581; *Vandewater v. New York & N. E. R. Co.* 185 N. Y. 588, 18 L. R. A. 771; *Hanks v. Boston & A. R. Co.* 147 Mass. 495; *Owens v. Pennsylvania R. Co.* 41 Fed. Rep. 187; *Reifenyder v. Chicago, M. & St. P. R. Co.* 90 Iowa, 76; *Clampitt v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71; *Mason v. Chicago, St. P. M. & O. R. Co.* 89 Wis. 151; *Swift v. Staten Island R. T. R. Co.* 128 N. Y. 645; *Pearce v. Humphreys*, 34 Fed. Rep. 282; *Armstrong v. New York, N. H. & H. R. Co.* (R. I.) 29 Atl. 448; *Gurley v. Missouri P. R. Co.* 122 Mo. 141; *Murphy v. Boston & A. R. Co.* 138 Mass. 121; *O'Connor v. Boston & L. R. Corp.* 185 Mass. 352; *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Sandborn v. Detroit, B. O. & A. R. Co.* 91 Mich. 538, 16 L. R. A. 119; *Hydraulic Works Co. v. Orr*, 83 Pa. 832; *Larkin v. New York & N. R. Co.* 46 N. Y. S. R. 658; *Chicago, R. I. & P. R. Co. v. Caulfield*, 27 U. S. App. 358, 68 Fed. Rep. 396; *Texas & P. R. Co. v. Neill* (Tex. Civ. App.) 80 S. W. 269; *Mark v. St. Paul, M. & M. R. Co.* 80 Minn. 498, 82 Minn. 208; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 628; *Troy v. Cape Fear & Y. V. R. Co.* 99 N. C. 298; *Kelly v. Southern Minnesota R. Co.* 28 Minn. 98; *Charleston v. Weller*, 84 S. C. 357; *Hinkle v. Richmond & D. R. Co.* 109 N. C. 472; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400; *Clampitt v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71; *Carraher v. San Francisco Bridge Co.* 100 Cal. 177; *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 23 L. R. A. 575; *Hankinson v. Charlotte, C. & A. R. Co.* 41 S. C. 1; *Westaway v. Chicago, St. P. M. & O. R. Co.* 56 Minn. 28; *Stewart v. Pennsylvania R. Co.* (Ind.) 14 Am. & Eng. R. Cas. 679; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; *Morrissey v. Eastern R. Co.* 126 Mass. 877; *O'Connor v. Boston & L. R. Corp.* 185 Mass. 352; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162; *Thomas v. Delaware, L. & W. R. Co.* 8 Fed. Rep. 729; *Cordell v. New York C. & H. R. R. Co.* 64 N. Y. 535; *Byrne v. New York C. & H. R. R. Co.* 94 N. Y. 12; *Hodges v. St. Louis, K. C. & N. R. Co.* 71 Mo. 50; *Bauer v. Kansas P. R. Co.* 69 Mo. 219; *Merz v. Missouri P. R. Co.* 14 Mo. App. 459; *Indiana O. R. Co. v. Hudson*, 18 Ind. 325, 74 Am. Dec. 254; *Murphy v. Boston & A. R. Co.* 138 Mass. 121; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362; *Delaney v. Milwaukee & St. P. R. Co.* 88 Wis. 87; *Townley v. Chicago, M. & St. P. R. Co.* 58 Wis. 626; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 687; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11.

Where there are duties imposed by statute, 88 L. R. A.

duties other than those imposed by statute may be incumbent upon the people.

Struck v. Chicago, M. & St. P. R. Co. 58 Minn. 298.

Mitchell, J., delivered the opinion of the court:

The plaintiff brought this action to recover damages for personal injuries sustained by reason of a collision with one of defendant's passenger trains at a private crossing on plaintiff's farm. The negligence alleged and relied on at the trial as the ground of plaintiff's right of action was that the train approached the crossing, at a high and dangerous rate of speed, without any signal or warning being given of its approach. The only question in the case worthy of special consideration is whether the evidence justified a verdict for the plaintiff. The case made by the plaintiff was by no means a strong one, but, after carefully examining and re-examining the evidence, we have arrived at the conclusion that it made a case for the jury; in other words, that we cannot hold, as a matter of law, either that the defendant was not guilty of negligence, or that the plaintiff was guilty of contributory negligence. The crossing was immediately east of a "cut" on defendant's road over 800 feet long, and varying in depth from nearly 6 feet at the east end to nearly 11 feet at the center, or deepest point. The defendant had permitted trees and brush to grow and remain on the sides or slopes of this cut, which materially added to the obstructions to the view westward. The crossing was therefore an exceedingly dangerous one to a person approaching it from the north, because of his inability to see trains coming from the west until he reached a point very near the railroad track. Plaintiff was about to drive his team, hitched to a farm wagon, from his house, on the north side of the railroad, over this crossing, to that part of his farm on the south side. He testified that, when he reached the gate in the railway fence (a distance of about 60 odd feet from the track), he stopped his team, went down upon the railroad track, and looked both east and west, but neither saw nor heard any train. The evidence shows that, if he did this, he would have a view of the track westward for a distance of from 1,600 to 1,800 feet. He further testified that he then drove through the gate upon the right of way, and, before crossing the track, stopped his team and listened for a train, and, hearing none, then drove on, still looking and listening, but that he neither saw nor heard the train until it was within about 100 feet of him, when his horses were already on the track. His testimony was corroborated by that of his daughter, who was riding in the wagon with him. There are some circumstances which tend to create doubt as to the entire accuracy of this testimony, but its credibility and weight were questions for the jury. Notwithstanding that this was a private crossing, where the defendant was neither accustomed, nor required by statute, to give signals of the approach of trains, and although it appears that plaintiff was entirely familiar with the situation, and knew that this train was due from the west at or about this

time, we could not hold, as a matter of law, that he was guilty of contributory negligence, if his testimony and that of his daughter were true, which was a question for the jury.

2. The remaining question is whether the evidence justified the jury in finding that the defendant was negligent. We agree with counsel for the defendant that the statute requiring a bell to be rung or a whistle to be sounded at least 80 rods from the place where a railway crosses a "traveled road or street" on the same level does not apply to private farm crossings. It only applies to public roads; that is, roads traveled by the public. A mere farm crossing, designed exclusively for the convenience of the adjacent landowner, is never spoken of, either in the statutes or in common speech, as a "road." Probably the object in using the term "traveled road," instead of "highway" or "public highway," was to include roads actually used and traveled as public highways, without regard to whether they have been legally laid out or dedicated as such. But it does not necessarily follow from this that a railway company may never, under any circumstances, owe a duty to the adjacent landowner to give a signal or warning of an approaching train. It merely leaves the question to be determined on common-law principles, whether, under the circumstances of the case, reasonable care would have required the giving of such a warning. It may be conceded that, as a general rule, and under ordinary circumstances, a railway company owes no duty to the adjacent landowner to give him a warning signal, or to slacken the speed of its trains, on approaching a private crossing. The necessities of public travel and of the railway company would not permit of this; and when such a crossing is put in for the convenience of an adjacent landowner, although he has, of course, a legal right to its reasonable use, he must take it subject to the risk or burden incident to this condition of things. But reasonable care means the degree of care commensurate and corresponding with the situation. While in certain respects the rights of the adjacent landowner to use the crossing must, from the necessities of the case, be subordinate to the rights of the railway company to use its road, yet the rights and duties of each are correlative and reciprocal; and, in exercising its or his right, each must bear in mind the right of the other to use it also, and use reasonable care to avoid injury to such other while in the exercise of such right. Therefore, while there is no statutory obligation on a railroad company to give a signal of the approach of a train to a private crossing, yet the condition of the crossing as a

38 L. R. A.

peculiarly hazardous one, for any reason, coupled with the high rate of speed at which a train is running, may render the case one where reasonable care would require that some warning signal should be given. *Thomas v. Delaware, L. & W. R. Co.* 8 Fed. Rep. 739.

In this case this crossing was, for the reasons already stated, a peculiarly dangerous one. This was, or ought to have been, fully known to the defendant and its servants. They knew that plaintiff was liable to be using the crossing. There was evidence that would justify the conclusion that this train, although on schedule time, was running at an unusual rate of speed. We attach very little weight to the mere opinions or estimates of nonexpert bystanders or passengers to that effect, but the case furnishes evidence of a more satisfactory character. The testimony of the engineer is that the schedule time of the train, including stoppages, was about 27 miles an hour, and that its usual actual running time between stations was about 80 miles an hour. It was a regular passenger train, presumably supplied with all the usual modern appliances, such as air brakes. The engineer testified that he knew of the collision the moment it occurred, and immediately applied the brakes with full force. But there is evidence tending to prove that the engine ran over 900 feet past the crossing before the train was brought to a full stop. We refer to the testimony of the measurement of the distance from the crossing to the place where the broken glass was found which was taken out of the cab window after the train stopped. There is no evidence that the grade was a descending one, or that the track was wet or slippery. This, corroborated as it was by some other evidence, would, we think, have warranted the jury in finding that the train was running at an unusually high rate of speed. Considering the peculiarly dangerous nature of the crossing, and the high rate of speed at which the evidence tended to show that the train was running, we think it was a question for the jury whether the defendant was negligent in not giving some warning signal, and hence we cannot say that their verdict is not supported by the evidence.

In response to some questions of pleading raised by counsel, we may add that while the complaint was evidently drawn on the theory that the statute imposed a duty on defendant to give a signal on approaching the crossing, and also that its custom previously had been to give such a signal, yet its allegations are broad enough to entitle the plaintiff to recover on common-law grounds, and irrespective of the existence of the custom referred to.

Order affirmed.

RHODE ISLAND SUPREME COURT.

Ruth M. HARRINGTON *et al.*

v.

Board of Aldermen of the City of PROV-
IDENCE.

(.....R. L.....)

1. Notice and opportunity to be heard need not be given to a property owner before the passage of an ordinance under statutory authority requiring him to connect his drainage with the sewer and destroy any cesspool on the property.
3. The legislature may declare privy vaults in thickly settled communities to be nuisances, and require them to be abated, without giving their owners opportunity to show in each particular case whether their vault is or is not in fact a nuisance.

NOTE.—Municipal power over nuisances affecting safety, health, and personal comfort.

- I. Nuisances relating to public safety.
 - a. In general.
 - b. Electricity, steam, and explosives.
- II. Nuisances relating to health.
 - a. In general.
 - b. Removal of filth, etc.
 - c. Water-closets and privies.
 - d. Drains and drainage.
 - e. Persons and things infected with disease.
 - f. With respect to offensive and unwholesome smells.
 - g. Water and watercourses.
 - h. Burial of the dead.
 1. Dead animals.
 - j. The keeping of animals.
 - k. Articles of food.

Cases in which the nuisance, although it affects the public safety, health, and personal comfort, arises from a trade or business, will be found in note to *Ex parte Lacey* (Cal.) — L. R. A. —.

The general principles of the law relating to the power of municipal corporations to define, prevent, and abate nuisances are treated of in the note to *Grossman v. Oakland* (Or.) 38 L. R. A. 568.

The question of the power of municipalities over nuisances affecting buildings and other structures will be found in note to *Evansville v. Miller* (Ind.) ante, 161.

A note to the case of *Cape May v. Cape May, D. B. & S. P. R. Co.* (N. J.) — L. R. A. —, shows the power of such authorities over nuisances on highways and waters.

Cases of nuisances affecting public morals, decency, peace, or good order, and the power of municipalities over the same, will form the subject of another note, as will also the question of prescription in cases of nuisances, and the jurisdiction of a court of equity when the aid of such court is sought by municipal authorities for the purpose of abating nuisances.

The question of smoke as a public nuisance within the power of municipalities to regulate, abate, and prevent will be found treated of in note to *St. Louis v. Heitzberg-Packing & Provision Co.* — L. R. A. —.

- I. Nuisances relating to public safety.
 - a. In general.

In *Little Rock v. Barton*, 33 Ark. 436, 442, it is said what are called police powers relate mostly to the government of municipal corporations. Of this nature is the authority to suppress nuisances, pre-
33 L. R. A.

3. It is sufficient to authorize the abatement of privy vaults as nuisances that the legislature has so treated them in a statute stated to be for the benefit of the public health, without a distinct declaration in the statute that they are so.

4. A statute authorizing the destruction of a privy vault which had been ordered by municipal authorities to be destroyed notwithstanding an appeal from the order is not unconstitutional.

5. It is common knowledge that the condition in which privy vaults shall be kept, when allowed to exist, their construction, their locality, and the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation.

6. The expenditure by a city of vast sums of money in perfecting its water and sewer systems is a matter of common knowledge.

serve health, prevent fires, to regulate the use and storage of dangerous articles, to establish and control markets, and the like.

In cases where a particular thing is denounced by the municipality as a nuisance it is not required that the ordinance shall provide for an investigation as to the fact whether or not it is a nuisance. *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 868.

The adjudication of a board of health under Pa. act 1849, providing for the removal of the cause of all nuisances then or thereafter existing, even without the aid of the city ordinance of 1872, which gives express authority to the board to fence in vacant lots, is sufficient to give the board of health power to fence in a lot for the purpose of preventing a nuisance. *Wistar v. Addicks*, 9 Phila. 145.

Under Pa. act 1849, April 5, a board of health had authority to remove the cause of all nuisances that existed, or that might thereafter be created, and therefore, under that act as construed along with the prior act of 1840, the board of health had the power to abate nuisances and their causes. *Wistar v. Addicks*, 9 Phila. 145.

Under a charter giving power to the mayor and council to pass all laws and ordinances that they may consider necessary for the preservation of the health, peace, prosperity, comfort, and security of the inhabitants of the city not inconsistent with the Constitution and laws of the state, a city would have power to pass an ordinance prohibiting boys and other persons unconnected with railroad trains, except passengers and other persons in the act of taking passage, from getting off or on engines or cars at the depot or elsewhere in the city limits. *Bearden v. Madison*, 73 Ga. 184.

So, under an ordinance giving the town power to declare what shall be considered nuisances and to prevent and remove the same, and to regulate the police of the town and make such ordinances as the good of the inhabitants of the town may require, the town has authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens. *Chicago, B. & Q. R. Co. v. Haggerty*, 87 Ill. 118, 119.

In *Charleston v. Elford*, 1 McMull. L. 224, an ordinance prohibiting the throwing of bales of cotton or other articles from the second story or upper floors of warehouses within the city into the streets of the same was held a valid exercise of the police power as essential to the safety of the inhabitants.

In *Agnew v. Washington*, 7 Pa. Co. Ct. 180, an ordinance making it unlawful for any person to

(August 2, 1897.)

PETITION by appellants for a new trial after a ruling by the trial judge directing a verdict confirming the order upon an appeal from an order of the board of aldermen of the city of Providence directing petitioners to connect their premises with the sewer in the street and destroy all cesspools on the property. *New trial denied.*

The facts are stated in the opinion.

Messrs. Henry J. Spooner and Cooke & Angell for appellants.

Messrs. Francis Colwell and Albert A. Baker, for appellee:

Said acts are constitutional. They come within the broad powers of the legislature to abolish nuisances and provide for the public health.

A privy is prima facie a nuisance, and has been tolerated only as a matter of necessity.

Wood, Nuisance, § 512; Wahle v. Reinbach,

mine, drill, or bore for natural gas or oil within the limits of the borough at any point within 150 feet of any house, stable, or other building, or for the owner of any lot of ground within the borough to permit such well to be drilled on his lot within 150 feet of any house, stable, or other building, and providing that in case of any refusal or neglect after ten days' notice to abate the same, that the chief burgess should have power to inflict a penalty and cause the nuisance to be abated and removed at the cost of the owner of the premises, was upheld upon the ground that the same constituted a public nuisance endangering the lives and property of the citizens and interfering with their peace and comfort, although there was no jurisdiction given to such burgess to collect the penalty by summary conviction under Pa. acts 1851 or 1887.

See more particularly, as to the general rules in cases of nuisances affecting public health arising from particular trades or business, *note to Ex parte Lacey* (Cal.) — L. R. A. —.

b. Electricity, steam, and explosives.

In abating nuisances by the public authorities it has been said there may be substances like some explosives which are dangerous in cities under all circumstances, and made dangerous by city conditions, but most dangerous things are not so different in cities as to require more than increased or qualified safeguards, and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated in free institutions, regulation, and not prohibition, being the extent of such power. *Re Frazee*, 65 Mich. 398, 404.

The creation of an extra hazardous business in the public streets, such as one using electricity, or of organizations to use elements therein, dangerous to life from their very nature, can only be legal, if at all, when they are so burdened as to secure the public safety preliminary to such use, and its continuance by the untiring and unfailing vigilance of the person or corporation: and, if this cannot be done, then a nuisance is created and exists, and not the lawful enterprise, and such nuisance may be abated by the public authorities. *United States Illuminating Co. v. Grant*, 55 Hun, 222.

And the legislature has no power to violate the laws of public safety, and, consequently, none to authorize an enterprise to be conducted in the public streets by the use of a death-dealing factor, unless the conditions imposed concerning and controlling it are such as to secure the public safety, not for a time, but for all time during its use, and whenever this safety ceases to exist the business

76 Ill. 322; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654; *Cleveland v. Citizens' Gas-light Co.* 20 N. J. Eq. 205.

No laws have been more uniformly supported by the courts than the so-called health laws when reasonable in their intent and calculated in a measure at least to secure such reasonable result.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Dill. Mun. Corp.* § 374; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87, 16 Am. Rep. 611; *Watertown v. Mayo*, 109 Mass. 815, 12 Am. Rep. 694; *Cooley*, Const. Lim. 4th ed. 784.

Every presumption is in favor of the constitutionality of said statutes.

People v. Gillson, 109 N. Y. 389; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501.

Said acts are not unconstitutional in that they confer summary power and that no pro-

immediately becomes a nuisance, and may be abated as such. *United States Illuminating Co. v. Grant*, 55 Hun, 222.

Electric wires stretching over and upon the roofs of buildings in a thickly populated city, in such a manner that, if a fire should occur, they would greatly add to the risk, are a constant and continuous menace and nuisance which may be abated by a city. *Electric Improv. Co. v. San Francisco*, 45 Fed. Rep. 568, 565, 13 L. R. A. 181.

So, a wire carrying a heavy current of electricity and not properly insulated is dangerous to life and a public nuisance, which the board has the right to direct the immediate discontinuance of without notice; and the board of health, under the peculiar phraseology of the New York act conferring powers upon it, has a right to remove such wires because dangerous to human life, and the department of public works has also a right to remove all obstructions which interfere with the use of the streets, and has therefore ample authority to abate such nuisance. *United States Illuminating Co. v. Grant*, 55 Hun, 222.

If the entire system by which electricity is used for the lighting of public streets becomes, as a conclusive and openly apparent fact, so flagrantly and imminently dangerous to human life as to come within the principles governing conflagrations and pestilence, the corporate authorities can doubtless summarily abate it, but if, on the other hand, the systems are not necessarily and unavoidably dangerous to human life, if they can be kept in a safe condition by active vigilance and proper repairs, they are permitted to continue until the subways are made for their reception, and in that case while the entire system may not be a nuisance, that part of it which is suffered to become dangerous is a nuisance of the highest kind. *United States Illuminating Co. v. Grant*, 55 Hun, 222.

In *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497, it is said that the law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here as elsewhere to the improved and improving condition of our country and countrymen, and therefore railroads and locomotives, the offspring, as they will be the parents, of progressive improvements, should not in themselves be considered as nuisances, although in ages that are gone they might have been so held because they would have been comparatively useless and therefore mischievous.

There are many things which courts have power to declare nuisances, and in such cases it is sufficient to show the existence of the fact constituting

vision is made for notice prior to the action of the board of aldermen, or that no jury trial is granted.

King v. Davenport, 98 Ill. 805, 38 Am. Rep. 89; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Wadleigh v. Gilman*, 13 Me. 403, 28 Am. Dec. 188; *Blair v. Forehand*, 100 Mass. 186, 1 Am. Rep. 94, 97 Am. Dec. 82; *Morey v. Brown*, 42 N. H. 373; *Den. Murray v. Hoboken Land & Improv. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372.

The abatement of a public nuisance, being an ancient extrajudicial remedy, is not unconstitutional.

Salem v. Eastern R. Co. 98 Mass. 481, 96 Am. Dec. 650; *Train v. Boston Disinfecting Co.* 144 Mass. 623, 59 Am. Rep. 118; *New York Health Department v. Trinity Church*, 145 N. Y. 82, 27 L. R. A. 710; *Nickerson v. Boston*, 181 Mass. 307; *Com. v. Roberts*, 155 Mass. 281, 16 L. R. A. 400; *Slaughter-House Cases*, 88 U. S. 16 Wall. 36, 21 L. ed. 894; *Baker v. Boston*, 12 Pick. 198, 22 Am. Dec. 421.

the nuisance in order to empower a city council to abate such nuisances. The use of steam for the purpose of propelling a street car along the public streets in a thickly populated town will constitute a nuisance *per se*, in the absence of any legislative grant authorizing such use, and therefore an ordinance of a municipal corporation which forbids such use and declares it a nuisance is valid and will be upheld. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788, 790.

The mere fact that a steam engine is liable to explode, and that it is used in a business in which combustible materials are necessarily brought in dangerous proximity to the fire of its boiler, such as the business of a carpenter and box maker, thereby subjecting buildings and merchandise in that vicinity to increased danger from fire, raising the premiums of insurance and exciting the fears of neighboring owners for the safety and security of their property, does not constitute the same a nuisance. *Baltimore v. Radecke*, 49 Md. 217, 227, 38 Am. Rep. 239, 242. *Rhodes v. Dunbar*, 37 Pa. 314, 98 Am. Dec. 221, to the same effect.

Steam railway cars running through a city street, unless conducted with more than human watchfulness, may be regarded as a public nuisance, and therefore a statute giving the common council power to regulate the running of such cars within the corporate limits authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill, 209.

A steam engine used as a means of locomotion upon a public highway is not necessarily a nuisance, it may possibly be a nuisance at some times, and under some circumstances, but the question in any such case is one of fact; a question of reasonable conduct and management on the part of both parties, and therefore a question for the jury. *Macomber v. Nichols*, 84 Mich. 212, 22 Am. Rep. 522, 523.

So, a stationary steam engine is not itself a nuisance, even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets, or unless it is used in connection with some trade or occupation which the law pronounces offensive or noxious. *Baltimore v. Radecke*, 49 Md. 217, 38 Am. Rep. 239, 242.

And a city ordinance which prohibits the erection of a steam engine within the city limits without the consent of the mayor and common council, giving them the power to revoke such permits and

The trial court ruled correctly in rejecting evidence to the effect that the vault in question was not a nuisance and not prejudicial to the public health, and evidence as to the propriety and necessity of making such an order.

Miller v. Horton, 152 Mass. 540, 10 L. R. A. 116.

Rogers, J., delivered the opinion of the court:

The sole question in this case before the court at this time is as to the constitutionality of R. I. Pub. Laws, chap. 777, of April 25, 1889, as amended by chapter 1407 of March 1, 1895, and which act, as amended, is as follows:

"Sec. 1. The board of aldermen of the city of Providence may compel any abutting owner or occupant of land upon any street in said city in which there is a sewer to connect the drainage of his land and premises with such sewer, and may direct said owner or occupant to fill up and destroy any cesspool, privy vault,

to force the removal thereof, after a specified notice, and imposing a certain penalty for neglect of such request, is unreasonable and void, the same not being a nuisance *per se*, even though used in a populous city, notwithstanding the fact that the city has power to pass ordinances for the prevention of fire and for other purposes beneficial to the city and the inhabitants thereof. *Baltimore v. Radecke*, 49 Md. 217, 38 Am. Rep. 239, 242.

Where permission was granted to erect and use a steam engine for the carrying on of a business pursuant to the terms of the city ordinance, whereby such engine was to be removed after six months' notice to that effect from the mayor, and after the expiration of such six months a suit was brought by justices for the recovery of the penalty for the nonremoval of such engine and to enforce its removal, the court granted an injunction to stay the proceedings of the city officers, the ordinance in question being void and inoperative as clothing one single individual with discretionary power, such engine itself and its use in the particular business not being a nuisance *per se*. *Baltimore v. Radecke*, 49 Md. 217, 227, 38 Am. Rep. 238.

In *Vason v. South Carolina R. Co.* 48 Ga. 681, 688, the court refused to abate as a nuisance the use of steam on a railroad run through the streets of a city under the power given by the state statutes and the ordinances and contracts of the city, although the use of steam locomotives in a street or public highway comes within the definition of a public nuisance, and although under the Revised Statutes of the state it "tends to annoy the community or injure the health of the citizens in general."

So, where by the terms of the charter, the common council of a city has power to prevent immoderate driving in the streets, and riding or driving on the sidewalks, and also to regulate the speed and running of locomotive engines and railroad cars through the city, and also power to declare what shall be considered nuisances in lots, streets, docks, wharves, and piers, and to direct, provide for, and enforce their removal, such council has no power by ordinance to prohibit as a nuisance the running of any locomotive, steam engine, train of cars of any kind whatsoever, through or upon any track, street, or thoroughfare in the city at a faster or greater rate of speed than a mile in six minutes. *State, New Jersey R. & Transp. Co., v. Jersey City*, 29 N. J. L. 170.

See, further, as to the use of electricity and steam upon the public streets and the power of a municipal

or other arrangement for the reception of drainage.

"Sec. 2. Upon the service of any order or direction or a copy thereof upon any owner or occupant of such land to connect the drainage as aforesaid or to fill up or destroy any cesspool, privy vault, or other arrangement for the reception of drainage, such owner or occupant shall comply with such order or direction within ten days from the time of service of such order.

"Sec. 3. In case the owner or occupant to whom such order shall be directed shall neglect or refuse to comply therewith within ten days after the service thereof upon him, such owner or occupant shall be fined not less than \$5 nor more than \$20 for each subsequent twenty-four hours during which he shall neglect or refuse to comply therewith, and in case such neglect or refusal shall continue for sixty days after the service of said order, said board of aldermen may cause any cesspool, privy

vault, or other arrangement for the reception of drainage upon the land of such owner or occupant to be filled up and destroyed, and the pendency of any appeal from any of such orders or doings of said board shall not affect the power of said board after the expiration of said period of sixty days to cause the same to be forthwith filled up and destroyed, the foregoing provisions being in the interest of the public health of said city.

"Sec. 4. This act shall take effect from and after its passage, and all acts and parts of acts inconsistent herewith are hereby repealed."

On August 1, 1895, the board of aldermen of the city of Providence passed the following resolution: "Resolved, that Ruth M. Harrington, wife of Wm. W., be, and she hereby is, ordered to connect the drainage of the land and premises situated on West Clifford street in this city, bounded and described as follows: . . . with the sewer in said West Clifford street, and that the said Ruth M. Harrington

pally to abate the same and to prevent their becoming nuisances, *note to Cape May v. Cape May, D. B. & S. P. R. Co. (N. J.)*—*L. R. A.*—.

Other explosive substances have also been made the subject of municipal control.

Thus, it has been stated that the business of keeping, storing, and dealing in inflammable and explosive oils is a legitimate one, and every citizen has an inherent right to engage in the business in equal terms with other citizens. *Richmond v. Dudley, 129 Ind. 112, 115, 13 L. R. A. 587.*

An ordinance relating to the keeping and storing of explosives, which does not establish any general rules for the storage of the substances proposed to be regulated, but reserves to itself at regular meetings the right to grant or refuse permission to keep and store such oils and materials, dependent upon whether it, at such times, deems the location and buildings suitable for such purposes, and the person presenting the petition "a proper person," and providing that the permission when granted "may be revoked at any time at the option of the council," gives the common council an arbitrary control of the business without any fixed or known rules, and is therefore invalid. *Richmond v. Dudley, 129 Ind. 112, 114, 13 L. R. A. 587.* The ordinance, however, did not expressly declare such business a nuisance.

So, an ordinance prohibiting the keeping of inflammable or explosive substances within the city limits in greater quantities than therein specified, and providing for the presentation of a petition to the council specifying the location of the premises, the kind of vessels used, and the purposes for which kept, and leaving the granting of the permit to the common council's discretion, is invalid as not specifying the rules and conditions to be observed in such business, and as not admitting of the exercise of the privileges by all citizens alike upon complying with such rules, and as admitting of the exercise, or of an opportunity for the exercise, of an arbitrary discrimination by the municipal authorities between citizens who will comply. *Richmond v. Dudley, 129 Ind. 112, 116, 13 L. R. A. 587.*

And an ordinance passed pursuant to the city charter, giving the common council power to make by-laws and ordinances not inconsistent with the laws of the state and necessary to carry out the objects of the corporation, which ordinance prohibits the keeping of a quantity of straw exceeding 5 tons unless inclosed in a fire-proof inclosure, is in derogation of common right or unreasonable as contrary to the general welfare of the community. *Clark v. South Bend, 85 Ind. 276, 278, 44 Am. Rep. 13.*

In *Reg. v. Lister, Dears. & B. C. C. 250, 26 L. J. M. 38 L. R. A.*

C. N. S. 196, 3 Jur. N. S. 570, in which the defendants were indicted for a public nuisance in keeping and storing large quantities of wood, naphtha, and rectified spirits in a warehouse bordering on the streets, it was held that it was not error to charge the jury that if the depositing and keeping the naphtha, coupled with its liability to ignition *ab extra*, were dangerous to life and property by reason of its being so inflammable that water could not put out the fire unless applied in enormous quantities, and that a fire occasioned by the quantity kept by the defendants could not be so quenched and would prove disastrous to the neighborhood, they might find a verdict of guilty.

But in *Anderson v. Savannah, 60 Ga. 472*, the court refused to restrain the action of the defendants in storing naphtha, the penalties imposed by the law of the state being ample for the protection of the public.

With reference to the keeping and storing of gunpowder there would seem to have been a conflict in opinion as to whether or not the keeping of that substance in large quantities is a nuisance *per se*, the earlier cases inclining to the opinion that it is, the later ones making the manner of keeping the subject of the nuisance.

It has been held that the keeping of gunpowder in great quantities is a nuisance. *Rex v. Taylor, 2 Strange, 1167.*

So, it has been said that to manufacture or keep gunpowder in large quantities in towns or closely inhabited places is, by the common law of England, a nuisance and an indictable offense. *Reg. v. Lister, Dears. & B. C. C. 257, 26 L. J. M. C. N. S. 196, 3 Jur. N. S. 570; Rex v. Taylor, 2 Strange, 1167; Rex v. Williams, cited in 1 Russell on Crimes, 321; Crowder v. Tinkler, 19 Ves. Jr. 617.*

Although with great and unremitting care gunpowder may be kept, and perhaps manufactured, in very large quantities without doing any damage, yet the law takes notice that occasional carelessness may be reckoned on, and forbids that to be done which on the occurrence of carelessness will, in all probability, prove destructive to life and property. *Reg. v. Lister, Dears. & B. C. C. 257, 26 L. J. M. C. N. S. 196, 3 Jur. N. S. 570.*

In *Crowder v. Tinkler, 19 Ves. Jr. 617, 623*, it is said to be a nuisance at common law to use articles of recent discovery, such as gunpowder or gas, so as to cause danger to the public, and that the construction of the English Statute, 12 Geo. III., chap. 61, does not authorize a powder mill which, will be a nuisance at common law, though, as working at the commencement of the act, it is not liable to the penalties imposed by it.

be, and she hereby is, directed to fill up and destroy any and all cesspools, privy vaults, or other arrangements for the reception of drainage on said premises, the said Ruth M. Harrington being the owner, occupant of said premises, within ten days from the time of service of this order, or of a copy thereof, upon said Ruth M. Harrington." August 3, 1895, a copy of said resolution or order was duly served upon Mrs. Harrington, and, an appeal from said proceedings of the board of aldermen having been taken by Mr. and Mrs. Harrington,—for both husband and wife joined in the appeal,—and a claim for jury trial having been made, trial was had before the common pleas division, in which, upon the admissions of the appellants, a verdict was directed by the court ratifying and confirming the said order of the board of aldermen. At the jury trial it was admitted and agreed that Mrs. Harrington was the owner of the premises described; that there was a privy vault used for the reception of human excrements upon said

premises; that West Clifford street was a sewer street; that said board of aldermen passed said order August 1, 1895; that said order was duly served on Mrs. Harrington August 3, 1895, and that before the making of said order Mrs. Harrington had no notice to appear before the board of aldermen, and show cause why said order should not be made against her in the premises, nor any opportunity for a hearing. The appellants claimed that said chapter 777, as amended by chapter 1407 of the Public Laws, was unconstitutional. They also claimed that, although there was a privy vault on said premises, used for the reception of human excrements, yet it was not used for the reception of drainage in the sense in which they claimed the word was intended in the statute; and they offered to prove that on August 1, 1895, and long prior thereto, said privy vault was not kept and maintained as a nuisance, but was kept in good order and condition, and so as not to be prejudicial to the public health; and also that the drainage of said premises

Again, it has been stated that, though gunpowder be a necessary thing for the defense of the kingdom, yet, if it be kept in such a place as to be dangerous to the inhabitants or passengers, it will be a nuisance. *Anonymous*, 12 Mod. 842.

And the keeping of gunpowder, nitro-glycerine, and other explosive substances in large quantities in the vicinity of a dwelling house or place of business has been said to be a nuisance *per se* abatable by action at law or injunction in equity. *McAndrews v. Collier*, 42 N. J. L. 189, 192, 36 Am. Rep. 508.

In *Cheatham v. Shearon*, 1 Swan, 213, 215, 55 Am. Dec. 734, the question was raised whether the erection of a powder magazine in a populous part of a city, and the keeping stored therein large quantities of gunpowder, was *per se* a nuisance. The court held it to be so without a doubt, stating that there were few things one could do that would annoy the community more than the deposit of a large quantity of gunpowder in the midst of a populous city.

By § 267 of the Criminal Code of Illinois, powder magazines located within 50 rods of any occupied dwelling, or established near incorporated towns at a point different from that appointed by law, are declared public nuisances. *Chicago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364, 366.

The keeping of a mill for the making of powder and other explosives upon the bank of a river upon which boats bearing thousands of persons and property passed and repassed, and near which were two railroads, the same being also within 75 yards of a country road, also a highway in constant use, was said to be a public nuisance which no care, having reference to its situation, could exempt from the charge of being a nuisance. *Wilson v. Phoenix Powder Mfg. Co.* 40 W. Va. 413, 416.

In the above case it is said that the manufacture and keeping of quantities of gunpowder, nitro-glycerine, and other explosives in, or dangerously near to, public places such as towns or highways is a public nuisance, and it makes no difference whether carefully or negligently conducted and managed; negligence being no material element.

So, the right of city authorities to prohibit the keeping of more than a certain quantity of gunpowder in the city, elsewhere than in a magazine approved by the council, and declaring such magazines dangerous to life and property, and directing their removal at the expense of the owners, was upheld in *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694.

In *Kinney v. Koopmann* (Ala.) 37 L. R. A. 497, 38 L. R. A.

after an elaborate review of the authorities upon the question as to whether or not gunpowder is a nuisance *per se*, the court stated that steam power, gas, electricity, dynamite, and gunpowder were in daily use, and had become indispensable for the convenience of the public and for the public defense. Invention of man and advancement in science have enabled the manufacturer of, or dealer in, these articles to provide the public or the individual with almost, if not altogether, absolute protection against danger or hurt from explosion. And, even had the manufacturing and storage of gunpowder in its early history been a nuisance at common law, yet the common-law definition of a nuisance would not include gunpowder at this day.

So, upon the question whether or not gunpowder, kept in large quantities in public places, is dangerous and *per se* a nuisance without regard to the manner of its use or keeping, it is said in *Kinney v. Koopmann* (Ala.) 37 L. R. A. 497, that, considering the vast number of gunpowder magazines, and the daily transportation of gunpowder by every known power of conveyance, its daily use by millions of persons in war or for blasting, or for amusement with scarcely a well-authenticated instance of spontaneous combustion, it cannot be said that gunpowder *per se* is dangerous.

Again, in *Dumesnil v. Dupont*, 13 B. Mon. 800, 805, 68 Am. Dec. 750, it is said that a powder magazine is not *per se* a nuisance.

And in *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, it is said that the mere fact of the keeping of gunpowder does not of itself constitute a nuisance, and that in order to make it such the question as to the location of the building and the amount of the materials stored, together with other surrounding circumstances, must be taken into consideration.

From the case of *Walker v. Chicago*, R. I. & P. R. Co. 71 Iowa, 658, 662, it would seem that giant powder is an explosive substance of immense disruptive powers, yet, if properly packed, the shipment of it by a railroad is not likely to be attended with any more hazard than the transportation of ordinary merchandise, and therefore it would not seem to constitute a nuisance *per se*.

Yet it has been held that the fact that an explosion of a powder magazine destroys buildings is sufficient to show that the keeping of gunpowder, considered with reference to the locality and quantity and the surrounding circumstances, constitutes a nuisance *per se*. *Lafin & R. Powder Co. v. Tearney*, 131 Ill. 323, 7 L. R. A. 262.

was on and before August 1, 1895, and ever since, connected with the sewer on West Clifford street; the broad claim of the appellants being the right to put in evidence to the jury as to the condition of that privy vault and of the premises and surroundings, in order that the jury might determine (as it was contended that it should determine) that an order of the kind aforesaid should not be passed against the said Ruth M. Harrington. The presiding justice ruled said statute constitutional as required by law, ruled out the evidence offered by the appellants, and directed the jury, upon the admissions made, to find a verdict ratifying and confirming the said order; whereupon the constitutional question was duly certified to the appellate division for determination, and the appellants petitioned for a new trial for the alleged misrulings upon the evidence and upon ordering the verdict; but the question now before this division, as stated above, is solely upon the constitutionality of said statute, the whole travel of the case in the com-

mon pleas division having been given merely to elucidate the constitutional aspect of it.

The appellants claim that chapter 777, Pub. Laws, and chapter 1407, in amendment thereof, are unconstitutional, because no provision is made for notice to the owner or occupant of premises, and no opportunity for hearing thereon is given to the owner or occupant, before the passage of the order or direction by the board of aldermen, and because, also, by the provisions of § 3, chap. 1407, the pendency of an appeal will not affect the power of the board to fill up and destroy the privy vault of such owner or occupant of the premises. This statute, "being in the interest of the public health of said city,"—to quote the concluding words of § 3 of it,—is clearly intended to be an exercise of what is called the "police power," and if it is a proper exercise of such power, both as to subject-matter and as to methods, then its constitutionality cannot be successfully impugned.

"Rights of property," says Chief Justice

Where the gunpowder was deposited in a building insufficiently secured and protected, and unfit for the safe-keeping of a large quantity of such an article, the situation of the building in other respects being such as to render the gunpowder dangerous to the lives of the citizens, the evidence showing that if an explosion ever, by accident or design, occurred at any period it would be disastrous to more or less of the inhabitants residing in the neighborhood, the court held that the same constituted a nuisance. *Rudder v. Koopmann* (Ala.) 37 L. R. A. 420.

In *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744, the negligent keeping of gunpowder was held to be a nuisance *per se*, the powder being kept in large quantities in an upper story of a carpenter's shop built of wood within the limits of the corporation, a lumber yard and a number of wooden buildings, some used as dwelling houses and others as stables, being in close proximity.

From the case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, it would seem that the keeping of gunpowder, in order to be a nuisance *per se*, must be in a negligent and improvident manner, in order to sustain an indictment for a nuisance in keeping such powder.

So, in *Bradley v. People*, 56 Barb. 72, 73, the court supported the finding that the carelessness or negligent keeping of gunpowder in large quantities, near dwelling houses or where the lives of persons are thereby endangered, is a nuisance at common law, adopting the finding of the court in *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, and *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744.

In *Kinney v. Koopmann* (Ala.) 37 L. R. A. 497, the court took exceptions to the ruling of the court in the above case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, upon the ground that it did not consider that it was impossible to protect a powder house from lightning, and also to the ruling that a powder house in a populous city was a nuisance *per se*, the court being of opinion that a powder magazine might be constructed and so provided as to insure absolute security from lightning.

The storage of gunpowder in a city or town being attended with danger, its regulation is a matter within the power of the corporate authorities, and consequently the judgment of the city council as expressed in their ordinance requiring the removal of the magazines is conclusive upon the courts. *Davenport v. Richmond City*, 81 Va. 636, 642, 59 Am. Rep. 694.

The fact that a city sold to the defendants the site of the powder magazine ordered by the com-

mon council to be removed, for the purpose or with the knowledge that the same was to be used for the erection of such magazine, will not prevent the city council from passing an ordinance prohibiting its further use, if, in the judgment of such body, the safety or convenience of the people demands the removal of such magazines. *Davenport v. Richmond City*, 81 Va. 636, 642, 59 Am. Rep. 694.

The provisions contained in N. Y. Laws 1830, § 24, p. 362, that no person shall have powder in his store, comprehends every active possession, whether for the immediate purpose of removal or not, if such possession be in a store or other building or place, except, indeed, when the powder is on its passage in the street secured in a manner provided by the 29th section of the act and such statute is a mere police regulation to prevent nuisances in a city, and is not unconstitutional as conflicting with the clause of the Constitution of the United States granting to Congress the power to regulate commerce between the states. *Foot v. New York Fire Department*, 5 Hill, 99, 100.

So, an ordinance regulating the keeping of gunpowder in a city is necessary for the security and welfare of the inhabitants, and is a sanitary police regulation for the benefit and safety of the persons and property within the limits thereof, and is fully authorized by an act incorporating the city, giving the city council power to make and establish such by-laws, rules, and ordinances as shall appear necessary for the security of the public welfare and convenience of the city. *Williams v. Augusta*, 4 Ga. 509, 512.

In *Harley v. Heyl*, 2 Cal. 477, the question of the construction of the California statute of April 27, 1862, which authorized the erection of a powder magazine at a place to be sanctioned by the mayor, arose, the question being whether such statute interfered with the powers of the municipal authorities. The court stated that even under the old charter of the city, the city possessed the power of licensing and sanctioning such magazines, and that the same power existed under the city's new charter which was established since the passing of the statute, and therefore that the power remained in the city. The case, however, did not enter upon the question of such magazines being nuisances.

An ordinance authorizing the seizure of gunpowder, and declaring it forfeited, without legal investigation, when kept contrary to the provisions thereof, is void, although the city authorities may have the power to prevent the storage of such substances in large quantities within the city

Shaw in *Com. v. Alger*, 7 Cush. 58, 85, "like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of

the commonwealth, and of the subjects of the same. . . . Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . If a landlord could let his building for a smallpox hospital, or a slaughterhouse, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, *Sic utere tuo, ut alienum non ledas*. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." In the words of Mr. Justice Harlan in the *Slaughter-House Cases*, 83 U. S. 16 Wall.

for purposes of public safety. *Cotter v. Doty*, 5 Ohio, 368.

So, a city ordinance prohibiting the keeping of more than a specified quantity of gunpowder in any one place, declaring the same forfeited to the public authorities, and authorizing inspection of the premises and use of the powder there found without any legal adjudication, is void, although the city has a right to prohibit such keeping and to enforce the ordinance by fine. *Cotter v. Doty*, 5 Ohio, 363, 368.

In *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152, 156, 12 U. S. App. 665, the maintenance by defendant of a powder magazine containing a large quantity of powder within the city limits in violation of a city ordinance was held to be a nuisance. In this case, however, the action was brought to recover damages occasioned by the plaintiff from an explosion of the powder upon the defendant's premises, and was not one brought by the public authorities for a violation of the ordinance.

The case of *Fillo v. Jones*, 2 Abff. App. Dec. 121, 122, was a statutory action to recover damages for the death of plaintiff's testator by reason of an explosion of fire works on defendant's premises, and the court said that before such action could be maintained it must be shown that such keeping was a nuisance at common law, as a common nuisance dangerous to human life.

The power, when deemed necessary for public safety, to prohibit the blasting of rocks with gunpowder without written consent, is within the powers given by Mass. Pub. Stat. chap. 27, § 15, and therefore a city ordinance prohibiting such action without the written consent of the board of aldermen is valid, for the reason that blasting might be a private or a public nuisance. *Com. v. Parks*, 156 Mass. 531, 532.

The storing of gunpowder in large quantities, especially in thickly populated localities, is a nuisance which may be abated by the public authorities,—especially where the act of the legislature has recognized such storing as a nuisance. *Wier's Appeal*, 74 Pa. 220.

An ordinance declaring it to be a nuisance for any person or persons to keep or store in any building, or shed, or any other inclosure whatever within the limits of the corporation, any explosives or other highly inflammable materials dangerous to the safety of life in any other quantities than that which may be necessary for the supplying of the ordinary or every-day usage, or the demands of the retail selling business, is constitutional, and is not in restraint of trade, neither does it author-

ize the taking of private property without due process of law, and is therefore a valid exercise of the power given to such corporations to enact all necessary police regulations so far as the same do not conflict with the state and Federal Constitutions, the city charter also giving them power to pass ordinances relative to anything whatever that may concern the police and good government of the town. *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 868.

So, an ordinance prohibiting the storage and keeping for sale of explosive oils within the city limits, except in cellars, was held to be violated by a railroad company who warehoused such explosives for transportation, although they were not shown to have been stored for an unreasonable length of time. *Wright v. Chicago & N. W. R. Co.*, 27 Ill. App. 200, 208. In this case the ordinance did not, however, specifically declare it a nuisance.

As to the use of electricity and steam in the streets, see note to *Cape May v. Cape May*, D. R. & S. R. Co. (N. J.)—1 L. R. A. —.

The subject of police regulation of electric companies forms the subject of a note to *State, Laclede Gaslight Co., v. Murphy* (Mo.) 31 L. R. A. 798.

As to the grant of franchises to electrical subways companies, see note to *State, St. Louis Underground Service Co., v. Murphy* (Mo.) 34 L. R. A. 369.

Upon the question of negligence in the manufacture and storage of gunpowder, nitro-glycerine, dynamite, and other explosives, see note to *Judson v. Giant Powder Co.* (Cal.) 29 L. R. A. 718.

II. Nuisances relating to health.

a. In general.

The power conferred upon city councils to make regulations for securing the general health of the inhabitants, and to abate, prevent, and remove nuisances, is conferred upon them for the public good. *Armstrong v. Brunswick*, 79 Mo. 319, 321. In this case, however, the action was brought against the city authorities for not enforcing the terms of its ordinance in abating a nuisance, and to recover damages occasioned by plaintiff from such neglect.

Under the general police power the legislature may delegate to a municipality the authority to pass ordinances for the preservation of the health or the promotion of the comfort, good order, and general welfare of its citizens, provided always that they are not in conflict with the provisions of the Federal and state Constitutions framed for the protection of the citizens and the enjoyment of

36, 62, 21 L. ed. 394, 404: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." Chief Justice Redfield, in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 149, 150, 62 Am. Dec. 625, uses this language: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state; . . . [and] persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as

natural persons are concerned." To quote Mr. Justice Harlan again, and this time in *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 257: "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large." "Police regulations," says Mr. Justice Wilde in *Baker v. Boston*, 12 Pick. 183, 193, 22 Am. Dec. 421, "to direct the use of private property so as to prevent its proving pernicious to the citizens at large, are not void although they may in some measure interfere with private rights without providing for compensation. . . . If by such regulations an individual receives some damage, it is considered as *damnum abeque injuria*. The law presumes he is compensated by sharing in the advantages arising from such beneficial regulations." In regard to a Massachusetts statute authorizing

equal rights, privileges, and immunities. *State v. Summerfield*, 107 N. C. 895, 897; *State v. Moore*, 104 N. C. 714; *State v. Pendergrass*, 106 N. C. 664.

In *Re Ryers*, 72 N. Y. 1, 7, 28 Am. Rep. 88, it is stated that it is a recognized constitutional power of legislation to provide for removing or abating that which, though at first lawful, proper, and unobjectionable, has afterwards become a public nuisance endangering the public health, and the legislation of the state in creating boards of health in cities, villages, and towns, and vesting in them great if not extreme and arbitrary powers, shows that the promotion and preservation of the public health are a public purpose.

One of the burdens cast upon a city in accepting its charter is the obligation to keep the city free from nuisances, and therefore, where the charter gives the city full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city and to prevent and remove nuisances, the power thus conferred is not merely discretionary, but imperative, and the words "power and authority" may be construed as "duty and obligation." *Baldmore v. Marriott*, 9 Md. 180, 174, 66 Am. Dec. 326.

Under the act of general assembly incorporating the city of Baltimore the corporation have full power to enact laws and ordinances necessary for the preservation of the health of the city and to prevent and remove nuisances and the introduction of contagious diseases within the city and within 3 miles thereof. *Harrison v. Baltimore*, 1 Gill, 264, 266.

A city charter expressly vesting in the city power "to suppress all nuisances" must be so construed as to apply to cases of nuisances clearly so to the detriment of public health and public convenience. *Tisot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 998.

In *State v. Summerfield*, 107 N. C. 895, 899, an ordinance which prohibited produce, merchandise, cooked provisions, poultry, fruits, vegetables, or other commodities from being kept exposed for sale in or upon any sidewalk or the space in front of buildings used as sidewalks, alley, gutter, or street of the town, and the placing of any stand thereon for the purpose, and also the exposure of any such articles thereon or in the space in front of any building in such manner as to be in the way of persons traveling the same, was upheld as valid for the reason that such articles might, in the opinion of the commissioners based on reasonable grounds, endanger the health of the citizens of the town or incommode them in passing by a way left open for them by the owner, or might frighten horses attached to vehicles driven along the streets,

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which circumstances would be sufficient to warrant the enactment under the general authority to prohibit businesses, protect health, and prevent individuals from so using their own property as to subject others to serious and unnecessary inconvenience or danger.

Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and to secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. *Re Jacobs*, 98 N. Y. 98, 109, 110, 50 Am. Rep. 636. In the above case the constitutionality of the New York act to improve the public health by prohibiting the manufacture of cigars was attacked, such act being declared unconstitutional as being beyond the legislative power of police regulation as not being a health law, having no relation whatever to the public health, the legislature having no power to declare an act or thing to be a common nuisance which, palpably, is not, and cannot be such under any circumstances, by the common-law definitions or decisions.

Under N. Y. Laws 1867, chap. 956, whatever is dangerous to human life or detrimental to health, and whatever renders the air or human food or drink unwholesome, is a nuisance. *Jamica v. Long Island R. Co.* 37 How. Pr. 379, 382.

The abatement of a nuisance detrimental to public health is one of the ordinary functions of the police power of the state. *Kelley v. New York*, 6 Misc. 516, 521. To the same effect *Renwick v. Morris*, 7 Hill, 575; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 697, 24 L. ed. 1088.

The municipal authorities have power to abate a nuisance by pulling down and removing tenements or buildings which are old and almost worthless, filthy, and crowded with filthy tenants, and injurious to the health and comfort of the neighborhood, especially where they have been occupied by patients afflicted with smallpox and are in an improving and flourishing party of the city, and more especially where the owner is able to repair and improve them, but fails to do so, the same having been condemned as a nuisance by the board of health of the city, the charter of which gives it ample power to suppress and abate nuisances, even though there may be some proof that they have been cleaned and whitewashed. *Ferguson v. Selma*, 43 Ala. 398, 401.

So, for the purposes of destroying, removing, or preventing sickness, the city authorities may destroy, injure, or appropriate private property other

the city council of Boston to raise the grade of certain lands in order to secure a complete drainage thereof, Mr. Justice Morton in *Nickerson v. Boston*, 181 Mass. 306, 308, said: "It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances, and to preserve the general health. The authority of the legislature to pass laws of this character is too well settled to be questioned." See also *Com. v. Roberts*, 155 Mass. 282, 16 L. R. A. 400. Unwholesome trades, slaughterhouses, operations offensive to the senses, the burial of the dead, drainage, the deposit of powder, and the building with combustible materials in thickly settled communities, are some of the numerous matters to which the police power has been applied, but the list is too long to make an attempt at enumeration practicable. See 18 Am. & Eng. Enc. Law, p. 748; 2 Kent, Com. 840; Cooley, Const. Lim. 712 *et pass.*

than that which constitutes or causes the nuisance. *Salem v. Eastern R. Co.* 98 Mass. 431, 433, 96 Am. Dec. 630.

The board of health has power to declare and abate nuisances. *Kennedy v. Philadelphia Bd. of Health*, 2 Pa. 306; *Philadelphia v. Provident Life & T. Co.* 132 Pa. 224.

And such a board in abating a public nuisance may, under Mass. Stat. 1883, chap. 160, act by a committee for the reason that the board of health can do the work by agents. *Grace v. Newton Bd. of Health*, 135 Mass. 490, 497.

The New Jersey statute, giving boards of health power to abate nuisances hazardous to public health, does not apply or give authority to such boards of health to abate nuisances which merely render home uncomfortable or depreciate the value of property, or only amount to an annoyance to individuals or communities, and in such cases the relief is to be sought by the individual or the community. *State, Hamilton Twp. Bd. of Health, v. Neldt* (N. J.) 19 Atl. 318.

Where, under the legislative authority granted to a city council to abate nuisances, the property owner is permitted to abate nuisances, such council must first ascertain, after judicial hearing by the owner, the existence of the nuisance, and then determine the manner in which the work is to be done in order that the owner may intelligently exercise his privilege of abating the same at his own expense. *Joyce v. Woods*, 78 Ky. 386, 389. In this case the nuisance complained of was stagnant water, filled with putrid substances which the city sought to have abated, and then to recover the costs thereof from the owner; but the court refused their demand, no opportunity to be heard having been given to the defendant.

Under a city charter conferring upon the city council within the city limits power to make regulations to secure the general health of the inhabitants, and to abate, prevent, and remove nuisances, the power is conferred upon the corporation for the public good and not for private corporate advantage, and such power is exercised by the city council in the passing of an ordinance devolving upon the constable, upon complaint of the existence of a nuisance made to him by any person, the duty of removing or abating it. *Armstrong v. Brunswick*, 79 Mo. 319, 321.

The resolution of a board of health declaring that a nuisance exists on lots between certain streets north and south of another street cannot be held to include a nuisance existing on land lying at the southwest corner of such latter street, for the reason that judgment should be certain or 86 L. R. A.

Is the subject-matter of said chapter 777, as amended by chapter 1407, R. I. Pub. Laws, a proper one for the constitutional use of the police power? And by this we mean not merely the regulation of the use of privy vaults, cesspools, and other arrangements for the reception of drainage, but the absolute abatement of them under certain conditions, regardless of the manner in which they may chance to be kept. It is sufficient for us in this inquiry to consider privy vaults alone, as it is agreed on all hands that it was a privy vault only that was, as a matter of fact, obnoxious to the statute in the case at bar, and that, too, one used solely for the reception of human excrements; for a statute may be unconstitutional in part and constitutional in part, and, while the unconstitutional part may be void, the constitutional part may be valid, and may be carried into effect, the test in such cases being whether the parts are so interwoven and interdependent that they can stand only as a whole.

capable of being reduced to a certainty. *City v. Houseman*, 2 Phila. 349.

In *Hutton v. Camden*, 30 N. J. L. 123, 23 Am. Rep. 203, the proceedings of the board of health in filling up the plaintiff's lot to the level of the street without notice to him and an opportunity to be heard were held void, and the court refused to impose upon them the expenses incurred by the board in so doing.

Where the board of health, upon complaint that the cattle-feeding barns used by the plaintiff, and the cattle kept therein, were a nuisance, inducing zymotic disease, heard the parties and duly construed the allegations and reached the conclusion that a nuisance existed, and the common council took further action to remove the cattle as a sanitary necessity, the city charter giving ample power to abate nuisances, the plaintiff's action to restrain the proceedings of the board, and his injunction restraining such action, were dissolved, the board having jurisdiction of the subject-matter, having heard the parties and determined the matter. *Cook v. Buffalo*, 16 N. Y. Week. Dig. 8.

Under the New York public health law, § 21, as amended by the Laws of 1895, chap. 203, which declared that every such local board of health may impose penalties for violation of its orders or regulations to be used for and recovered by it in the name and for the benefit of the municipality, and may maintain actions in any court of competent jurisdiction to enforce such orders and regulations, an action for the abatement of a nuisance and the enforcement of such orders and regulations by the board of health must be brought in the name of the municipality. *Green Island Bd. of Health v. Magill*, 17 App. Div. 249.

And an ordinance prohibiting the feeding of milch cows on still slopes, and the selling of milk from cows fed on such slopes, and from sick or diseased cows, was upheld by the court in *Johnson v. Simonton*, 43 Cal. 242, the same being for the preservation of the public health, although not specifically declared a nuisance.

Where a defendant is charged with creating a nuisance in violation of § 221, cl. 1, Ill. Crim. Code (Starr & Curtis), § 227, p. 815, it is immaterial whether the defendant intended the prejudicial result to others or not, if the result flows from his unlawful act in collecting and depositing the prohibited noisome substances, as it is presumed that every sane man intends the natural and probable consequences of his act. *Seacord v. People*, 121 Ill. 623, 629, 632.

The English Statute, 18 & 19 Vict. chap. 120, § 8, is

State v. Clark, 15 R. I. 888; *Re Constitutional Amendment*, 16 R. I. 754, 758; *State v. Tonks*, 15 R. I. 885.

The receptacles known as privy vaults, for what might not inaptly be called the drainage of the human body, *viz.*, human excrements, have in thickly settled communities been a very common matter for the exercise of the police power. It is common knowledge that the condition in which they shall be kept when allowed to exist, their construction, their locality, the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation. Few things are more disagreeable to the senses or more injurious to health than the noisome smells too frequently arising from them. Their very presence is a menace to comfort and health, and a source of apprehension to the neighborhood. The best that can be done so long as they exist is to reduce the dangers within them

a sanitary act, and applies only to such nuisances as are injurious to health, and therefore, where the nuisance complained of was rainwater which collected on a railroad bridge, and, running through the planks, dripped onto the highway and upon persons using the same, it was held that the same could not be abated under the act. *Great Western R. Co. v. Bishop*, L. R. 7 Q. B. 550, 28 L. T. N. S. 905, 20 Week. Rep. 969, 41 L. J. M. C. N. S. 120.

b. Removal of filth, etc.

Under a power to preserve the health of the city, and to prevent and remove nuisances, a municipal corporation has the undoubted right to pass ordinances creating boards of health, appointing health commissioners with other subordinate officials, regulating the removal of house dirt, night soil, refuse, offals, and filth by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever is intrinsically and inevitably a nuisance. *Vogt v. Baltimore (Md.)*, 4 Am. & Eng. Corp. Cas. 329, 331; *Boehm v. Baltimore*, 61 Md. 259, 263.

And such ordinances, being for the preservation of the health of the city and to prevent and remove nuisances, and also to prevent the introduction of contagious diseases, are ordinary proper exercises of the power to preserve the health of the city and to abate nuisances. *Vogt v. Baltimore (Md.)*, 4 Am. & Eng. Corp. Cas. 329, 331.

So, the fact that garbage is not a nuisance or detrimental to health does not exempt it from police power or entitle a citizen to transport it without a license. *State v. Orr*, 68 Conn. 101, 34 L. R. A. 279.

In the above case of *State v. Orr*, 68 Conn. 101, 34 L. R. A. 279, an ordinance prohibiting the collection or transportation of garbage without a license was held to be within the provisions of the charter giving the authorities power to regulate by ordinance the collection and removal of garbage, although no express provisions for licenses was made.

So, in that case it was said that "refuse matter" within the meaning of an ordinance prohibiting the transportation without a license of "such refuse matter as accumulates in the preparation of food for the table" includes only what is abandoned as worthless; but such materials as may be properly utilized for other purposes when they do not constitute a nuisance remain property which may be sold or otherwise disposed of at the will of the owner. *State v. Orr*, 68 Conn. 101, 34 L. R. A. 279.

A city by-law prohibiting unlicensed persons from removing house dirt and offal from a city will be upheld upon the ground that, if everyone were engaged in such a business, there would be a con-

tinual moving nuisance in the streets of the city, breaking up the streets by their weight, and poisoning the air with their effluvia, and such a by-law is binding upon strangers coming within the city limits. *Vandine*, Petitioner, 6 Pick. 187, 17 Am. Dec. 351.

Reasonable regulations and restrictions in respect to the removal of night soil are within the powers delegated to the boards of health by N. Y. Laws 1875, chap. 633, as amended by Laws 1880, chap. 545, and the exercise of such power is not an unconstitutional interference with individual rights or with the freedom of trade. *Brooklyn Bd. of Health*, 13 N. Y. Week. Dig. 185, 186.

As a means of preventing a nuisance, it would seem that an ordinance of the board of health prohibiting the removal of night soil without a permit is within the powers conferred upon a board of health, such board having power to restrain the use of private property and the acts and businesses of all persons within the state for any purpose that is incompatible with the public health. *Brooklyn Bd. of Health*, 13 N. Y. Week. Dig. 185, 186.

The use of a cremator within a village for the destruction of garbage, etc., in such a manner as to substantially damage the surrounding premises by the stenches arising therefrom, is not authorized by N. Y. Laws 1893, chap. 376, which provide for the maintenance of a cremator for such purposes within village limits, and its use in such a manner as to cause or permit stenches to come from it will be enjoined. *Kobbe v. New Brighton*, 20 Misc. 477.

The ashes from a furnace used by a piano manufacturer are "refuse of a trade, business, or manufacture" under the English metropolis management act of 1855, 18 & 19 Vict. chap. 20, § 123. *Gay v. Cadby*, L. R. 2 C. P. Div. 391, 46 L. J. M. C. N. S. 290, 36 L. T. N. S. 410.

In *Holborn Union v. St. Leonard*, L. R. 2 Q. B. Div. 145, 46 L. J. Q. B. N. S. 38, 35 L. T. N. S. 403, 25 Week. Rep. 40, the court upheld an action brought to recover the expense of removing refuse which the defendants had refused to remove, although bound to do so under the metropolis management act of 1855, § 42, relating *inter alia* to the suppression of nuisances.

In *Draper v. Sperring*, 4 L. T. N. S. 365, 10 C. B. N. S. 113, 30 L. J. M. C. N. S. 225, 9 Week. Rep. 656, an order of the justices under § 12 of the English nuisances removal act requiring the defendant, as a person by whose permission or sufferance the nuisance was created, to remove the nuisance caused by sheep penned up in front of his premises upon land claimed by the defendant and used as a market with his permission, was upheld, the nuisance being within the act.

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tional powers of the legislature as a police regulation. It is an act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage." But it is contended on the part of the appellants that the privy vault itself, when properly used, is neither a nuisance nor injurious to health or comfort; that it only becomes so when not properly cared for, and therefore that its abuse, or improper use, alone makes it subject to police regulation and repression. The storage of gunpowder, the existence of buildings of such character and condition as to make them liable to catch fire, in thickly settled neighborhoods, have frequently been the subject of police regulation and repression, but neither would do any actual harm until carelessness, accident, or some unforeseen agency set them on fire, an event that might never happen; and yet the menace and the apprehension caused by their presence have been

frequently deemed sufficient to justify their removal under the police power.

The reasonable exercise of human power must always be exerted within reasonable human limitations. It is one of the laws of human nature that there shall be, from time to time, rejections from our persons of unsimulated matter, and this higher law must be recognized in judging of the reasonableness of any human legislation in any wise pertaining to it; hence the necessity of some sort of provision for these rejections is always recognized by legislatures and courts. The crudest and most objectionable provision for this in civilized countries is presented by a great army in the field in time of war; while the most perfect and least objectionable provision for it is afforded in those towns and cities possessing the best water and sewage systems, thus making possible what are called the "modern conveniences." It is common knowledge that the

In *Train v. Boston Disinfecting Co.* 144 Mass. 523, 50 Am. Rep. 113, rags were seized and destroyed by the order of the public authorities under the powers conferred upon the board of health to examine into all cases of sickness, nuisance, and sources of filth in any vessel within Boston harbor, or within the limits thereof, and to destroy, remove, or prevent the same.

Upon the question of quarantine regulations by health authorities, see *note* to *Hurst v. Warner* (Mich.) 26 L. R. A. 484.

As to municipal power in case of epidemics, see *note* to *Thomas v. Mason* (W. Va.) 26 L. R. A. 727.

Dirt, rubbish, garbage, and filth are in their nature nuisances; and that glass or broken ware can be very easily converted into nuisances if thrown about promiscuously is equally plain. *Ex parte Casinello*, 62 Cal. 538, 539.

So, garbage is in the nature of a nuisance which it is within the power of the local authorities to provide against. *Newtown v. Lyons*, 11 App. Div. 105.

And a city ordinance requiring garbage to be removed through, and out of, the city in water-tight close carts or wagons, marked "garbage," is a reasonable exercise of the police power as a means of preventing nuisances. *People v. Gordon*, 81 Mich. 306.

Again, an ordinance prohibiting the throwing into or depositing upon any public street, highway, or grounds, or upon any private premises, or anywhere except in such places as are designated for that purpose by the superintendent of public streets and highways, of any glass, broken ware, dirt, rubbish, garbage, or filth, is valid, and within the power vested in the board of supervisors by the California act of April 25, 1863, which authorizes and directs the summary abatement of nuisances and the making of regulations for the preservation of the public health and the prevention of contagious diseases, the same not being in conflict with § 11 of art. 11 of the state Constitution. *Ex parte Casinello*, 62 Cal. 538, 539.

And the proceedings of one appointed by a board of health to carry out the resolutions of such board, passed after duly called meetings and notices to remove the nuisances, in removing and destroying brush and oysters which in the opinion of such board, after procuring medical testimony, they declare to be a nuisance injurious to the public health, are valid, even though such material was not necessarily filthy. *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

An action by a board of health of a village to abate a nuisance, by reason of waste water and fecal matter running into the streets, under the 23 L. R. A. ,

provisions of N. Y. Stat. chap. 270 of the Laws of 1885, which provides that the penalty "may be sued for and recovered with costs by said board in the name of such board in any court having competent jurisdiction," is well brought in the name of the board without naming the individual members thereof. *New Brighton Bd. of Health v. Casey*, 18 N. Y. S. R. 251; *New Rochelle Bd. of Health v. Valentine*, 22 N. Y. S. R. 919.

An ordinance prohibiting the deposit of certain specified matters in a public street, or upon any lot, or upon the banks of any canal or river in the city, and imposing a penalty for the violation thereof, is not valid under a power conveyed by the city charter to abate and remove nuisances; yet it is valid under the power conveyed by another section of the New York act, giving the city authority to do all acts, make all regulations, and pass all ordinances which they deem necessary for the preservation of health and the suppression of disease in the city, and to carry into effect and execute the powers thereby granted. *Rochester v. Collins*, 12 Barb. 559, 562.

The proceedings of the board of health declaring the depositing of manure on any lots in a city to be a nuisance, and abating the same without notice or opportunity to be heard, were adjudged illegal in *People, Savage, v. New York Bd. of Health*, 38 Barb. 344, such a board having no power to declare any trade or occupation carried on within the limits of the city to be a nuisance without notice and an opportunity of being heard.

A nuisance, injurious and dangerous to health, consisting of an accumulation of foul mud, existing between the high and low water mark in a tidal creek running inland from the line of a river, cannot be abated by the public authorities by an order made upon the conservators of such river as owners of the property, as, under § 4, subsec. 1, of the English public health act 1891, the sanitary authority, if satisfied of the existence of a nuisance liable to be summarily abated under the act, must serve notice on the person by whose act, default, or sufferance the same arises or continues, or if not found, upon the occupier or owner of the premises, such subsection being read with subsection 3 which provides that if such parties cannot be found, and the nuisance does not arise from the act of the occupier or owner, the same shall be abated by the authorities, and be construed as saying that when the person causing a nuisance cannot be found, the liability of the owner of the premises to abate only arises where it is shown that it continues by his act, default, or sufferance, the order made upon the conservators being wrong, they not being owners of the soil for the purposes of such

city of Providence has expended vast sums of money in perfecting its water and sewer systems, thus making possible what was before impossible in the way of eliminating the menace presented and the apprehension aroused by the existence of privy vaults, and the statute in question operates merely to remove an objectionable receptacle where an opportunity exists of supplying a means of getting rid of the objectionable matter. It operates to repress privy vaults under reasonable limitations, for the land on which the privy vault to be repressed was situated must abut upon a street in which there was a sewer. Then, if there was no connection with the sewer from that land, ten days after notice given were allowed to make the proper connections and comply with the statute. Then, if the owner or occupant neglected or refused to comply, a penalty of not less than \$5 or more than \$20 for each subsequent twenty-four hours during which

he should neglect or refuse to comply therewith was imposed; and if this accumulating penalty, this milder means, failed of accomplishing the result, then the board of aldermen, as a last resort, could cause the privy vault to be filled up and destroyed. The pressure of power was applied at first very moderately, and free from harshness, gradually increasing until it might well be claimed that the fear of a money penalty would not repress the evil, and only culminating at last in the actual repression by the board when the owner or occupant had neglected or refused to act.

Is notice to the owner or occupant before the passage of the order by the board of aldermen, under the statute in question, constitutionally necessary, or is it requisite that he should have what is called "his day in court," or a trial by jury, before the passage of said order, or before the privy vault can be filled up and destroyed? Senator Edmonds in *Hart*

section of the act. *Conservators of the River Thames v. Port Sanitary Authority* [1894] 1 Q. B. 647, 38 L. J. M. C. N. S. 121, 69 L. T. N. S. 808, 53 J. P. 335.

Upon the question of monopoly in a contract for removal of garbage, see *note* to *Smiley v. MacDonald* (Neb.) 27 L. R. A. 540; and also *Walker v. Jameson* (Ind.) 23 L. R. A. 679.

c. Water-closets and privies.

In the principal case of *HARRINGTON v. PROVIDENCE* the right of a municipality to declare privy vaults nuisances, and to require them removed without giving an opportunity for the owners to show whether the same are or are not nuisances, was upheld, it being sufficient that the legislature had so treated them in a statute, even though they had not expressly declared them to be such.

In *Wahle v. Reinbach*, 76 Ill. 322, privies were looked upon as *prima facie* nuisances, but that case was an action by a private individual to restrain their erection and continuance near his dwelling.

Ordinances enacted relating to privies and the removal of the contents thereof by a person duly licensed, subject to the orders of the board of health in matters relating thereto, and providing for the written application of such person and evidence as to his character and security of his appliances, such license to run for one year with power of renewal on payment of certain fees, and the giving of a bond, are a lawful and proper exercise of the powers given the city by its charter to pass ordinances for the preservation of the health of the city, and to prevent and remove nuisances, and to prevent the introduction of contagious diseases. *Boehm v. Baltimore*, 61 Md. 259, 263.

Under a city ordinance passed pursuant to the provisions of the charter, enacting that no person shall keep on his or her premises any nuisance to the annoyance of his or her neighbors, and that any person so annoyed may complain to the city council, who shall require the same to be abated within twenty-four hours, and make provisions in cases of refusal to abate the same, a privy attached to a store, twelve years old, and offensive, is a nuisance. *Vason v. Augusta*, 38 Ga. 542, 548.

So, an ordinance imposing a fine for failing and refusing after due notice to fill up the vaults or sinks or privies on premises within the city, passed under the provisions of a city charter giving the authorities power, *inter alia*, to abate nuisances, is valid and infringes no constitutional right. *Monroe v. Gerspach*, 33 La. Ann. 1011.

And the Tennessee act of 1879, condemning all buildings, cisterns, wells, privies, and other erec-

tions in the taxing district found to be unhealthy, as nuisances, was upheld in *Theilan v. Porter*, 14 Lea, 622, 52 Am. Rep. 173.

In *St. Louis v. Flynn*, 123 Mo. 413, a city ordinance passed under the provisions of the city charter providing for the abatement of nuisances, or the removal of accumulated filth, giving the health commissioner power, whenever in his opinion such nuisances or filth existed, and, after being officially so declared of record by the board of health, providing that notice be given to the owner or agents thereof, to abate and remove the same, and if he failed to do so within the time indicated, which time was discretionary with the health commissioner, such owner was deemed guilty of a misdemeanor and liable to a fine, was upheld. The case, however, turned upon the question of the sufficiency of the notice and of the service thereof.

And an ordinance of the town council relating to the cleaning of sinks, cesspools, etc., is within the provisions of N. J. Stat. April 6, 1871, which confers full power to pass, alter, and repeal ordinances for regulating and suppressing nuisances in the township. *State, Nicoulin v. Lowery*, 49 N. J. L. 391.

In an action brought to recover a penalty for an alleged violation of a special order of the board of health declaring a certain privy vault to be a nuisance, dangerous to life and health, and requiring the ventilation of the same, the question as to whether the same is a nuisance is covered, so far as the New York law is concerned, by the principles established in the case of *Metropolitan Bd. of Health v. Helster*, 37 N. Y. 661, which case is to be regarded as settling the law upon the points involved in the decision. *New York Health Department v. Knoll*, 70 N. Y. 630, 636.

The exercise of the powers contained in N. Y. Stat. 1882, chap. 410, § 537, 1089, relating to the construction of drains in a conscientious manner by the board of health, is for the advantage of the health of the city by protecting the inmates of houses from the ill arising from an imperfect system of drainage, the act being in the nature of a police regulation for the preservation of health, and therefore a person refusing to comply with the orders of a board of health in constructing a private sewer from his premises in the manner pointed out and directed by the board will be restrained at the instance of the board. *New York Health Department v. Lalor*, 38 Hun, 542.

Although the mayor and aldermen of the city of New York have power to pass by-laws and ordinances in advance to prevent nuisances, as well as to secure their abatement, and although the board of health may have power to act upon a particular matter or thing dangerous to the public health and

v. *Albany*, 9 Wend. 571, 609, 24 Am. Dec. 165, says: "Much stress was laid by the counsel for the appellants upon the fact that the exercise of the right claimed by the respondents would result in the destruction of their property, without the benefit of a trial by jury, and that, consequently, the ordinance in question was a violation of the Constitution and the Bill of Rights. The same objection would apply to the dejection of every nuisance, yet nothing is clearer or better settled than the right to exercise this power in a summary manner, not only where the whole community is affected, but where a private individual alone is injured. It is a right necessary to the good order of society, and the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice."

cause it to be removed, yet they have not power to assume in advance that all the stinks and privies in the city of New York are or will become nuisances, or dangerous to the public health, and contract for the removal of their contents indefinitely until they or the common council otherwise order. *Gregory v. New York*, 40 N. Y. 273, 283.

In *People v. Wood*, 63 Hun, 131, the board of health served an order upon the defendant calling upon him to abate and suppress a nuisance and source of danger to life and health upon his premises, arising from a privy which required cleaning. The court in a prosecution for the violation of an ordinance held that the act of the board of health in making such order against the defendant ex parte and without notice to him was without jurisdiction and void, although the court stated that the board of health might, at the expense of the party maintaining it, abate the public nuisance, being accountable to the party injured for an abuse of the power which was to be exercised only in extreme cases.

Under the power of a board of health to declare and abate nuisances it may declare privies to be public nuisances where they tend to endanger the public health, and such boards act strictly in the line of their duty in ordering them to be cleaned and purged, and in charging the owner of the premises with the costs thereof. *Philadelphia v. Provident Life & T. Co.* 133 Pa. 224, 226.

The discretion vested in the board of health of the city of Philadelphia by Pa. act January 29, 1818 (Pamph. Laws, 38), making it the duty of such board to cause such of the privies to be emptied or corrected as the board shall from time to time deem necessary for the health of the inhabitants, and giving them power to determine whether or not a privy vault, in view of the surroundings, is a nuisance *per se*, and by Pa. act April 5, 1849 (Pamph. Laws, 346), requiring the board to remove the cause of all nuisances, gives such board power to determine whether or not a particular privy vault in view of the surroundings is a nuisance *per se*. *Adams v. Ford*, 3 Pa. Super. Ct. 230.

And under such statutes the board of health of the city may, in the exercise of such discretion, require such a vault to be filled up when it decides that cleaning is not sufficient to abate the nuisance. *Adams v. Ford*, 3 Pa. Super. Ct. 230.

Yet under the power to declare and abate nuisances, a board of health has no power to order water closets to be constructed by the owners, although the act under which they exercised their powers authorizes them to remove the cause of all nuisances that exist or which may thereafter be

In *King v. Davenport*, 98 Ill. 805, 88 Am. Rep. 89, the question was as to the validity of an ordinance of the city of Jacksonville, it having been empowered to pass the same, to establish fire limits, and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, and to provide against the erection of buildings, roofs, or cornices, with other than fireproof material within said fire limits, and which provided that if the offender, upon reasonable notice, failed to remove such wooden building, or wooden part of such building, the city marshal, upon the written direction of the mayor, should remove or tear down such building or such part thereof as may be necessary. The ordinance further provided that the offender should be subject to a fine of \$100 for each week he failed to remove such wooden building, or wooden part thereof, and that, if the city caused the removal the expense of the removal might be recovered of the offender. The plaintiff's tes-

created, especially where the cause of the nuisance is not the privy well itself, but its contents. *Philadelphia v. Provident Life & T. Co.* 133 Pa. 224, 226.

So, the authorities will be justified in removing and abating as a public nuisance a county jail and the cesspool connected therewith situated in a public square when the same are dangerous to health. *Llano v. Llano County*, 5 Tex. Civ. App. 128.

Under a provision of the city charter giving the health commissioners of a city power to abate as a nuisance any business or practice dangerous or detrimental to the public health, the health commissioners of a city have no authority to construct an indoor water-closet in place of a privy, and require the landowner to pay the costs thereof. *Eckhardt v. Buffalo*, 19 App. Div. 1.

And a notice served upon the landowner declaring such privy to be a nuisance to health, and directing the water-closets to be put in, is no authority to the health commissioners, without further notice, to construct a water-closet at the owner's expense. *Eckhardt v. Buffalo*, 19 App. Div. 1.

And the fact that there is great and "imminent" peril to the public health by reason of "impending" pestilence because of the existence of Asiatic cholera in seaports several thousand miles away which have connection with the city will not authorize the health commissioner to construct such water-closet as substitute for the privy at the owner's expense. *Eckhardt v. Buffalo*, 19 App. Div. 1.

But an order of the justices under the English public health act of 1875, calling upon the owner to abate a nuisance arising from untrapped drains, which did not specify what works and things were to be done in order to abate the nuisance, was held bad in *Queen v. Wheatley*, L. R. 16 Q. B. Div. 34, the order only calling upon the owner to execute such works and do such things as might be necessary to remove the nuisance.

Under the English metropolis management act, 18 & 19 Vict. chap. 120, the vestry and district board of the parish may, if necessary, convert an insufficient privy into a water-closet after notice to the owner, and recover the costs from the owner. *St. Luke v. Lewis*, 1 Best & S. 935, 31 L. J. M. C. N. S. 83, 8 Jur. N. S. 432, 5 L. T. N. S. 603, 10 Week. Rep. 120.

And under the English public health act of 1843, 11 & 12 Vict. chap. 63, § 54, the surveyor of the board of health may examine any drain, water-closet, privy, or cesspool or ashpit, and if in bad order or condition the board shall cause notice to be given to the owner to do the necessary work to remedy the same, and if such notice is not complied with they may recover the penalty imposed upon the owner.

tratrix violated this ordinance by taking off an old and out of repair shingle roof from her building, situated within the fire limits, and putting thereon, without permission, a new shingle roof. She failing to remove the same upon due notice, the roof was removed by the city marshal in conformity with the ordinance, whereupon she brought an action of trespass against the mayor and marshal of the city for the removing of the roof, and, dying since the bringing of the action, her executor was substituted as plaintiff. The defendants justified under the ordinance, and the sole question was as to the validity of the ordinance. The court, in its opinion, said, *inter alia* (p. 814, 18 Am. Rep. 95): "There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire' in a populous neighborhood, and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power than that of the prohibition of the erection of

buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced. The imposition of a penalty would but punish the offender, it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy."

Salem v. Eastern R. Co. 98 Mass. 481, 96 Am. Dec. 650, was an action to recover money expended from the city treasury by its board of health to remove a nuisance, which removal, being the digging of a canal for the abatement of a nuisance in a mill pond, was made under an ordinance of the city authorized by a statute of the state. Mr. Justice Wells, in delivering the opinion of the court, on page 442 used this language: "The proceedings of the board

the board having a discretion in determining what works are necessary, and such discretion is not reviewable by the justices. *Hargreaves v. Taylor*, 8 Best & S. 613, 23 L. J. M. C. N. S. 111, 9 Jur. N. S. 1053, 8 L. T. N. S. 149, 11 Week. Rep. 562.

In *Tinkler v. Wadsworth Dist. Bd. of Works*, 2 De G. & J. 261, 27 L. J. Ch. N. S. 842, 4 Jur. N. S. 263, the board of works entered upon the plaintiff's property for the purpose of changing into water-closets certain privies attached to cottages on his land, alleging the same to be nuisances. The court held that under the powers vested in such board by the metropolis local management act of 18 & 19 Vict. chap. 120, the board had exhausted their powers and must therefore be restrained, the order served by them upon the defendant appearing to have been made, not with regard to the state of the particular property in question, but in consequence of a previous determination to substitute water-closets for privies throughout the district.

Although the English local government act of 1858, § 34, as a means of preventing nuisances to health, enables the local board of health to make by-laws with respect to the drainage of buildings to water-closets, privies, ashpits, and cesspools in connection with buildings, yet such section does not empower them to make a by-law to the effect that no dwelling house shall be erected without having at the rear or side thereof a good and sufficient back street or roadway at least 12 feet wide communicating with some adjoining public street or highway for the purpose of affording access to the privy or ashpit of such house. *Waite v. Garston Local Bd. of Health*, L. R. 3 Q. B. 5, 37 L. J. M. C. N. S. 19, 17 L. T. N. S. 201, 16 Week. Rep. 78.

So, in *Ex parte Whitchurch*, L. R. 6 Q. B. Div. 545, 50 L. J. M. C. N. S. 41, 29 Week. Rep. 507, 45 J. P. 302, the nuisance complained of consisted of a privy and ashpit in such a state as to constitute a nuisance, and notice was given by the local sanitary authority under the English public health act of 1875, § 94, to abate the same by filling up the ashpit, abandoning the privy, and building a pall closet, and upon the failure of the owner so to do an order was made by the justices under § 96, calling upon him to carry out the notice. Upon certiorari it was held that the order of the justices was bad, as they had no authority to order the erection of such a closet under the 96th section of the act.

In *Ex parte Saunders*, L. R. 11 Q. B. Div. 191, 52 L. J. M. C. N. S. 89, 31 Week. Rep. 918, 47 J. P. 584, the sanitary authorities gave notice under the same 88 L. R. A.

statute to abate as a nuisance a water-closet in the center of a house and to remove the same near an outer wall, so that there might be proper ventilation, and to fix the soil pipe outside the walls. The court held that the justices, upon the failure of the defendant to carry out the notice, had jurisdiction to compel him to do so under the 96th section of the act, distinguishing the case from that of *Ex parte Whitchurch*, L. R. 6 Q. B. Div. 545, 50 L. J. M. C. N. S. 41, 29 Week. Rep. 507, 45 J. P. 302, upon the ground that in that case the owner of the premises had a privy of the ordinary kind and the order did not direct the execution of such works as might be necessary for preventing it from becoming a nuisance, but directed another kind of closet to be put in its place.

So, in *Green v. Lewellyn*, L. R. 13 Q. B. Div. 681, the sanitary authorities served a similar notice under the provisions of the same statute calling upon the owner to abate a nuisance consisting of a privy openly discharging nightsoil and offensive matter on the bank of a river, to remove the pipes and pan and level the floor, and provide a galvanized pan so as to prevent the nuisance injurious to health. Upon his failure to comply it was held that the justices had jurisdiction to compel him. In that case the court approved of the decision in *Ex parte Saunders*, L. R. 11 Q. B. Div. 191, 52 L. J. M. C. N. S. 89, 31 Week. Rep. 918, 47 J. P. 584, but dissented from that in *Ex parte Whitchurch*, L. R. 6 Q. B. Div. 545, 50 L. J. M. C. N. S. 41, 29 Week. Rep. 507, 45 J. P. 302.

Again, in *Parker v. Inge*, L. R. 17 Q. B. Div. 564, after a similar notice had been served upon the defendant as required by the same statute, he was summoned upon complaint by the inspector of nuisances for the borough for maintaining a nuisance in his house and premises in the nature of a defective water-closet and sink drains. The court held him liable, although he claimed that he could not enter upon the premises without the consent of the tenant, to whom the same were let on a long lease.

In *St. James and St. John v. Feary*, L. R. 24 Q. B. Div. 708, the proceedings of the vestry under the Metropolis management acts of 1865 and 1862, which required houses in the district to be provided with a water-closet or privy and ashpit furnished with proper doors and covers, and making provision for the recovery of penalties imposed in neglecting to comply with its provisions after notice, it was held that if the defendant objected to the proceedings of the vestry his proper course was to apply to the

of health are said to be defective, because taken without previous notice to the defendants and opportunity to be heard. The evidence tended to show that the defendants were notified of the pendency of proceedings, and of the action taken by the board of health from time to time, but there was no such notice beforehand as would give the defendants an opportunity to appear and be heard upon the contemplated action of the board; and there was no hearing upon any of the questions before them. The statute does not require any previous notice. Notice must be given of general regulations prescribed by the board of health under §§ 5 and 6, before parties can be held in fault for a disregard of their requirements. But, although such general regulations may seriously interfere with the enjoyment of private property, and disturb the exercise of valuable private rights, no previous notice to parties so to be affected by them is necessary to their validity. They belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by

enactments of the legislative power, or by its authority through boards of local administration." After citing various cases, and enlarging upon the reasons for notice not being required, *viz.*, the necessity for summary action, the fact that delay for hearing the parties might defeat all beneficial results from an attempt to exercise the power conferred upon boards of health, etc., the learned judge concludes on this point as follows (p. 444, 96 Am. Dec. 655): "The necessity of the case, and the importance of the public interests at stake, justify the omission of notice to the individual. When the statute authorizing the proceedings requires no notice, their validity without notice is not to be determined by the apparent propriety of giving notice in the particular case, but by considerations affecting the whole range of cases to which the statute was intended to apply."

In *Blair v. Forehand*, 100 Mass. 136, 139, 1 Am. Rep. 94, 97 Am. Dec. 82, where the question was as to the validity of a statute authorizing the summary killing of unlicensed

county council, and not having done so the matter rested with the magistrate whether the order had been made by the vestry, and whether it had been disobeyed, and if found so to be the conviction under the act was proper.

In *Queen v. Osler*, 32 U. C. Q. B. 324, the defendant was convicted for maintaining a drain from the privy vault which was obstructive and offensive, and for neglecting and refusing to remove, clean, alter, amend, or repair the same after notice contrary to the by-law of the municipality made in respect thereto for the benefit of the public health.

d. Drains and drainage.

The finding of a board of health that a drain and sewer emptying into a public street of a city is a nuisance, is *prima facie* evidence of the fact, the board acting in accordance with the provisions of its ordinance by taking proceedings against the owner of the premises after notice given to abate the same. *Kirkwood v. Cairns*, 44 Mo. App. 89, 93, 95.

In *State, Bd. of Health, v. Hutchinson*, 30 N. J. Eq. 218 and 559, the court abated a private sewer or drain at the instance of the board of health, the same having become a public nuisance, even though it was laid by the permission of the authorities and the ordinance granting such permission had not been repealed.

In the above case as reported in 30 N. J. Eq. 559, 577, it is said that, if a business such as that of a hotel cannot dispose of its necessarily accumulating filth without creating a nuisance, and happens to be erected in a populous city, and will not or cannot provide sewers or other facilities for disposing of such filth without injury, such business must cease in that locality until it can be conducted with due regard to public safety and comfort, and the court therefore sustained the decree of the court granting an injunction against the creation of a nuisance.

Where it was sought to restrain the discharge of sewage by the defendant city upon the lands of an adjoining town, and notice had been given to such defendant of the determination of the board of health of the town to consider the matter, and also of the subsequent hearing and resolution of such board, to which notices no attention was paid by the city, the subsequent proceedings of the board of health with respect to the abatement of such nuisance were considered valid and within the provisions of the New York Statutes of 1886. *Bell v. Rochester*, 38 N. Y. S. B. 739, wherein the court re-

strained the discharge of sewage upon the lands of the town from the city sewers.

Under N. Y. Stat. chap. 824 of the Laws of 1850, as amended by the act of 1883, chap. 351 of the Laws of 1882, for the preservation of the public health, which provides for the organization of such boards, and gives them power to make rules and regulations for the suppression and removal of nuisances, which powers were subsequently enlarged, although, in cases outside of the jurisdiction such boards of health have no power to enter upon the premises and summarily abate the nuisance; yet it may seek redress in courts for the prevention of the violation of such rules and regulations and to prevent or abate such nuisance, even though it may arise in a locality outside of their jurisdiction. *Gould v. Rochester*, 105 N. Y. 46, Reversing 39 Hun, 79. In this case action was brought by the plaintiff as a board of health to restrain defendants from discharging the contents of a sewer upon and over the lands of the town of such board of health, and to have the same declared a nuisance.

And where by the public laws the board of aldermen of a certain city are empowered to provide for the summary removal of drains, vaults, cess-pools, etc., prejudicial to the public health, and a later state statute authorizes town councils to remove nuisances, such latter act repeals the former, and therefore the city authorities must proceed to abate the nuisance in the manner pointed out by the latter act. *State v. McCulla*, 16 R. I. 190.

So, statutes giving the boards of health authority to fill in land or raise its grade in order to allow better drainage and to prevent the accumulation of offensive materials, and for the suppression of nuisances occasioned thereby, have been upheld in the following cases: *Dingley v. Boston*, 100 Mass. 544; *Cobb v. Boston*, 109 Mass. 438, 112 Mass. 181; *Phillips v. Middlesex County Comrs.* 122 Mass. 258; *Phillips v. Middlesex County*, 127 Mass. 262; *Cambridge v. Munroe*, 128 Mass. 496; *Bancroft v. Cambridge*, 128 Mass. 498; *Read v. Cambridge*, 126 Mass. 427; *Farnsworth v. Boston*, 121 Mass. 173; *Cavanagh v. Boston*, 130 Mass. 428, 438, 434, 52 Am. Rep. 716; *Lawrence v. Webster*, 167 Mass. 513; *Nickerson v. Boston*, 131 Mass. 306.

An order of the board of health undertaking to describe the manner in which a nuisance should be removed, such as by filling in the place where the alleged nuisance exists with gravel, earth, or some other proper material, to the satisfaction of the board, and not allowing the owner of the premises to adopt the alternative of excavating or dredging

dogs. Mr. Justice Gray said: "All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the Constitution of commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare. In the exercise of this power, the legislature may not only provide that certain kinds of property (either absolutely, or when held in such a manner or under such circumstances as to be injurious, dangerous, or noxious) may be seized and confiscated upon legal process after notice and hearing; but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner—as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health;" citing various authorities in support thereof.

the flats or of keeping them covered with water to a sufficient depth, is not within the powers vested in such board of health by Mass. Gen. Stat. chap. 26, § 8, for the reason that instead of ordering, in general terms, the owner or occupant at his own expense to remove the nuisance, they undertake to prescribe the manner of so doing. *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71, 73.

And under Mass. Stat. 1868, chap. 160, such an order is of no effect unless the owner or occupant of the premises has been served with notice and had a hearing. *Watuppa Reservoir Co. v. Mackenzie*, 132 Mass. 71, 73.

Where a city is authorized by charter to fill in a lot in order to suppress a nuisance on default made by the owner, it is given the power to demand, against such owner, the costs of filling in if done by the city, and the avement of the amount and costs of the work is one upon which an issue may be taken. *Hannibal v. Richards*, 82 Mo. 380.

"By 18 & 19 Vict. chap. 121, § 12, where a nuisance is ascertained by the local authorities to exist, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, who shall proceed to inquire into the complaint; and if it be proved to their satisfaction that the nuisance exists, the justices shall make an order on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance." By § 8 of the same act "nuisance" includes any ditch or drain so foul as to be a nuisance or injurious to health; any accumulation or deposit which is a nuisance or injurious to health. *Brown v. Bussell*, L. R. 3 Q. B. 251.

In the above case the defendant drained his premises into a barrel drain, which also received the sewage of other premises, the drain passing for a certain distance under a turnpike road, and thence the sewage was conveyed by an open drain through certain land not owned by the defendant, and ultimately into an open drain about half a mile from defendant's premises by the side of other lands not belonging to him. This drain was a nuisance, the matter from defendant's premises in itself being sufficient to cause one, and on complaint the justices ordered it abated by cutting off all communication from the defendant's premises to

In the celebrated *Trinity Church Case, New York Health Department v. Trinity Church*, 145 N. Y. 82, 47, 27 L. R. A. 710, Mr. Justice Peckham gave expression to this *obiter dictum*: "This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him; nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without a hearing) that the thing condemned was a nuisance. Nor is it the case of the destruction of property which is in fact a nuisance, without compensation. Where property of an individual is to be condemned and abated as a nuisance it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance." Mr.

the barrel drain. It was held that the order was right. *Brown v. Bussell*, L. R. 3 Q. B. 251.

The case of *Francomb v. Freeman*, L. R. 3 Q. B. 257, was also decided under the authority of the above statute. In that case the defendant, the owner of houses let to tenants, had constructed a drain from the houses onto land not belonging to him by leave of the owner, by which drain sewage was conveyed into and along a watercourse. The accumulation at the mouth of the drain was a nuisance which was ordered to be abated under the above statute, and it was held that the order was valid.

In proceedings under the above statute the question whether or not the persons against whom the proceedings are taken have a legal right to cause their sewage to flow into the given channel is immaterial. *Brown v. Bussell*, L. R. 3 Q. B. 251; *Francomb v. Freeman*, L. R. 3 Q. B. 257.

In the two preceding cases it was said to be questionable, when several persons empty sewage into one place and the aggregate becomes a nuisance the amount contributed to by each not being in itself sufficient to cause a nuisance, whether the proceedings could be taken under § 12 of the above act against any of such persons. *Brown v. Bussell*, L. R. 3 Q. B. 251; *Francomb v. Freeman*, L. R. 3 Q. B. 257.

Under the English statutes it is no answer to an information at the relation of the board of health to abate a nuisance arising from sewage, that the board has power itself to remedy the evil by making sewers, for the reason that it is the duty of the board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works. *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 146, 30 L. J. Ch. N. S. 285, 17 Week. Rep. 240, 19 L. T. N. S. 708.

Where, by the public act for the removal of nuisances, a nuisance is defined, and the method of procedure by the local authorities is pointed out, and by a local act the public authorities themselves are bound to flush, cleanse, and trap the sewers in the town, and the proprietors of chemical works are entitled to discharge refuse by two separate drains into a public sewer, by one of which drains liquids impregnated with muriatic acid are discharged, and by the other liquid impregnated with sulphur is discharged, and upon their combination in the sewer sulphurated hydrogenic gas is produced which escapes in quantities sufficient to be injurious to the public health, and no nu-

Justice Peckham's *dictum*, just quoted, is claimed by both appellants and appellees in this case as favoring their respective contentions, but, rightly understood, it would seem beyond peradventure to favor the appellees. The case of *Müller v. Horton*, 152 Mass. 540, 10 L. R. A. 116, affords an apt illustration of Mr. Justice Peckham's meaning. This was tort for the summary killing of a horse that had been adjudged by the commissioners on contagious diseases among domestic animals, under Stat. 1887, chap. 252, had the contagious disease known as "glanders" or "farcy" and for the killing of which an order had been issued by them, with no provision for compensation to the owner. The defendants admitted the killing, but justified that they did it in obedience to the order. The court below ruled the act to be constitutional, found that the horse killed was not afflicted with glanders or any contagious disease, and found for the defendants, *i. e.*, that the justification was sufficient. The whole of the supreme judicial court assumed the statute to be constitutional, a difference arising only as to whether, if the horse

did not have the glanders, as a matter of fact, the killing was justifiable under the order. The court stood four to three, the majority deciding that the killing was not justified, and the minority that it was justified, under the order. Holmes, J., in giving the opinion of the majority of the court, said, *inter alia*: "The language of the material part of § 13 of the act of 1887 is: 'In all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof.' Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit by the owner for compensation. . . . When, as here, the horse not only is not to be paid for, but may be condemned without appeal and killed without giving the owner a

sance exists in the private drains of such company, but the corporation has not properly flushed, cleaned, and trapped the sewer pursuant to the provisions of the local act, the escape of such sulphurated hydrogenic gas from the sewer is a nuisance within the meaning of the statute arising from the acts of the chemical company, and therefore the public authorities can make complaint, although they themselves may have contributed to the existence of the nuisance. *St. Helena Chemical Co. v. St. Helena*, L. R. 1 Exch. Div. 196, 45 L. J. M. C. N. S. 160, 34 L. T. N. 8, 387.

But where the nuisance is artificially created by emptying the sewage of dwelling houses through a private drain upon private land, the board of health has no right to extend such private drain through the land of the proprietors to a brook on their land, and to clean out the brook in order that it may be used to carry off the sewage, as such a nuisance may be dealt with by the board of health under chap. 80, §§ 18, 25, Mass. Pub. Stat., or the proper authorities may lay a public sewer with which the board may require the buildings on the private way to be connected, the nuisance not being within the provisions of Mass. Stat. chap. 80, § 28: *Huse v. Amesbury Bd. of Health*, 163 Mass. 240. See also *New York Health Department v. Lator*, 38 Hun, 542, and *Queen v. Osler*, 22 U. C. Q. B. 324.

e. Persons and things infected with disease.

A municipal corporation has power to declare a wreck which has become dangerous to the health of the inhabitants to be a nuisance, and to order its removal. *Lewis v. Dodge*, 17 How. Pr. 229, 237.

In an Anonymous Case, 3 Atk. 760, it is said that it was not settled that a house for the reception of inoculative patients was a public nuisance.

And in *Haag v. Vanderburgh County Comrs.* 60 Ind. 511, 28 Am. Rep. 654, a pest-house for the treatment of small-pox patients was held to be within the definition of a nuisance as contained in § 623, 2 Ind. Rev. Stat. 1876, p. 258. In this case, however, the action was of a private nature, and showed special damage.

And a city ordinance directing the removal of persons affected with contagious disease without the city limits is a valid exercise of the police power, and authorized by the provisions of a charter, the continuance of such a person within the city limits being detrimental to the health and safety of the public, the city acting under legislative au-

thority in passing such ordinance, relating to health and preventing nuisances. *Aaron v. Broiles*, 64 Tex. 316, 53 Am. Rep. 764.

The power conferred upon a common council to make and publish ordinances for the purpose of abating and removing nuisances is a mere grant of authority to adopt general rules and regulations respecting the removal of nuisances, and does not authorize the passing of an ordinance directing the removal of sick persons suffering from an infectious or contagious disease, as the mere fact that a person is sick of such disease either in his own house or in a public hotel does not constitute a nuisance. *Boom v. Utica*, 2 Barb. 104, 109, 110.

In *Seavey v. Preble*, 64 Me. 120, the court upheld the action of the authorities in tearing the paper from the walls of a house in which there had been smallpox patients, the same being necessary for the preservation of the public health.

Hospitals and homes for the sick are far from being nuisances *per se*. *Beasones v. Indianapolis*, 71 Ind. 189, 195.

In a case where the city ordinance prohibited the erection of a private hospital within the corporate limits, and the defendant was expelled by the municipal authorities from the premises which he had rented for the purposes of such hospital, the court upheld the proceedings taken by the authorities under such ordinance. *Milne v. Davidson*, 5 Mart. N. S. 586, 16 Am. Dec. 189, 191.

The authority of the municipal authorities to make a regulation prohibiting the erection of private hospitals within the corporate limits under the provisions of the charter which gives them full power and authority to make and pass such by-laws as they deem necessary to maintain the cleanliness and salubrity of the city cannot be tested by the principles of the common law in relation to nuisances, no such guide being given to the authorities by their charter and no such limits being inferred from the motives inducing such a grant of power, the police of cities requiring many regulations growing out of their situation, and many things which would not amount to nuisances at common law might be hurtful in a city. *Milne v. Davidson*, 5 Mart. N. S. 586, 16 Am. Dec. 189, 191.

General laws giving the city power to make and enforce ordinances to erect and establish market houses and market places, engine houses, houses of refuge, pest-houses and hospitals do not embrace the power to enable them to license or regulate the erection of private hospitals, and therefore an

hearing, or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. . . . Section 18 of the act of 1867 by implication declares horses with the glanders to be nuisances, and we assume, in favor of the defendant, that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is whether, if the owner of the horse denies that his horse falls within the class declared to be so, the legislature can make the *ex parte* decision of a board like this conclusive upon him. That question is answered by the decision in *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 881. It is decided there that the owner has a right to be heard; and, further, that only a trial by jury satisfies the provision of article 12 of the Declaration of Rights, that no subject shall be deprived of his property but by the judgment of his peers, or the law of the land. . . . Of course there cannot be a trial by jury before

killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If he does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

There are many other cases which might be cited in reference to the non-necessity of notice before the passage of the order, but the foregoing are sufficient to satisfy us that no such notice is required. When the appellant is sued for the penalty, she will have her day in court, and a trial by jury, if she desires; and proof will have to be adduced to show that she had an unauthorized privy vault upon her premises

ordinance respecting such hospitals is void, private hospitals not being within the meaning of such ordinances, hospitals not being nuisances *per se* or *prima facie* such. *Bessones v. Indianapolis*, 71 Ind. 189, 195.

A board of health of a city, under its power to abate and prevent nuisances, cannot remove citizens from their homes and close up their houses without either the sanction of the law or the justification of their act by great public necessity demanding such action, by reason of there being no other way to avert the threatening peril, especially where there is no existence or allegations of existence of a pestilential disease; and in such a case their power is limited to the removal of the alleged nuisance or cause thereof. *Eddy v. Board of Health*, 10 Phila. 94.

In *Newark & S. O. Horse Car R. Co. v. Hunt*, 50 N. J. L. 308, the plaintiff claimed damages against the defendants for killing certain horses belonging to him, the defendants justifying their action under the provisions of the supplement to an act establishing a state board of health and preventing the spreading of glanders in horses, and making horses afflicted with that disease common nuisances, and authorizing the destruction of the same. The court upheld the constitutionality of the acts as being within the police power, even though they authorized the summary abatement of such nuisances, the act leaving the question of justification in the killing of such animals open to proof.

Under § 13 of the Massachusetts act of 1867, authorizing the summary killing of animals having the farcy or glanders, and which by implication declares horses with the glanders to be nuisances, all horses are not declared to be nuisances. *Miller v. Horton*, 152 Mass. 540, 548, 10 L. R. A. 116.

Upon the question of quarantine regulations by health authorities, see note to *Hurst v. Warner* (Mich.), 26 L. R. A. 484.

As to municipal power in the time of epidemics, see note to *Thomas v. Mason* (W. Va.), 26 L. R. A. 727.

1. With respect to offensive and unwholesome smells.

Anything offensive to the sense of smell or hearing, erected or carried on in a public place where the people dwell or pass or have a right to pass, to their annoyance, is a nuisance at common law. *Blackney v. State*, 8 Ind. 494.

Dead, decaying, and putrid animal or vegetable matter is a nuisance *per se*. *Rogers v. Barker*, 31 Barb. 447, 452.

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So, vessels, clothes, and goods charged with the effluvia and infection of persons fatally diseased are nuisances *per se*. *Rogers v. Barker*, 31 Barb. 447, 452.

It has been stated that the public have a right to pass over a public highway without being discomforted by any offensive smells, and such smells may constitute a public nuisance. *Com. v. Rush*, 11 Lanc. L. Rev. 97.

In order to constitute a nuisance it is not necessary that the smell should be unwholesome, it is enough if it renders the enjoyment of life and property uncomfortable. *Reg. v. White*, 1 Burr. 837; *Richards' Case*, 6 N. Y. City Hall Rec. 61.

An ordinance, the object of which is to protect the inhabitants and travelers in a close and populous neighborhood from nuisance by reason of offensive and unwholesome smells, is valid. *Com. v. Patch*, 97 Mass. 221.

An instruction to the jury that the court declares the law to be that, if the premises complained of were kept in as cleanly a manner as they could be kept in the reasonable prosecution of the defendant's business then the defendant was not guilty, was rightly refused, inasmuch as such an instruction would compel the toleration, in the midst of private residences, and in the most populous districts, of trades or avocations necessarily noxious and highly offensive to the neighborhood and the public, and was therefore rightly refused. *State v. Boll*, 59 Mo. 321, 323.

The use of a cremator in a village for the destruction of garbage in a manner which emits stenches therefrom and substantially damages the surrounding premises is an unauthorized proceeding and will be abated by the public authorities. *Kobbe v. New Brighton*, 20 Misc. 477.

Where the odors and gases from a fat-rendering establishment produce headache, nausea, vomiting, and compel citizens to close their doors and windows both by day and night, and interfere with them in the enjoyment of their meals and of sleep, such an establishment is a nuisance which it is the duty of the board of health to abate. *State, Board of Health, v. Lederer*, 52 N. J. Eq. 676.

In a similar case it is stated that although the simple odor arising from a properly conducted fat-rendering establishment may not be detrimental to the public health, yet when such smells not only compel citizens to retire from their porches and close their doors and windows both by day and night and thereby deprive them of a constant supply of fresh wholesome air, and also

to obtain a recovery against her. So, if an alleged privy vault upon her premises is filled up and destroyed, under alleged authority of said chapter 777 as amended by chapter 1407, she can bring suit against the persons doing the act for the supposed trespass, and when they attempt to justify under the statute she will have her day in court, and a trial by jury, if she desires, and the defendants will have to show that the alleged privy vault was actually a privy vault, and that it was unauthorized under the statute. Of course, if the thing declared by statute to be a nuisance, or the thing regulated or repressed under an exercise of the police power, is not a nuisance in fact, or within the province of the exercise of the police power, then the court will declare the statute unconstitutional, for the power is not to be used under the mere allegation, color, or pretense of being a proper exercise of the police power, when in truth it is not. But the legislature, as we have already seen, is to a great extent the proper judge of the necessity for the exercise of this restraining power. In addition to cases al-

ready quoted from, see *Watertown v. Mayo*, 109 Mass. 315, 319, 12 Am. Rep. 694; and *Train v. Boston Disinfecting Co.*, 144 Mass. 528, 580, 59 Am. Rep. 113, in which latter case Devens, J., says: "But there can be no doubt of the right of the legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves."

The appellant urges, as a ground for adjudging the act in question unconstitutional, that she cannot be heard upon the question whether the privy vault upon her premises is a nuisance or not, irrespective of the legislative determination thereof. We have already seen that the legislature can pronounce under its police power that certain things are nuisances *per se*, and privy vaults, under the conditions provided for in said chapter 777, as amended by chapter 1407, are embraced in such things. The legislature is authorized under its police power to determine and enact that places used for the illegal sale of intoxicating liquors are nuisances, and persons prosecuting thereunder can show that the place

causes nausea and sickness of the stomach, retching and vomiting, and oblige them to forego their meals, there may then be strong proof of hazard or peril, or danger to the health of those so affected, which will warrant the abatement of such a nuisance by the public authorities, the New Jersey act which authorizes the boards of health to abate nuisances hazardous to public health not being confined to cases of cholera, smallpox, or yellow fever, or the plague, the intention being to submit to the board the power of determining whether or not every such nuisance might in any reasonable event tend to the inviting, generating, fostering, or promoting of disease. *State, Hamilton Twp. Bd. of Health, v. Neidt* (N. J.), 19 Atl. 318.

So, noxious or offensive smells emanating from any trade or business in a town or populous neighborhood, or near to a public road or highway, to the annoyance of the neighborhood, or the persons traveling such road, are a nuisance abatable by the public authorities, and it is sufficient if they are offensive to the senses. *State v. Luce*, 9 Houst. (Del.) 396; *State v. Wetherell*, 5 Harr. (Del.) 487; *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 616, 619; *Belcher v. Farrar*, 8 Allen, 325, 327; *Taunton v. Taylor*, 116 Mass. 254, 261; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, 107; *Chicago v. Rumpf*, 45 Ill. 90, 32 Am. Dec. 194, 203.

In *Coe v. Schultz*, 47 Barb. 64, a metropolitan board of health ordered the manufacturing of superphosphate of lime within the metropolis sanitary district to be discontinued until the mode of conducting such manufactures should be altered so that no odors or fumes could escape into the external air. It was held that although such an order might deprive the owner of such business of his property, yet he would not be so deprived without due process of law provided the business was a public nuisance the board having a right to suppress a nuisance, by reason of its power to protect the life and health of the inhabitants from nuisances.

But the mere fact that they emit a disagreeable odor is not sufficient to warrant the imposition of a penalty by such authorities under their power to remove and prevent nuisances, where the business is in itself lawful. *Lippman v. South Bend*, 84 Ind. 278, 279.

And where the resolutions of the board of health were not acted upon for some months after they were passed, for the reason that the board feared that the removal at the time when the resolution was passed would greatly increase the poisonous

effluvia and so aggravate the malady which then prevailed in the town, the board were held justified in waiting until the cooler weather prevailed before carrying out such resolutions in order to prevent the repetition of the malady the following summer. *Raymond v. Fish*, 51 Conn. 80, 103, 50 Am. Rep. 8.

It is not necessary to constitute an offense under § 114 of the English public health act of 1875, that the effluvia should arise from a business, if it amounts to a nuisance and is also injurious to health. *Malton Local Bd. of Health v. Malton Farmers' Manure & Trading Co. L. R. 4 Exch. Div.* 302, 49 L. J. M. C. N. S. 90, 44 J. P. 155.

An offense is committed under § 91 of the English public health act of 1875, where the accumulation or deposit, which is a nuisance or injurious to health, emits offensive smells which interfere with the personal comfort of persons living in the neighborhood but does not cause injury to health. *Bishop Auckland Local Board v. Bishop Auckland Iron & S. Co. L. R. 10 Q. B. Div.* 138, 52 L. J. M. C. N. S. 88, 48 L. T. N. S. 223, 31 Week. Rep. 238, 47 J. P. 389.

See further, as to odors arising from buildings and in the use thereof in general, notes upon the question of municipal control over buildings and other structures as nuisances, to *Evansville v. Miller* (Ind.) ante, 161; *Monroe v. Hoffman*, 29 La. Ann. 651, 656, 29 Am. Rep. 345, 346; *State v. Purse*, 4 McCord, L. 472, 474; *State, Rodwell v. Newark*, 34 N. J. L. 254, 257; *Ex parte Whitwell*, 98 Cal. 73, 83, 19 L. R. A. 727. See also the following cases relating to odors arising from particular trades or businesses, in note to *Ex parte Lacey* (Cal.) — L. R. A. —; *Com. v. Kidder*, 107 Mass. 186, 192; *Lake View v. Letz*, 44 Ill. 81, 83; *State v. Luce*, 9 Houst. (Del.) 396; *State v. Wetherell*, 5 Harr. (Del.) 487; *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 616, 619; *Taunton v. Taylor*, 116 Mass. 254, 261; *Malton Local Bd. of Health v. Malton Farmers' Manure & Trading Co. L. R. 4 Exch. Div.* 302, 49 L. J. M. C. N. S. 90, 44 J. P. 155; *Belcher v. Farrar*, 8 Allen, 325, 327; *Com. v. Rumford Chemical Works*, 16 Gray, 251; *Dennis v. State*, 91 Ind. 291; *State, Marshall v. Cadwalader*, 86 N. J. L. 233; *Beiling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272, *Wanstead Local Bd. of Health v. Hill*, 13 C. B. N. S. 479, 32 L. J. M. C. N. S. 135, 9 Jur. N. S. 973, 7 L. T. N. S. 744, 11 Week. Rep. 268; *Reynolds v. Schultz*, 34 How. Pr. 147, 4 Robt. 282; *Grand Rapids v. Weiden*, 97 Mich. 82; *Winslow v. Bloomington*, 24 Ill. App. 647; *Lippman v. South Bend*, 84 Ind. 278, 279; *Rex v. Nell*, 2 Car. & P. 483; *Brantree Local Bd.*

complained of is not used for the sale of intoxicating liquors, but they are not permitted to show that, although the place is used for the illegal sale of intoxicating liquors, yet that it is not a nuisance. That was determined by the legislature when it passed the act, as to the propriety of the passage of which the persons prosecuted doubtless had no notice or hearing; neither are such persons entitled to be heard whether proceedings shall be commenced against them. So the legislature has made a statute as to certain classes of privy vaults, and the appellant can have an opportunity of being heard whether her privy vault is of that class; but she will not be heard as to whether her privy vault would not have been a nuisance if the act had not been passed, because she was not heard upon the question whether the legislature should pass such a law, nor whether the board of aldermen should have initiated proceedings against her by giving her a preliminary notice or order.

of Health v. Boyton, 52 L. T. N. S. 90, 48 J. P. 582; People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 782.

As to odors arising from the keeping of animals, see *infra*, §.

g. Water and watercourses.

The fouling of water after the right to foul it has ceased, by reason of an act giving a city authority to use the same for public purpose, amounts to a public nuisance. Martin v. Gleason, 139 Mass. 183; Morton v. Moore, 15 Gray, 573, 576; Brookline v. Mackintosh, 138 Mass. 215, 225.

Supplying the citizens and others visiting a city with unwholesome and poisonous water constitutes a nuisance; so held in Stein v. State, 37 Ala. 123, 131, the court stating that the poisoning of the water consumed by an entire community and by all who might go that way certainly possessed the quality of injuries to the community requisite to constitute a nuisance.

In State v. Taylor, 29 Ind. 517, the defendant was charged with polluting a stream of water near a public highway used by persons in the vicinity and travelers along the road in such a manner as to render it unfit for use and indecent, so as to obstruct the free use of the water by citizens. The court held that "the charge was sufficient under the definition of a nuisance as contained in Ind. Stat. (2 Gavin & H.) § 623, p. 288, which defined a nuisance as whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property," and that such a nuisance affecting the public was punishable as such, the court relying upon Sloan v. State, 8 Ind. 312.

If the act of a defendant in fouling the stream has made it necessary for the city to resort to extraordinary means for preserving the purity of the water of a pond or reservoir such means cannot justify the continuance of the illegal fouling, the mere fact that the city has thus far been able, by means of such special works, to prevent the natural result of its acts, being no defense. Martin v. Gleason, 139 Mass. 183.

In Martin v. Gleason, 139 Mass. 183, an action by the mayor of a city for an injunction to restrain the defendant from discharging sewage into a certain brook was upheld under the Massachusetts statutes.

A city has a right to be protected against the necessity of maintaining works for the preservation of the purity of water used for public purposes. Martin v. Gleason, 139 Mass. 183.

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The appellants contend that privy vaults have never been declared by statute nuisances *per se*. We do not understand that a formal declaration that a thing is a nuisance, *ipse iuris*, is necessary to bring it within the exercise of the police power, or to constitute it a nuisance. A formal declaration that a thing is a nuisance does not necessarily make it so, as we have already seen; and not formally declaring it to be a nuisance does not technically keep it from being one, if it is treated as such in the statute. Thus we have seen that Mr. Justice Holmes, in *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116, said, "Section 13 of the act of 1887, by implication, declares horses with the glanders to be nuisances," and yet reference to that section shows that such horses were not called nuisances, but only treated as such; nor is the word "nuisance" anywhere to be found in the whole act. Chapter 777, as amended by chapter 1407, distinctly declares at the end of the act that its pro-

An incorporated city has the power to abate a nuisance, whereby a certain creek is polluted by means of filth and other refuse matter being deposited therein from a private sewer, and this without regard to trespass upon the city's property or that of any person by the nuisance complained of. Belton v. Central Hotel Co. (Tex. Civ. App.) 33 S. W. 297.

In Belton v. Baylor Female College (Tex. Civ. App.) 33 S. W. 680, the court followed its decision in the above case of Belton v. Central Hotel Co. (Tex. Civ. App.) 33 S. W. 297, the nuisances complained of in the two cases being of the same character.

In State, Board of Health, v. Bergen County Chosen Freeholders, 46 N. J.; Eq. 173, wherein the defendants were charged with creating and maintaining, in and about the courthouse and jail and other public county buildings, a nuisance within the limits of the municipality which was hazardous to the public health, and set forth in detail the particulars of the alleged nuisances, which were, *inter alia*, the use of the river as a sewer, thereby rendering it foul, noxious, and hazardous to the public health, it was held that the authorities must show that the acts complained of amounted to a public as distinguished from a private nuisance, the mere fact that it had a tendency in that direction not being sufficient to justify the court in granting the injunction prayed for.

Where deposits in a mill-pond by a railroad company for the purpose of filling up certain portions of it without supplying culverts or other means of drainage are claimed by the city to be a nuisance which the board of health may proceed to remove, the order of such board under the Massachusetts General Statutes for the removal of such nuisance is sufficient notice of its nature and locality, and for the purposes of abating such nuisance the city is justified in entering upon such land and digging a trench for the purpose of removing or preventing the nuisance. Salem v. Eastern R. Co. 96 Mass. 431, 433, 96 Am. Dec. 650.

The action of a city for the abatement of a nuisance, under chap. 189, N. Y. Laws 1893, caused by the pollution of a stream which at a certain point was used for drinking and domestic purposes, after notice to abate the same, is legal and a valid exercise of legislative power. Keller v. New York, 6 Misc. 518, 621, wherein the plaintiff's action to restrain the city from summary abatement of the nuisance was dismissed.

So, a city ordinance prohibiting boating, sailing, and fishing upon a lake, passed for the purpose of protecting and preserving the water of the lake

visions were made "in the interest of the public health of the city," and that is all-sufficient, coupled with the nature of its provisions. Neither do we see that the provision of the statute in question referring to the filling up and destroying privy vaults, etc., notwithstanding the pendency of an appeal, was in any way in contravention of the Constitution. We have already referred to various authorities that summary action under the police power without being heard, without previous jury trial, and without compensation, might be constitutional. Under our system an appeal is allowed from any order of a town council, but, as the law stood in August, 1895, it was at least sixty-five days from the date of the passage of the order before it could be called in the appellate court for assignment even (jud. act, 183), and so, to avoid all question as to the effect of an appeal from an order under said chapters 777 and 1407 under the general provisions as to such appeals, it was plainly declared that such an appeal should not prevent summary pro-

ceedings under said chapters. The appeal was not affected by the abatement of the nuisance any more than trial by jury was affected by such abatement, although the prosecution of the appeal, like the trial by jury, followed the abatement. The appellants seem to draw a distinction between the privy vaults mentioned in said chapters 777 and 1407 on the one hand, and the cesspools and other arrangements for the reception of drainage on the other, that is not altogether apparent to us, but, inasmuch as such distinction is sought to be drawn, and as a privy vault is alone involved in this suit, our decision is limited to the constitutionality of the statute in question so far only as it refers to privy vaults mentioned therein. In conclusion we are of the opinion that chapter 777 of April 25, 1899, as amended by chapter 1407 of March 1, 1895, so far as it relates to privy vaults, being the only portion called in question in this case, is not in violation of the Constitution.

and preventing a nuisance, and for the benefit of the public health, will be enforced, although the use of the waters of the lake for boating, sailing, and fishing is not of itself injurious nor a nuisance, but as a necessary incident to or concomitant with such use, a considerable quantity of impure, objectionable, decayed, and decomposing matter, filth, and various excreta of the human body being deposited in the lake, thereby constituting it a nuisance. *Dunham v. New Britain*, 55 Conn. 573, 383, a similar case to the above.

The ordinance of a common council acting pursuant to power given to it by the legislature prohibiting under penalty, *inter alia*, boating, sailing, and fishing on a lake the water from which was used by the public for private as well as other purposes, was upheld as a means of preventing a nuisance, although the use of the waters of the lake for such purposes was not of itself injurious nor a nuisance, but might become so by reason of impure and objectionable and decayed and decomposing matter being deposited in the lake, the germs of infection and contagious diseases being thereby deposited at or near the entrance of the supply pipes, thereby communicating disease to those using the water for domestic purposes. *Dunham v. New Britain*, 55 Conn. 573, 383.

Under § 27, Pa. act Jan. 29, 1818, it is the duty of the board of health to cause all offensive or putrid substances, and all nuisances which may have a tendency in their opinion to endanger the health of the citizens, to be removed from the streets, lanes, alleys, highways, walks, docks, or any other part or parts of the city, and the expenses attending such removal are recoverable by the board in case due notice to remove has been given and neglected; and the claim of the board of health in removing a nuisance from a pond of stagnant water was held recoverable in the district court, even though such claim was less than \$100. *Kennedy v. Philadelphia Bd. of Health*, 2 Pa. 366.

In *Com. v. Reed*, 84 Pa. 278, 281, 75 Am. Dec. 661, it was alleged that the president and directors of the Erie canal created a nuisance in keeping up and maintaining, by damming the southern end of a certain swamp, a certain pond and reservoir as a part of their canal, by means of which several hundred acres of land were overflowed and the water of the pond and reservoir became stagnant, putrid, and noxious, occasioning unwholesome damps and smells corrupting and infecting the air, thereby creating a nuisance to the citizens, and the defendants contended that the alleged nuisance was created, constructed, and erected by authority and

in pursuance of the laws of the commonwealth. The court stated that works of internal improvement erected at the expense and by the officers of the state for the benefit of the citizens at large could never be regarded by the law as nuisances, the sovereign authority having expressly intended them to advance the prosperity of the community.

Under a charter conferring power, *inter alia*, to suppress all nuisances a city has power to pass an ordinance preventing the use of unwholesome well water in the making of bread, and to cause all wells upon the premises to be filled up. *State v. Schlemmer*, 42 La. Ann. 1166, 10 L. R. A. 135.

If the filling up of a ditch is the only means of accomplishing the abatement of a nuisance by the public authorities under the provisions of their ordinance passed pursuant to their charter, supposing the ditch to be a public nuisance, the powers of police under proper legislative sanction are sufficient to authorize it to be done, and any invasion of private interests by a reasonable exercise of the power must be submitted to by the owner as *damnum absque injuria*. *State, Rodwell v. Newark*, 34 N. J. L. 264, 267.

A city government has the right to fill up a creek or watercourse adjoining houses belonging to a party and in the occupation of a tenant for years, in order to abate a nuisance injurious to the health of the inhabitants, so long as they do not unlawfully interfere with private property, such a measure being a health regulation subject to which every citizen holds his property. *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421, 423.

An ordinance providing that every owner, occupant, or lessee of any stone quarry or premises theretofore used for quarrying stone therefrom within the city should cause the same to be filled with earth even with the surface of the ground before any excavation was made, or should cause the water therein to be drained therefrom and said quarries or excavations kept dry and the water prevented from accumulating or standing therein under certain penalty for each offense, to be sued for and recovered from the owner, occupant, or lessee thereof severally and respectively, was held to be a valid exercise of the powers conferred by the charter as a means of preserving the public health and preventing nuisances. *Rochester v. Simpson*, 134 N. Y. 414, *Reversing* 57 Hun. 86.

Where the nuisance consisted in large quantities of stagnant water standing in an open drain in a certain location, and notice was given by the board of health under the Massachusetts Statutes of 1868, chap. 160, and the board of health subsequently

SOUTH CAROLINA SUPREME COURT.

Town of DARLINGTON, *Rept.*,

v.

J. J. WARD, *Appt.*

(48 S. C. 570.)

1. An ordinance cannot be held invalid because it is unreasonable, when the power to pass ordinances on the subject is conferred by a constitutional statute.

2. An ordinance making it unlawful to keep any hog within the corporate limits of a town cannot be held void for unreasonableness under statutes giving power to define nuisances and to regulate and control the keeping of animals in the town.

(Moliver, Ch. J., and Pope, J., dissent.)

(March 26, 1897.)

abated the nuisance but it was not shown whether the drain was a public or private one, although there was evidence that it appeared to be a water-course it was held that it was too late upon petition for certiorari to object to the proceedings by the board. *Grace v. Newton Bd. of Health*, 135 Mass. 490, 497.

A city ordinance directing wells dug by the owners of property on their respective parcels of land and in the sidewalks, and furnished with pumps by them, especially where the water in such wells is found to contain six or more grains of chlorine to a gallon of water to be filled up, is a sanitary measure valid as a means of securing the general health of the inhabitants, and the prevention and abatement of nuisances, which power is vested in them under 2 Mo. Rev. Stat. p. 1555. *Ferrenbach v. Turner*, 86 Mo. 418, 419.

And under an ordinance, passed pursuant to an amendment to a city charter, directing the filling up of an old ditch to abate a public nuisance, authorizing the city council to direct the digging down, draining, filling up, or fencing of lots, etc., in all cases where the same is necessary to prevent or abate a nuisance, when the nuisance consists and results from the condition in which the bed of the stream is kept, and not from the fact that the bed of the stream is there situated, the action of the city should be directed to the condition in which the ditch is kept, and the abatement of that condition, rather than in filling it up and depriving the owners of its use, as the defeating of the use of such ditch for the legitimate purpose of draining and receiving waste water is an unreasonable and unnecessary invasion of private rights,—especially where the nuisance complained of can be remedied by the less severe method of compelling a proper outlet or drainage for the ditch. *State, Rodwell, v. Newark*, 34 N. J. L. 284, 287.

And it has been said that when the preservation of the public health is thought to require such acts, as the filling in of land or raising its grade over a considerable extent of territory or the covering of land with water, or the removal of dams and streams in order to allow better drainage, or to prevent the accumulation of offensive materials, it is usual to pass statutes giving the requisite authority and making due provision for the protection of the property of individuals, for the reason that the general power vested in boards of health and in city governments is not adequate to deal with such cases if it is impossible to come to an agreement with the owners of property to be affected. *Cavanagh v. Boston*, 139 Mass. 426, 433, 434, 52 Am. Rep. 716.

88 L. R. A.

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Darlington County dismissing an appeal from the mayor's judgment convicting him of violating a city ordinance forbidding the keeping of hogs within the corporate limits. *Affirmed.*

The judgment of the court below by BUCHANAN, J., was as follows:

"This case comes up on the appeal from the decision of the mayor fining the appellant for the violation of an ordinance forbidding the keeping of hogs within the corporation limits. Soon after the decision I made and filed a short memorandum of my reasons for the judgment rendered, but, owing to the scarcity of time and the absence of authorities at the moment, I have thought a more extended view of my reasons may not be amiss when the importance of the powers conferred by

A resolution of a city council requiring lotowners to fill and drain their lots in such a manner as may be necessary to remove therefrom all stagnant water is a valid exercise of the police power as a sanitary measure for preserving the health of the inhabitants, and is therefore constitutional, and will extend, not merely to the removal of such water as may be upon the lots at the time, but also to the subsequent gathering of stagnant waters. *Bliss v. Kraus*, 16 Ohio St. 54.

Neither a dam thrown across a stream of water nor a collection of water in a reservoir created thereby is a nuisance *per se*, but, on the contrary, they are sources of mechanical power, and tend to the diffusion of health, strength, and comfort to large numbers of people, and the water collected therein cannot in itself become detrimental or dangerous to the health of the population in the vicinity without other things combined, such as the presence of decayed and decaying vegetation, and its exposure in shallow basins to the evaporations of the summer heats, and therefore the question of nuisance or no nuisance depends upon the presence or absence of such extraneous facts and circumstances. *Rogers v. Barker*, 81 Barb. 447, 452.

The owner of premises may lawfully erect a mill dam on a river not navigable; and in such a case the dam will not *per se* be a nuisance, but whenever such dam is erected, managed, or carried on in such places or in such a manner as to become prejudicial to the health or comfort of others it becomes a public nuisance. *State v. Close*, 35 Iowa, 370, 573.

The resolution of a board of health which contemplates and intends nothing short of a total destruction of the property, such as a mill dam thrown across a stream without compensation to the owner, without notice of the proceedings by which it is devoted to destruction, without judgment of any judicial tribunal, and without due process of law, is invalid for the reason that the fact that such dam was injurious to others must be first established by the usual and customary proceedings, summary proceedings only being valid in cases of great and imminent emergencies, the mere fact of the boards declaring it to be a dangerous nuisance and detrimental to the health of the inhabitants being too vague and indefinite. *Rogers v. Barker*, 81 Barb. 447, 452.

In order to support a charge of creating a public nuisance in damming up and stagnating the water of a creek, it must be alleged and proved that the obstruction placed thereon produced a stagnation of the waters thereof in or near to a public highway or some other place in which the public

the recent act is remembered. The ordinance in question reads: 'That on and after December 31st, proximo, it shall be unlawful for any person or persons to keep any hog or hogs on any premises within the corporate limits of the town, and any person or persons so doing shall be punished by a fine of not less than \$10 or by imprisonment not exceeding thirty days, or both, at the discretion of the said board of health.' No question, as I understand, was made as to the latter part of the ordinance, the purpose being merely to test whether the town council have the power to pass an ordinance, forbidding the keeping of hogs within the corporate limits and punishable with fine. The appellant was fined \$20 for a violation of the ordinance. I have therefore confined myself simply to the points made which presuppose the proper passage and sufficient phraseology of the ordinance in question.

"The grounds of appeal raised before me

have such special interest, and a general conclusion that the stagnation of the waters does injury to the people of the commonwealth will not cure the want of such special averment. *Com. v. Webb*, 6 Rand. (Va.) 726, 729.

A pond in a city is a public nuisance where foul and malarial exhalations arise from the stagnant water, and from the sides and bed as the water is drawn off, and are intensified by the accumulation of filth which no police vigilance can keep out of the stream, and which the dam retains and holds. *Yonkers Bd. of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 485.

And the fact that a dam is made when the water of a stream is clean and pure will not prevent its abatement as a nuisance made by the growth of the city, and the consequent pollution of the water which has become an inevitable menace to the public health. *Yonkers Bd. of Health v. Copcutt*, 140 N. Y. 12, 23 L. R. A. 485.

An arrangement between a town and a person, under which an original dam was built, a bond being given to clear the town from any damage from the flowing of the water, and that the dam should never interfere with the town road, does not prevent the town from suing for damages occasioned by the dam interfering with the road and constituting a nuisance, neither will it prevent the town from recovering the damage done by the rebuilding of the dam to a greater height. *Grace v. Newton Bd. of Health*, 135 Mass. 490, 497.

And under the power contained in Minn. Spec. Laws 1881, chap. 38, under which a village was incorporated with authority, by ordinance, resolutions, or by laws, to remove and abate any nuisances injurious to the public health, and to do all acts and make all regulations necessary and expedient for the preservation of health and the suppression of disease, the 5th section of the 4th chapter of the act providing that the powers conferred upon the common council to provide for the abatement of any nuisance should not bar or hinder suits, prosecutions, or proceedings in any court of law, the common council may pass an ordinance prohibiting or abating a nuisance, such as opening the gates and sluices of a dam in the hot summer months and drawing the water from the pond, thereby converting the land into marshes and swamps, and causing the vegetable matter therein to decay and become decomposed in the hot sun filling the air with malaria, and causing sickness and death, and may enjoin such nuisance by proceedings in equity. *Pine City v. Munch*, 42 Minn. 342, 6 L. R. A. 763.

Under the 3d subdivision of the 14th section of 38 L. R. A.

are as follows: (1) That the ordinance by virtue of which the defendant has been fined is unconstitutional and void inasmuch as it takes from the citizens valuable rights in property without compensation. (2) That the said ordinance is without authority in law, and illegal. (3) That the said ordinance transcends the powers granted to the town council of Darlington and the mayor of the town, and is *ultra vires* and illegal. (4) That if the keeping of a hog by Mr. Ward was an offense, §§ 960-969, inclusive, of the Revised Statutes provide a way of dealing with the same, and that the said provision is exclusive of any other way of dealing with the said offense. (5) That the said ordinance is inconsistent with the laws of the state as laid down in §§ 960-969 of the Revised Statutes, and so is without authority of law and void. (6) That it is apparent that the keeping of the hog by Mr. Ward was not a nuisance, and it did not affect the health of the town.

the New York act empowering boards of health to make regulations in their discretion concerning, *inter alia*, the suppression and removal of nuisances, and all such other regulations as they deem necessary and proper for the preservation of the public health, the power has only reference to nuisances which may be the subject of regulation, and therefore the damming of a river is not in itself a nuisance; and the resolution of the board, declaring the same a dangerous nuisance, detrimental to the health of the neighborhood, and requiring the same to be removed within three days, is too indefinite and uncertain to authorize its removal, their statement not showing what the nuisance is, whether it is the dam itself or the waters collected above it. *Rogers v. Barker*, 81 Barb. 447.

So, municipalities have no power, upon the ground that it is a nuisance, as endangering the public health, to take proceedings without a trial or notice to the owner of a mill who, by virtue of a power vested in him under the act of the legislature, constructed a dam across a certain stream and conveyed the water from such dam to his mill by means of a race or ditch. *Clark v. Syracuse*, 13 Barb. 32.

In *Americus v. Mitchell*, 79 Ga. 807, 809, the question as to whether a mill pond was a nuisance or not was not determined, as before trial the mill-dam was swept away by a flood, the court stating that the Almighty had already abated the nuisance. In that case, however, the court passed upon the power of the city authorities, under their charter and ordinances, to define or determine whether a particular matter was a nuisance or not, and to abate it summarily if found to be one.

In *People, New York C. & H. R. R. Co., v. Seneca Falls Bd. of Health*, 58 Hun. 585, it was held that the proceedings of a board of health acting under chap. 270, N. Y. Laws 1836, as amended by Laws 1888, chap. 309, in requiring the company to make certain openings in its embankment so as to allow the water of a certain lake to flow freely through the same, was irregular when made without notice, the duties of the board in respect to inquiring into and determining whether or not a nuisance existed being quasi judicial in their nature.

b. Burial of the dead.

A cemetery is not a nuisance *per se* without proof of special circumstances making it such. *Musgrove v. Catholic Church of St. Louis*, 10 La. Ann. 431; *Bergin v. Anderson*, 28 Ind. 79, 81; *Lake View v. Letz*, 44 Ill. 81, 88; *Lake View v. Rose Hill*

"Every citizen holds his property subject to the proper exercise of the police power, either by the legislature directly or by public corporations to which the state legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'police laws or regulations.' And it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional. They do not appropriate private property for public use, but simply its proper use and enjoyment. *Dill. Mun. Corp.* §§ 146 *et seq.*, cited and approved in *Summerville v. Pressley*, 38 S. C. 62, 8 L. R. A. 854. It is perfectly clear if such an authority is given the town, that the exercise of such power would be unconstitutional.

"This leads us to a consideration of the second ground of appeal, which involves the consideration of exceptions 3 and 5. Was the town without authority to make and pass such an ordinance? It is to be observed that

the power sought to be exercised is a very common police power,—a power exercised for the health and comfort of a town. In addition to the powers given specifically to the town of Darlington by its charter and amendment, the powers conferred by §§ 960-969 of the Revised Statutes and the supplemental act of 1894 are invoked. Section 961 of the Revised Statutes gives local boards ample powers, among others, 'to define and declare what shall be nuisances to health in lots and streets,' etc., 'and to regulate and control the keeping or slaughter of all kinds of cattle, sheep, goats, and swine or other animals in any city or town or part thereof.' Again it says: 'And to prohibit and remove any nuisance or offensive matter in any public highway, road, street, or other place, public or private, in such city or town, and to cause the removal of the same at the expense of the owner thereof, if he decline to move it after notice.' Section 962 provides that such board of health shall notify the municipal authorities, who shall remove the same at

Cemetery Co. 70 Ill. 191, 195, 22 Am. Rep. 71; *Dunn v. Austin*, 77 Tex. 139, 144.

Burial places are indispensable and concern the public health, and are not the subject of absolute prohibition by legislative action. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 195, 196, 22 Am. Rep. 71.

As a place of interment of the dead is not necessarily a nuisance the question must depend upon the position and extent of the grounds, and especially upon the manner in which the burials are effected. *Ellison v. Washington Comrs.* 5 Jones, Eq. 57, 75 Am. Dec. 430; *Dunn v. Austin*, 77 Tex. 139, 144.

In *Barnes v. Hathorn*, 54 Me. 124, 138, it is said that a man may have a legal right to build a tomb on his own land, and such an act is not in itself and inherently a nuisance unless it becomes so from its locality and other extraneous facts.

The use of grounds for a cemetery either public or private is not unlawful, and when so used no nuisance is created, unless, from the manner of the use, the atmosphere surrounding other property is rendered unwholesome or offensive, or unless water in wells, springs, or reservoirs is injured by poisonous matter exhaled or otherwise thrown out, or unless the soil or other property through such use becomes impregnated with unwholesome or obnoxious matter from which injury results. *Dunn v. Austin*, 77 Tex. 139, 146.

Nor is the naked averment in proceedings for an injunction to restrain their establishment in proceedings by a town council, without the statement of sufficient reasons to render them so, sufficient to authorize proceedings for their abatement or suppression as such. *Begeln v. Anderson*, 28 Ind. 79, 81.

A power to prohibit the establishment of cemeteries, except by the authority of the trustees of the village or town, cannot be considered as falling within the power to abate and remove nuisances vested in them by the act of incorporation. *Lake View v. Letz*, 44 Ill. 81, 83.

Yet the powers given to municipalities "to make regulations to secure the general health of the inhabitants and prevent and remove nuisances" is sufficient to authorize the prohibition of burials and the discontinuance of graveyards in the populous districts of cities. *Campbell v. Kansas*, 102 Mo. 325, 350, 10 L. R. A. 593.

But a cemetery may be so placed as to be injurious to the public health, and may therefore be a

nuisance. *Lake View v. Letz*, 44 Ill. 81, 85; *Begeln v. Anderson*, 28 Ind. 79, 81.

The right of burial of the dead is not an absolute right of property but a privilege or license to be enjoyed so long as the place continues to be used as a burial ground subject to municipal regulation and control, and legally revocable whenever the public necessity requires it. *Page v. Symonds*, 63 N. H. 17, 12, 56 Am. Rep. 481.

The burial of the dead may be performed in such a manner as to be most injurious in its consequences to the people in the vicinity, and therefore laws may be passed to regulate the interment of the dead in order to prevent injury to the health of the community; and although a company formed for that purpose may be exercising franchises conferred by the state it is still within the legislative control. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 196, 22 Am. Rep. 71.

In *Concordia Cemetery Assn. v. Minnesota & N. W. R. Co.* 121 Ill. 199, 212, it was stated that the matter of burials was a proper subject of municipal regulation, although in that case the proceedings had no relation to the maintenance of a burial ground as a nuisance.

In *Com. v. Fahey*, 5 Cush. 408, the court upheld an ordinance of the city of Boston relating to burial grounds and the burial of the dead as being within the provisions of *Mass. Stat.* 1849, chap. 211, § 7, as being regulations relating to health.

And the regulation of cemeteries and burial grounds was looked upon as being within the exercise of the police power for the security of public health and safety, in *Woodlawn Cemetery v. Everett*, 118 Mass. 354, although in that case the main question of the court was a question of taxation of such grounds, and also the constitutionality of *Mass. Stat.* 1855, chap. 257, regarding the burial of the dead.

Under a charter giving the city power to make any and all regulations necessary to secure, protect, preserve, and restore the general health, and to prevent the introduction of contagious diseases and also to regulate the police of the city, and impose fines and forfeitures for a breach of such ordinances, the city has power to pass an ordinance regulating the burial of the dead. *Graves v. Bloomington*, 17 Ill. App. 476.

In *St. Peter's Episcopal Church v. Washington*, 109 N. C. 21, the court, without passing upon the validity of the ordinance, refused an injunction to restrain the city from enforcing the provisions

the expense of the owner where necessary. Section 8 of the act of January 5, 1895 (21 Stat. at L. 820), after reciting other powers, says: 'And by abating and removing all nuisances which they shall deem prejudicial to the public health.' Again: 'And make all such other regulations as they shall deem necessary for the preservation of the public health.' Section 8 of this act provides for the making of the rules and regulations necessary for the carrying of the powers granted into effect, and when approved as an ordinance such regulations shall have the same force and effect as other ordinances of the town. It then recited significantly: 'And all penalties for the violation thereof, as well as expenses necessarily incurred in carrying into effect the same, shall be recoverable for the use of the town or city in the same manner as penalties for the violation of their city ordinances subject to the like limitations as to the amount thereof.' Certainly the powers given in both the Revised Statutes and the act of 1895 are amply sufficient to prohibit

the keeping of anything that may be injurious to the health or comfort of the town. Could more power be given? If the act of 1895 is considered as supplementing the power given in the Revised Statutes, the powers are ample, and both abatement, fine, or imprisonment may be given in the sentence, unless such fine or imprisonment be for a higher sum or longer term than is justified by the charter of the town. If the act of 1895 repeals all prior legislation upon the subject, yet such act contains enough to empower the passing of such ordinance upon such subject.

"This brings us to a consideration of the sixth exception. What is the effect of the ordinance which was passed by the town council upon the recommendation of the board of health as required by 8 of the act of 1895? In this connection it is to be observed that, while such ordinance prohibits the keeping of a hog within the corporate limits, it does not in so many words call it a nuisance, although it treats such matter in the same manner as if it had been denominated a

of a city ordinance relating to the interment of the dead within the city limits, and the removal of dead bodies from such limits, even though it was alleged that such ordinance was void, leaving the parties to their remedy at law.

So, an ordinance may prohibit the future interment of the dead in an established burial ground as well as the removal of dead bodies therefrom, the same being within the police power of the state, for the reason that, although a burial ground in the infancy of a town may be outside of the limits thereof, yet its continuance as a place of interment upon the growth of the town may be a nuisance to the city. *Humphreys v. Front Street M. E. Church, South*, 100 N. C. 132, 138.

And an ordinance prohibiting the burial of the dead in any burial ground situated in a particular portion of the city was upheld as not conflicting with the Constitution and as being for the benefit of the public health and a proper exercise of the power vested in municipal bodies. *New York v. Slack*, 3 Wheel. Crim. Cas. 237. In this case, however, it did not appear that the act was specially declared a nuisance.

So, the trustees of a village or town under the act of incorporation may have a right to pass an ordinance regulating or restraining the use of any specific cemetery within its limits on the ground that its use will be injurious to public health and therefore a nuisance, and such an official determination on the part of the town authorities will be entitled to the respect that such municipal action always receives in courts of justice. *Lake View v. Letz*, 44 Ill. 81, 83.

In *People, Oak Hill Cemetery Assn., v. Pratt*, 129 N. Y. 68, 72, although it did not appear that the act constituted a nuisance, the court upheld the power of a common council to pass an ordinance prohibiting the burial of the dead in a cemetery within the city limits except in certain cemeteries named therein as being within the powers of a charter giving power to "make, modify, and repeal such ordinances, by-laws, and regulations as it shall deem reasonable within the said city" specifically mentioning those "to regulate the burial of the dead," such an ordinance being a police regulation.

In *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 305, an ordinance prohibiting the establishment of new burial grounds within the city limits was upheld as being within the power given to municipalities for the protection of the public security, welfare, and convenience. In 38 L. R. A.

this case also the act was not specifically declared a nuisance.

It has been stated that the removal of the dead is not a matter of public indifference, but affects the public health, and its regulation is strictly within the police powers of the state. *Re Wong Yung Quy*, 6 Sawy. 442, 447.

The right of the legislature to authorize the removal of the remains of the dead from cemeteries may be said to be well settled, and may be delegated to municipalities, being a police power necessary to public health and comfort. *Craig v. First Presby. Church*, 88 Pa. 42, 51, 32 Am. Rep. 417. To the same effect, *Kincaid's Appeal*, 66 Pa. 411, 420.

And the surviving relatives of the dead being entitled to their bodies as property, with a right to dispose of the same, cannot be permitted to create a nuisance, and therefore they may be required by city or town ordinance, especially in cases where the population is dense, to conform to certain rules and regulations in respect to the burial of the dead. *Bogert v. Indianapolis*, 13 Ind. 131.

Again, a municipal corporation, granting lands for the purpose of interment with a covenant for quiet enjoyment, will not be estopped by reason of such covenant from passing an ordinance or by-law, under the provisions of their charter, for the suppression of such interment as a nuisance, or for the public benefit and safety. *Coats v. New York*, 7 Cow. 585. To the same effect, *Stuyvesant v. New York*, 7 Cow. 588.

Therefore an ordinance passed pursuant to a state statute authorizing the corporation of a city to make various by-laws as deemed necessary and proper, for regulating, or, if they find it necessary, preventing, the interment of the dead within the city, which prohibits such interment within certain parts of a city under a penalty, is valid and operative as to such interments, the act being constitutional, not impairing the obligation of any contract, or taking private property for public use without compensation; such acts standing on the ground of an authority to make police regulations in respect to nuisances, even as against parties who have a right under grants of their title to land held in trust for the sole purpose of interment, some of which have been held and used for that purpose for more than a century, and to which certain fees are incident, interring bodies in the part of the city to which such by-laws related. *Coats v. New York*, 7 Cow. 585.

The supervisors, assessors, and commissioners of

'nuisance.' In this connection it bears a resemblance to the ordinance of the town council of Summerville for a violation of which Judge Pressley was fined. Assuming for the present that the town council had the power to pass the ordinance, no question can be made whether a 'nuisance' has been committed nor whether the restrictions complained of were necessary to accomplish the purpose in view. It was their exclusive right to judge what was 'necessary and requisite' to preserve the health of the town. *Summerville v. Pressley*, 38 S. C. 61, 8 L. R. A. 854. Again in the same case it was contended that the citizen 'was not bound to conform to the restrictions as to the amount to be cultivated for general agricultural purposes, without allegation and proof that such cultivation was negligent or of such a character as to create a nuisance. As it seems to us, this view ignores entirely the ex-

istence of the ordinance.' *Summerville v. Pressley*, 38 S. C. 61, 8 L. R. A. 854. So, here, that the hog is properly or cleanly kept is beyond the question. It may be now so kept, and may not be so kept in the future, or it may be so kept in the future. I can very well understand that, however well and cleanly kept a hog may be, the smell, the noise, indecent exhibitions, etc., may necessitate such an ordinance. This may be emphasized by reason of the levelness of the territory, the probability of smell being circumscribed or confined, or other circumstances showing a prepared and fertilized hotbed for the rapid growth and development of contagion upon its sudden arrival. The legislature having granted the power, the exercise of it, according to the decisions of the courts of this state, is left to the discretion of the municipal corporation, which discretion cannot be controlled

highways of an incorporated town, having powers for the purposes of municipal government to abate and remove nuisances, and punish the authors thereof by penalties, fines, and imprisonment, and to authorize and direct the summary abatement thereof, have no power to pass an ordinance forbidding the establishment of a cemetery, inasmuch as the preventive powers so vested in them can only be exercised in reference to those things which are nuisances in themselves, a cemetery not necessarily being in itself a nuisance. *Lake View v. Letz*, 44 Ill. 81, 88.

An act conferring upon the common council the power to establish cemeteries or burial places within or without the city, and to provide for the sanctity of the dead, and to prohibit interments except in cemeteries heretofore established by law, does not authorize the common council to prohibit the establishment of cemeteries or burial grounds by others without the corporate limits, nor does it give the city any jurisdiction or control over them so as to enable them to restrain the same as nuisances. *Begein v. Anderson*, 28 Ind. 79, 81.

So, where authority is conferred by special act of the legislature to purchase ground for the erection of a cemetery by a municipality, such cemetery not being a nuisance of itself, a municipal corporation has no power to abate the same upon the ground that it is or would become a nuisance and detrimental to the health of the city, the mere fact that it depreciates the value of surrounding property not affecting the case. *New Orleans v. Church of St. Louis*, 11 La. Ann. 244.

The provisions of Mass. Stat. 1832, chap. 150, establishing a board of health for a particular district, and regulating the burial of the dead, are invalid upon the ground that they invade the right of property under the guise of a police regulation for the preservation of health and the suppression of nuisances, such not being the manifest intent and purpose of the regulation. *Austin v. Murray*, 16 Pick. 121, 123.

In the English case of *Reg. v. Price*, L. R. 12 Q. B. Div. 247, 53 L. J. M. C. N. S. 51, 33 Week. Rep. 45, note, 15 Cox, C. C. 389, tried at the Cardiff assizes in the Queen's bench division in the high court of justices in February, 1884, it was held that a person who burns instead of burying a dead body does not commit a criminal act unless he does so in such a manner as to amount to a public nuisance at common law. From this case it would seem that the mere act of burning instead of burying a dead body is not a public nuisance in itself.

1. Dead animals.

A dead hog or steer or sheep is not *per se* a nuisance. 83 L. R. A.

See also 41 L. R. A. 219.

sance. River Rendering Co. v. Behr, 77 Mo. 98, 46 Am. Rep. 6.

So a dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. *Underwood v. Green*, 42 N. Y. 140, 142.

While a dead animal is not *per se* a nuisance, it may become so in a city; and under its charter a city may pass such ordinances as are necessary to prevent it from becoming a nuisance; but the city must in such legislation have a proper regard to the rights of the owner of such property. *River Rendering Co. v. Behr*, 77 Mo. 98, 46 Am. Rep. 6.

And until a dead animal does become a nuisance due regard must be had to the property rights of the owner. *Schoen v. Atlanta*, 97 Ga. 697, 33 L. R. A. 804.

But since it may become a nuisance of a very offensive and dangerous character unless some disposition is promptly made of it which will prevent its becoming so, municipal authorities need not wait until it has actually reached that stage before undertaking to deal with it as a nuisance. *Schoen v. Atlanta*, 97 Ga. 697, 33 L. R. A. 804.

Under §221, ¶227, Ill. Crim. Code (Starr & C.), p. 815, it is a public nuisance to cause or suffer the carcass of any dead animal or any other filth or noisome substance to be collected, deposited, or to remain in any place to the prejudice of others. *Seacord v. People*, 121 Ill. 623, 628.

Where the evidence showed that the effluvia emanating from the carcasses of dead animals and the filth there accumulated were so offensive as to render uncomfortable physically every one of the persons mentioned and others within the range of its effects, it was held a finding that the degree of discomfort produced by the noisome odors therefrom constituted it a public nuisance was correct. *Seacord v. People*, 121 Ill. 623, 629, 632.

In determining whether a nuisance which consists in causing or suffering the carcasses of dead animals, etc., to be collected, deposited, or to remain in any place to the prejudice of another, which establishments are *prima facie* nuisances, are really nuisances in fact, the location, whether convenient or otherwise, as well as the management and effect produced on the neighborhood, must be considered. *Seacord v. People*, 121 Ill. 623, 628.

And an ordinance of a city relating to the removal of the bodies of dead animals in such a way as not to become a public nuisance will be upheld. *Alpers v. Brown*, 60 Cal. 447.

A city has power to provide by ordinance for the removal of all dead animals, not slain for human food, from within the city limits, in such a manner as not to become nuisances, and therefore

by the courts, unless the exercise of the power violates some constitutional provision. *Kennedy v. Sowden*, 1 McMull. L. 326; *Crosby v. Warren*, 1 Rich. L. 385; *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 810; *State, Copes, v. Charleston*, 10 Rich. L. 502; *Sumnerville v. Pressley*, 33 S. C. 61, 8 L. R. A. 854. The two former cases grew out of ordinances prohibiting the running at large of hogs, etc. The first is valuable as showing an attempt to prove that the judgment of the town council was erroneous, and that 'hogs were the best of scavengers, and do their duty better than all the marshals the town ever had.' *Kennedy v. Sowden*, 1 McMull. L. 325. Surely if hogs running at large are injurious to the health of the town, the confinement of a hog in a town lot in summer time can be considered injurious, actual, or imminent.

"We have seen that such an ordinance did

an ordinance providing for the removal of such animals by a person designated by the authorities in cases where the owner neglects to remove the same within a specified time will be upheld as constitutional. *National Fertilizer Co. v. Lambert*, 48 Fed. Rep. 458, 462.

Yet the death of a domestic animal does not determine the owner's property, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench, or other inconvenience to the neighborhood the municipal authorities cannot arbitrarily deprive him of his property by giving it to another. *River Rendering Co. v. Behr*, 77 Mo. 98, 46 Am. Rep. 6.

A city has power by ordinance lawfully to prescribe that unless the owner of a dead animal, even though its carcass may be of some value, shall remove it, or cause it to be removed, beyond the city limits within a specified reasonable time, and to a specified reasonable distance, the municipal authorities may deal with such carcasses as a nuisance *per se*, and as such take charge of it and make such disposition thereof as will best conserve the public health. *Schoen v. Atlanta*, 97 Ga. 697, 33 L. R. A. 804.

Such authorities, however, have no right to prescribe that, after such removal beyond the limits within the time allowed, it shall be deposited at such place only as they shall designate, and therefore when the owner has, within the prescribed time, removed such carcass to a sufficient distance to prevent its becoming a nuisance, the municipal authorities have no further jurisdiction. *Schoen v. Atlanta*, 97 Ga. 697, 33 L. R. A. 804.

An ordinance of the city of Buffalo declaring the rendering of dead animals a nuisance and dangerous to the public health, and ordering the same to be immediately suppressed and prohibited within the city, which ordinance was duly published and a copy served upon the plaintiff, confers upon the board power to suppress the nuisance. *Cushing v. Buffalo Bd. of Health*, 13 N. Y. S. R. 783.

In *River Rendering Co. v. Behr*, 77 Mo. 98, 46 Am. Rep. 6, a city ordinance providing for the removal of the carcasses of dead animals from the streets of a city, giving to one person the right to make such removal and to convert the carcasses of all animals found dead in the city not slain for the purposes of food to his own use, which ordinance completely bars the owner's right to dispose of such animals, even before they become a nuisance, is unconstitutional and invalid for the reason that although the general assembly may confer upon the municipal authorities the power to abate nuisances and to declare what shall be deemed nuisances, yet such power cannot be so absolute as to be beyond the recognition of the courts to determine

not transcend the powers granted; that their exercise was constitutional. Is the remedy laid down by the Revised Statutes (abatement and removal) exclusive? It is plain to be seen that the act of 1895 gives the council power to inflict all penalties for the violation thereof, as well as expenses necessarily incurred in carrying into effect the same shall be recoverable for the use of the town or city in the same manner as penalties for the violation of the town or city ordinances, subject to the like limitation as to the amount thereof. If it were needed to show that the words 'penalties for the violation thereof' could include fines, we have only to look at our own case of *Crosby v. Warren*, 1 Rich. L. 386, 387. I conclude, therefore, from the law and evidence admitted that the appeal shall be dismissed. Let this report be inserted in the case on appeal, in lieu of the memorandum heretofore written."

whether it has been reasonably exercised in a given case or not, there being no right or necessity to take from a man his property and give it to another until such property is in such condition that it is, or is so used that it is likely to become, a nuisance, and until it has become a nuisance an opportunity should be given to the owner to change the use, or make such disposition of his property as will prevent the danger.

So, under an ordinance relating to the removal from any public place of any garbage or dead animal, making it unlawful for any other person than the contractor under the city ordinance to remove and dispose of dead animals, the property itself, which is the carcass of a dead animal, not being a nuisance, the owner thereof cannot be prevented from obtaining its value, and cannot be denied the right of making any disposition of it, as under police regulations the property of one man cannot be given to another, although a city may, as a sanitary measure, after giving a proper opportunity to dispose of such animals, authorize another to take them away and appropriate them to his own use, such measure being necessary in warm climates in order to prevent nuisances injurious to health; but although this may be so, yet the necessity of such ordinances will not justify a common council in so declaring all dead animals not killed for human food nuisances immediately after death. *State v. Morris*, 47 La. Ann. 1690.

And proceedings taken under the provisions of the ordinance regulating the abatement of nuisances are not justifiable, where the animals seized by the public authorities and disposed of under the city ordinance died from suffocation in transportation on the railroad, there being no evidence that they are offensive or dangerous in any way to the public health, or that the owner has abandoned or is unwilling to take proper care of them,—especially where they are taken away before the owner has an opportunity to take care of or remove such animals, and there is no evidence to show that there is any intention to make an improper use of them. *Underwood v. Green*, 42 N. Y. 140, 142.

Again, a city ordinance giving power to the city inspector to cause all putrid and unsound beef, pork, fish, hides, or skins, all dead animals and every putrid, offensive, unsound, or unwholesome substance found in any street or other place in the city, to be forthwith removed and disposed of by removal beyond the city, or otherwise, so as most effectually to secure the public health, in so far as it relates to dead animals, cannot be literally construed so as to give power to remove, with impunity, dead animals provided for food, the words, "dead animals," as used therein, when read in connection with the terms used and the object of the

The grounds of appeal were as follows:

"(1) Because the ordinance in question was not a reasonable or proper exercise of the police power vested in the board of health and the town council, and, inasmuch as it deprived the citizens of a valuable right in property without justification in police power and without compensation, is unconstitutional and void, and his honor, the circuit judge, should have so held, and he erred in holding to the contrary. (2) Because the keeping of his hog by the appellant was, as appears from the facts agreed on, not a nuisance detrimental to health and the requirement that he remove and keep it beyond the town limits without compensation, for the right so taken away was unjustifiable and unconstitutional, and the circuit judge should have so held, and he erred in not so holding. (3) Because his honor, the circuit judge, erred in holding the ordinance in ques-

tion constitutional, authorized by the powers vested in the board of health and the town council of the town of Darlington by the statutory law of the state and a reasonable exercise of the police power to preserve the health of the town; that, if an unreasonable exercise of the police power, its reasonableness could not be questioned by the court; and in dismissing the appeal. (4) Because the circuit judge erred in holding that the board of health of the town of Darlington at the date of the passage of the ordinance in question was authorized by law 'to define and declare what shall be nuisances to health in lots, streets, etc., . . . and to prohibit and remove any nuisance or offensive matter in any public highway, road, street, or other place, public or private,' etc. (5) Because the act of 1895, declaring the powers and the duties of boards of health, repeals all acts inconsistent therewith

ordinance, meaning such as are nuisances or dangerous or deleterious to public health. Underwood v. Green, 42 N. Y. 142.

A city has power under § 15, art. 3, of the Nebraska Constitution, to contract for the removal therefrom of dead animals, garbage, and other noxious and unwholesome matter for the prevention and abatement of nuisances. *Smiley v. MacDonald*, 42 Neb. 5, 27 L. R. A. 540, 545.

If a city has contracted for the removal of the bodies of dead animals from the city, it may recall such contract *in toto* in order to prevent a nuisance arising from such carcasses; and so, if it becomes necessary to make new regulations for the removal of such carcasses for the purpose of preventing a nuisance, the city has a right to require such new regulations to be carried out, provided they are not inconsistent with the party's essential rights under the contract. *Louisville v. Wible*, 84 Ky. 220, 226.

And the court will refuse an injunction to restrain one, acting under a contract made with the city, from removing animals which have died of disease, as, under § 62 of the Ohio Laws of 1852, cities of the first class have power to legislate and make all needful regulations to promote public health, prevent disease, and abate nuisances, it being within the power of the city council under such act to enact ordinances prohibiting dead animals from being carried through the streets without a permit, and also to contract with persons for the removal of such animals. *Morgan v. Cincinnati*, 12 Ohio L. J. 41.

A contract known as the dead-animal contract, which relates to the removal of dead animals not slain for human food, and provides for their being disposed of in such a manner as not to become a nuisance, is one within the competency of the municipality to make, as it is within the power of such body to provide for the health of its inhabitants, by causing the removal from the city limits of all dead animals not slain for human food. The California Constitution providing that any county, city, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with the general laws, the consolidation act of 1863 giving power to the board of supervisors to authorize a summary abatement of nuisances, and to make regulations for the preservation of the public health and the prevention of contagious diseases, and to provide by regulations for the prevention and summary removal of all nuisances and obstructions in the streets, alleys, highways, and public grounds of the city and county. *Alpers v. San Francisco*, 32 Fed. Rep. 503.

As to monopoly in garbage contract, see note to 88 L. R. A.

Smiley v. MacDonald (Neb.) 27 L. R. A. 541; and also *Walker v. Jameson* (Ind.), 28 L. R. A. 673.

As to garbage as a nuisance upon a highway or street, see note to *Hagerstown v. Witmer* (Ind.) — L. R. A. —.

3. The keeping of animals.

The principal case of *DARLINGTON v. WARD*, in holding an ordinance prohibiting *in toto* the keeping of any hog in the town, valid and reasonable as within the powers conferred by the South Carolina statute, is perhaps the strongest case that has yet been decided upon the question of municipal control over nuisances of this character. In the numerous cases discussed below, none will be found upholding such a stringent ordinance as the one in question in that case, but, on the other hand, cases will be found wherein such ordinances have been held void as too broad and sweeping in their provisions, and as being *ultra vires* in their general restrictions because they are not confined or restricted to such cases as are nuisances. See *McKnight v. Toronto*, 3 Ont. Rep. 224; *Ex parte O'Leary*, 65 Miss. 80. Other cases dealing with such animals as nuisances have clearly dealt with them as such, or the ordinances passed thereon have been mere regulations and partial restrictions on the keeping of such animals. This would seem to be the full extent to which the courts have previously gone, and it may be questioned whether such an ordinance as the one under discussion in the principal case is not too broad and sweeping a restriction upon the rights of the individual and of the public, as contended by the dissenting opinions of the chief justice and one of his associates.

Municipal corporations may legislate upon the restriction of the keeping of unlimited herds of swine and cows in a thickly populated district, and the keeping of such animals may be an occupation, and within certain limits may be detrimental to health and dangerous to the public safety, so as to amount to a nuisance. *Re Linehan*, 72 Cal. 114, 116.

Hogs may or may not be a nuisance, and any ordinance dealing therewith must be framed according to the fact that they are nuisances in fact. *Ex parte O'Leary*, 65 Miss. 80.

It has been held that a hog pen in a city is a nuisance. *Com. v. Van Sickle*, *Brightly* (Pa.) 69, 73; *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, 420.

The stench from a hogpen, in order to be a nuisance, must be offensive to a person of ordinary sensitiveness. *Burlingt. n v. Stockwell* (Kan. App.) 47 Pac. 968.

Where droves of live hogs were kept on certain premises in such numbers and for such length of time that the smell or stench arising from them proved an unquestionable nuisance the court or-

or contrary thereto, and provides a special mode for dealing with and removing nuisances detrimental to health, and this mode is exclusive of all others, and the circuit judge should have so held, and he erred in holding to the contrary. (6) Because the police power vested in the board of health and the town council, except in the case of actual nuisance, is a power to regulate, and not to destroy, and the ordinance in question is in excess of this power and so illegal and void, and it was error in the circuit judge not to have so held. (7) Because the circuit judge should have held that the ordinance in question was invalid, for the reason that it is not within the scope of the powers conferred by the legislature; has no substantial relation to the police, and ought to be subserved, and tends in no degree to accomplish that end; is unreasonable and oppressive; declares that to be a nuisance which manifestly

is not a nuisance; and invades the rights of the citizen protected by the general laws of the state without express authority so to do; and he erred in not so holding."

Messrs. Boyd & Brown for appellant.

Messrs. Woods & Macfarlan for respondent.

Jones, J., delivered the opinion of the court:

I think the judgment of the circuit court should be affirmed. I am unable to agree to the proposition so broadly stated in the opinion of Mr. Justice Pope as one sustained by authority and sound reason, *viz.*, that in order that the police power may be used by either the legislature or a municipal corporation there must appear affirmatively that its use is reasonable. The police power being confined to

dered the same to be abated. *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 256.

A piggery in which swine are kept in such numbers that their natural odors fill the air thereabouts and make the occupation of the neighboring houses and passage over the adjacent highways disagreeable or worse is a nuisance. *Com. v. Perry*, 139 Mass. 198; *Com. v. Kidder*, 107 Mass. 188, 192; *Reg. v. Wigr.* 2 Salk. 460, 2 Ld. Raym. 1168.

In *State v. Payson*, 37 Me. 361, the defendant was found guilty of a nuisance in keeping swine in a pen near the public highway so as to create noisome and offensive smells.

People locating their piggeries near a public road must take the necessary care to keep them in such a cleanly state as not to annoy the passengers along the road. *Com. v. Hutz*, *Brightly* (Pa.) 75, note.

And if it is shown that the stench from hogpens is a public nuisance, the fact that such pens are kept as clean as they can be under the circumstances affords no defense. *Burlington v. Stockwell* (Kan. App.) 47 Pac. 968.

The keeping of a hogpen may be a nuisance, and as such a violation of criminal law; one which was punishable as a nuisance at the common law, and which is punishable under the Kansas statute. So held in *Re Bolts*, 80 Kan. 758, in which case the city charter authorized the city council to make regulations to secure the general health of the city and to prevent and remove nuisances.

So, an ordinance declaring hogpens to be a nuisance, and providing for their removal, is a valid exercise of police power. *St. Louis v. Stern*, 8 Mo. App. 48, 55.

And if a person violates an ordinance which provides the rules or regulations of the board of health as to the keeping of hogs, by keeping one hog not for the purposes of commerce, he creates a nuisance, because of the rule or regulation of the board of health, such ordinance being reasonable and valid, even though it makes the offense a misdemeanor, and although the pen being clean there is no nuisance by reason of filth. *State, Cedar Rapids v. Holcomb*, 68 Iowa, 107, 56 Am. Rep. 852.

Where the defendant was charged with unlawfully and injuriously making, erecting, setting up, continuing, and using a certain inclosure, pen, or lot of ground in which cattle and hogs were confined, fed, matured, and retained, and the excrements, decayed food, and other filth retained upon and within such inclosure, which employment or use of an inclosure occasioned noxious exhalations, offensive, unwholesome smells, so that the air was then and there greatly corrupted and infested thereby, and other annoyances becoming and being dangerous to the health, comfort, and

property of the people residing in the immediate neighborhood, and that the same was dangerous to health and comfort as being a common and public nuisance, it was held that the same was a nuisance under § 4409 of Iowa Rev. Stat. as well as at common law. *State v. Kaster*, 35 Iowa, 221.

So, where the defendant was charged with keeping within the city sundry pens wherein he confined horses, mules, cattle, sheep, and hogs, and by reason of their filth and excrement unhealthy and pernicious smells were occasioned, and the air was greatly corrupted and infested, he was held guilty of creating a nuisance, even though such business had been carried on by him for thirty years, and when first created was entirely outside of the city limits. *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 618.

Under Mass. Gen. Stat. chap. 26, §§ 2, 5, in default of appointment of a board of health, the city council constitutes such board, and has power to make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth, and causes of sickness, and under such power a by-law, passed by such council, prohibiting the keeping of swine within particular districts of a city, is reasonable and valid, the keeping of swine not being a trade within the meaning of §§ 52, 60, of chapter 26 of such statutes. *Com. v. Patch*, 97 Mass. 221.

A city ordinance prohibiting the keeping of swine within certain parts of a city is a reasonable exercise of the power vested in municipal corporations, being for the protection of the inhabitants and travelers from offensive and unwholesome smells and for the prevention of nuisances, the city council, in default of the appointment of any other, constituting the board of health, and as such has the power to make necessary regulations respecting nuisances, sources of filth, and causes of sickness. *Com. v. Patch*, 97 Mass. 221, 223, 224.

And under § 52, chap. 26, Mass. Gen. Stat., the board of health has power from time to time to assign certain places for the exercising of any trade or employment which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates, and may prohibit the exercise of the same in places not so assigned, and may also forbid the exercise of such trade or employment within the limits of the town, or in any particular locality thereof.

And the regulation of the Massachusetts board of health in 1881, with regard to the keeping of swine, is within the above section of the statute, the keeping of swine within a prohibited district

legislation for the public health, the public morals, and the public safety, whether a particular regulation falls within the scope of the police power is necessarily a judicial question, but, falling within this scope, whether the regulation is reasonable is not a judicial question. It is sometimes asserted by courts that a police regulation may be declared void because it is unreasonable, but this view is not sound, in my judgment. Courts "cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." No act of a legislature can be declared void or unconstitutional unless it conflicts with some provision of the Constitution. Nor can any ordinance of any municipal corporation within the power conferred by the legislature, and not in conflict with the laws and Constitution of the state, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void, because un-

reasonable, will disclose that the attempted police regulation violated some constitutional guaranty. The right asserted by some courts to declare a municipal ordinance invalid because unreasonable is limited to ordinances passed under the implied or incidental powers of the municipality. In such cases I think the true thing is that such ordinances may be declared invalid only when they are so clearly unreasonable, oppressive, or violative of common right as to justify a court in concluding that the legislature did not intend to grant such power in the charter. In the last analysis it is a question of legislative intent, and not a question of reasonableness. But, whatever may be the rule in reference to the implied power of a municipality, I think it is clear that when the legislature, having power to authorize, does empower a municipal corporation to pass such ordinances on a specified subject, as they deem necessary to promote the particular

being an employment within the terms of such statute which may be abated as a nuisance. *Com. v. Young*, 135 Mass. 523.

And an order and notice containing a sufficient direction to the defendant under Mass. Pub. Stat. chap. 80, §§ 18-22, to abate a nuisance consisting in the keeping of hogs within forty-eight hours from the service of the notice, is good and is not rendered invalid by the addition of the further direction to remove the hogs, and therefore the authorities are justified in compelling the removal of the nuisance as being injurious to health and a source of filth. *Com. v. Alden*, 143 Mass. 118.

So, the board of health have authority to forbid the exercise of the employment of keeping swine in a town although the order is qualified by the words "without a permit in writing first obtained from the board of health," under Mass. Pub. Stat. chap. 80, § 84. *Quincy v. Kennard*, 151 Mass. 563.

In *Pierce v. Bartrum*, 1 Cowp. 299, a city ordinance providing, *inter alia*, that no butcher should keep swine within the walls of the city, nor any stinking filth, garbage, or annoyance within his house, outhouse, or backside, was upheld as not in restraint of trade, but as a regulation made in confirmation of the charter, and therefore reasonable.

A by-law made by a town council, under the provisions of § 90 of the English municipal corporation act, 5 & 6 Wm. IV. chap. 78, which prohibits the keeping of pigs or swine within the borough from the 1st of May to the 31st of October inclusive is invalid as being against the keeping of pigs generally, the court stating that by-laws of that kind always have the qualification "so as to be a nuisance." *Everett v. Grapea*, 3 L. T. N. S. 659.

Under the English public health act of 1875, § 47, it is an offense to keep swine so as to be a nuisance within the common-law meaning of the term, and it is not necessary that there should be injury to health. *Banbury Urban Sanitary Authority v. Page*, L. R. 8 Q. B. Div. 97, 51 L. J. M. C. N. S. 21, 45 L. T. N. S. 759, 30 Week. Rep. 415, 46 J. P. 184.

In *Chelsea v. King*, 34 L. J. M. C. N. S. 9, 17 C. B. N. S. 623, 10 Jur. N. S. 1150, 11 L. T. N. S. 419, 13 Week. Rep. 157, it was held that § 68 of the English statute, Geo. III. chap. 29, for the suppression of nuisances in keeping of pigs within 40 yards of any street whether the same be a nuisance or not, within a certain district of the metropolis, was a power of prevention and not of suppression, and did not therefore apply to a larger district mentioned in statute 25 & 26 Vict. chap. 102, § 78, whereby the power of improving and regulating streets and for the suppression of nuisances contained in the prior statute were applied to a larger district.

So, a by-law of the city providing that no person

shall keep, nor shall there be kept within the city, any pig or swine, or any piggery, is *ultra vires* as being a general prohibition, and not restricted to such as are a nuisance. *McKnight v. Toronto*, 3 Ont. Rep. 234.

And a city ordinance which declares the erection of hog-pens within any inclosure in the city limits, or the permitting of hogs to run at large within any lot or inclosure in a city, except at slaughter pens authorized by the board of aldermen, and all hog-pens or lots now used as such, to be nuisances and provides for the abatement thereof, is too broad and sweeping in its provisions, and is therefore invalid. *Ex parte O'Leary*, 65 Miss. 80.

Under the police power, in order to prevent nuisances, city authorities have a right to pass ordinances regulating the keeping of dogs. *Blair v. Forehand*, 100 Mass. 136, 139, 1 Am. Rep. 94; *Partbault v. Wilson*, 34 Minn. 254; *Morey v. Brown*, 43 N. H. 373; *Mitchell v. Williams*, 37 Ind. 62; *Carter v. Dow*, 16 Wis. 239; *Tenney v. Lena*, 16 Wis. 566; *Ex parte Cooper*, 3 Tex. App. 439.

In *Com. v. Steffee*, 7 Bush, 161, an ordinance regulating the keeping of dogs and providing for the consequences of damages occasioned thereby was upheld under the charter authorizing the public authorities to pass any police laws for security and comfort consistent with the Constitution and laws of the state, although such ordinance did not constitute such keeping specifically a nuisance.

So, the keeping of a ferocious dog in such a manner as to allow it to go at large and become dangerous and an annoyance and terror to the neighborhood or to the public is a nuisance. *Com. v. McClung*, 3 Clark (Pa.) 413.

And an ordinance providing for the muzzling of dogs or for the keeping of the same upon the owner's own premises, and authorizing the killing of such as are found at large, passed pursuant to a charter giving power to declare, prevent, abate, and remove nuisances, was upheld in *Haller v. Sheridan*, 27 Ind. 494.

As to the right to kill dogs, see *note to Hubbard v. Preston* (Mich.), 15 L. R. A. 249.

Where the state Constitution gives power to a county, city, town, or township to make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with the general laws, and an act of the state legislature confers power upon the board of supervisors of the city and county to authorize and direct the summary abatement of nuisances, and to regulate the preservation of the public health and the prevention of contagious diseases, a city ordinance prohibiting the keeping of more than two

object, and such ordinances are passed within the power conferred, the courts have nothing whatever to do with the reasonableness of the ordinances. Stated more briefly, a municipal ordinance, within the constitutional grant of the legislature, cannot be impeached in court for unreasonableness. The doctrine of judicial interference with town ordinances, on the ground of unreasonableness, has not been affirmed before in this state. On the contrary, our own cases repudiate the doctrine. In *Crosby v. Warren*, 1 Rich. L. 887, the court said: "The act gives the power to pass by-laws on the subject of streets, health, and good order, subject to the restrictions that they shall not be inconsistent with the laws of the land and legislative revision. On these subjects, and with these restrictions, their power is unlimited; and, if in their judgment the hog license to run at large be injurious to the streets or health of the citizens, they

have a right to legislate on the subject, and pass laws for the removal or abatement of it, as a nuisance." In this opinion all the court concurred except Judge Wardlaw. He, however, in his dissenting opinion, said: "An apprehension that hogs might become nuisances, in vulgar phrase, that is, troublesome and disagreeable, formed no doubt the reason, and perhaps a very sufficient reason, why the council desired to prevent their coming within the corporate limits. Of that, as a matter affecting, or supposed to affect, the welfare and convenience of the village, the council were the judges, and their decision is just as binding, if it be erroneous, as it would be if it were correct, provided they adopted such means to effect their purpose as the charter authorized. Within the range of subjects to which their power of legislating extended, and not opposing the law of the land, their discretion is the rule; they may direct and may prohibit." In

cows within certain limits within the city and county was held valid. *Re Linehan*, 72 Cal. 114, 116.

So, a by-law of a city providing that no cow shall be kept in any stable situated at a less distance than 40 feet from the nearest dwelling house, and where two cows are kept that the stable shall not be less than 80 feet from such dwelling house, is reasonable and unobjectionable. It not being necessary to declare expressly that the keeping of cows within such a distance is or may be a nuisance, although the prohibition is in effect such a declaration. *McKnight v. Toronto*, 8 Ont. Rep. 284.

In *State v. Mabner*, 48 La. Ann. 496, a city ordinance prescribing the limits within which dairies might be conducted by permission of the city council, and making it unlawful to keep more than two cows without a permit of the city council, was held not to be general in its operation as it did not affect all citizens alike who followed the same occupation, inasmuch as it was only those who kept more than two cows without permission who were subject to the penalties, and therefore the ordinance was unconstitutional and void.

And the same construction was put upon a similar ordinance in *State v. Dulaney*, 48 La. Ann. 500.

Under a statute declaring by implication the keeping of animals with the glanders to be nuisances, and directing the summary killing thereof, all horses are not declared nuisances. *Miller v. Horton*, 152 Mass. 540, 543, 10 L. R. A. 116, decided under Mass. Act of 1887, section 12.

In *Newark & S. O. Horse Car R. Co. v. Hunt*, 50 N. J. L. 308, the plaintiff claimed damages against the defendants for killing certain horses belonging to him, the defendants justifying their action under the provisions of the supplement to an act establishing a state board of health and preventing the spreading of glanders in horses, and making horses afflicted with that disease common nuisances, and authorizing the destruction of the same; and the court upheld the constitutionality of the acts as being within the police power, even though they authorized the summary abatement of such nuisances, the act leaving the question of justification in the killing of such animals open to proof.

Where the owner of a horse denies that the horse falls within the class declared to be nuisances, the legislature may not make the *ex parte* decision of the board conclusive upon it, and such determination is no defense in an action by the owner for compensation. *Miller v. Horton*, 152 Mass. 540, 543, 10 L. R. A. 116.

And under a city charter giving the authorities power to prevent and remove nuisances, an ordinance which prohibits the showing or exhibiting of

certain horses in the town is within the power, such horses being a nuisance. *Nolin v. Franklin*, 4 Yerg. 163.

But in regard to the keeping of such horses it has been stated that to constitute a public nuisance it must be in a public place, or in such a place as the public can come within range of it. *Ex parte Robinson*, 30 Tex. App. 493, 495, wherein the keeping of such a certain horse within the town was done in such a manner that the public could neither hear nor see.

Although by articles 408 and 408 of Tex. Rev. Stat. authority is given to cities to pass ordinances for the abatement of all nuisances affecting the public health or comfort, and to punish the authors in a manner defined thereby, and article 383 gives them power to license, tax, and regulate trades, professions, occupations, and callings the taxing of which is not prohibited by the Constitution, the keeping of such a horse is not in contravention of the laws and purposes of the state, and therefore an ordinance which declares such keeping to be a nuisance is invalid. *Ex parte Robinson*, 30 Tex. App. 493, 495.

See also *Cook v. Buffalo*, 16 N. Y. Week. Dig. 3, and *Johnson v. Simonton*, 43 Cal. 242, *supra*, II. a.

Upon the question of statutory regulations respecting infected animals, see *note to Grimes v. Eddy* (Mo.) 28 L. R. A. 638.

E. Articles of food.

The by-law of a town council of a borough providing that any butcher or dealer in meat, or any fishmonger, poulterer, or other person exposing or offering for sale on his premises, or having in his possession with intent to sell or expose for sale, any meat, fish, poultry, or other victuals or food unfit for the food of man, shall be subject to a penalty to be recovered before the justices, who shall decide of the unfitness, applies to a grocer exposing cheese upon his premises found to be unfit for food; the exposing for sale, or having possession of with intent to sell, things unfit for food, being a nuisance at common law, the by-law being within the powers of § 90 of the municipal corporation act. 5 & 6 Wm. IV. chap. 76. *Shillito v. Thompson*, L. R. 1 Q. B. Div. 12, 45 L. J. M. C. N. S. 18, 33 L. T. N. S. 503, 24 Week. Rep. 57.

The English public health act of 1875, §§ 116, 117, gives power to a medical officer of health or an inspector of nuisances to seize meat exposed for sale or deposited in any place for the purposes of sale or in preparation for sale, and intended for the food of man, which appears to be diseased or unsound and taken before a justice who has power to condemn the same and order it to be destroyed if

Heisembrittle v. Charleston, 2 McMull. L. 236, the court said: "Such regulations are sometimes apparently tyrannical, but they must be submitted to as necessary police regulations. If they are tyrannical and unnecessary, the popular will can repeal them through the city council, or, if redress should fail there, by an appeal to the legislature." In *Charleston v. Ahrens*, 4 Strobb. L. 256, the court said: "This court, of course, has nothing to do with the policy of the ordinance. It may be very unjust, oppressive, and partial, or it may be one of those wise measures of prevention which experience has rendered necessary to circumvent the cunning of those who look more to their private gain than the interest of society." In *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 810, the court said: "It is sufficient to establish the grant that the power is or may be necessary for the welfare and government of the city. The city council has exclusively the authority to determine when the occasion may exist for its exercise, and the manner in which it should be applied. If an ordinance be exceptionable on these grounds, an appeal against its enforcement lies only to the corporators." In *Summerville v. Pressley*, 83 S. C. 61, 8 L. R. A. 854, the court said: "Assuming, for the present, that the town council had the power to pass the ordinance, no question can be made whether 'a nuisance' had been created, nor whether the restrictions complained of were necessary to accomplish the purpose in view. It was their exclusive right to judge what was necessary and requisite to preserve the health of the town." The case of *State, Columbia Electric Street Light & P. Co., v. Sloan*, 48 S. C. 21, is in harmony with the foregoing expressions, for the court declared the city ordinance questioned in that case valid, as within the municipal power, not in any wise because it appeared to the court to be reasonable, for the court expressly stated that "the question whether the ordinance is reasonable is not before the court for consideration." I think the case of *Summerville v. Pressley*, 83 S. C. 61, 8 L. R. A. 854, is conclusive for affirmance in this case. It is impossible, on principle, to distinguish that case from this. I cannot see how the recital in the Summerville ordinance that "it is necessary for the protection of the public health of Summerville that the soil should not be cultivated beyond a limited extent" differentiates that case from this, in which the ordinance in question contains no recital of the reason or necessity for its enactment.

so found to be diseased. It has been held that such meat might be so taken and condemned without summons or notice to the person to whom it belonged. *White v. Redfern*, L. R. 5 Q. B. Div. 15, 49 L. J. M. C. N. S. 19, 41 L. T. N. S. 524, 28 Week. Rep. 168, 44 J. P. 87.

And under that statute a person having in his possession unsound meat intended for the food of man may be convicted, even though he may not have exposed the meat for sale. *Mallinson v. Carr* [1891] 1 Q. B. 49.

In *Daly v. Webb*, Ir. Rep. 4 C. L. 309, 18 Week. Rep. 631, diseased meat had been placed upon a cart and was passing along the streets of a city from a slaughter house to the place where it was to be manufactured into preserved meats, and was seized by the inspector of nuisances. It was held that his action was justifiable, the meat when

placed upon the cart being exposed for sale and intended for the food of man within the meaning of Eng. Stat. 26 & 27 Vict. chap. 117, § 2, which gives power to the medical officer of health or the inspector of nuisances to make such seizure.

Unless there is some law making it essential to the validity of a town ordinance that it contain such recitals, a court is bound to assume that the lawmaking body thought it expedient or necessary, all this being implied from the mere fact of enactment. Besides, the record before us states that the ordinance in question here is "a health ordinance of the town of Darlington adopted as required by law, and now in force." In the *Summerville Case*, 83 S. C. 61, 8 L. R. A. 854, Judge Witherspoon held that the duty of the court was limited to the inquiry whether or not the power existed, and, if so, whether or not its exercise violated any constitutional provision, and his judgment sustaining the ordinance was affirmed. Justice McGowan, speaking for this court, quoted with approval from *Harrison v. Baltimore*, 1 Gill, 264, the following language: "Of the degree of necessity for such municipal legislation the mayor and city council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians," etc.

Whatever, therefore, may be the law elsewhere, I think it is settled in this state that a municipal ordinance enacted within the power conferred by a constitutional act cannot be declared invalid because it is unreasonable. The ordinance in question here is clearly within the legislative grant, and it has not been shown that any constitutional provision has been violated thereby. But even granting the right of the courts to inquire into the reasonableness of an ordinance, the judgment below ought to be affirmed. Whether a particular ordinance is reasonable is a question of fact to be determined by the circumstances of the particular town or city, the objects in view, the necessity for its enactment, its tending to accomplish the purpose in view, etc. The evidence must be addressed to the trial court. This is a case at law, and it is well settled that this court will not reverse the judgment below on a question of fact in a case at law. According to the facts agreed on, Mr. Ward's inclosure wherein the hog was kept embraced about 2 acres in the town of Darlington. There is no report against Mr. Ward for keeping his premises in an uncleanly condition, which appear to the health officer who examined same to be clean and in proper general condition. The charge against him is for keeping the hog on the premises in

placed upon the cart being exposed for sale and intended for the food of man within the meaning of Eng. Stat. 26 & 27 Vict. chap. 117, § 2, which gives power to the medical officer of health or the inspector of nuisances to make such seizure.

An ordinance prohibiting butcher's meat being sold within the corporate limits except in a public market was held valid as being for the benefit of health and good order. *Winsboro v. Smart*, 11 Rich. L. 551. In this case, however, it did not appear that the market was determined to be a nuisance, or that the power of a corporation to deal with it as a nuisance arose except in the arguments of counsel.

As to power of municipalities to regulate markets, see note to *State v. Sarradat* (La.) 24 L. R. A. 534.

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violation of the ordinance. Mr. Ward admits keeping the hog on the premises, but denies the power of the council to pass and enforce the ordinance in question. It was admitted or stated in the "case" that the ordinance is a health ordinance. Upon this evidence the court was asked to declare the ordinance void. The circuit judge disposed of this in the following language: "So here that the hog is properly or cleanly kept is beyond the question. It may be now so kept, and may not be so kept in the future, or it may be so kept in the future. I can very well understand that, however well and cleanly kept a hog may be, the smell, the noise, indecent exhibitions, etc., may necessitate such an ordinance. This may be emphasized by reason of the levelness of the territory, the probability of smell being circumscribed or confined, or other circumstances showing a prepared and fertilized hotbed for the rapid growth and development of contagion on its sudden removal." If we had the power, can this court say upon the evidence that the circuit judge erred in finding, in effect, that the ordinance was reasonable and necessary? The presumptions are all in favor of the reasonableness of the ordinance. The burden of showing that the ordinance is not reasonable is upon him who assails it. What evidence was before the court to show the ordinance to be unreasonable, sufficient to override the implied fact of reasonableness and necessity, arising from the enactment of a health ordinance on the recommendation of a board of health charged with the duty of preserving the public health? Is the power of a town council to preserve the public health to be measured by the size of Mr. Ward's lot? Does the cleanly condition in which he keeps his premises relate in any way to the question whether the keeping of hogs within the limits of Darlington is or may become prejudicial to the health of the people of the town?

The judgment of the Circuit Court stands affirmed.

Davy, J., concurs.

Pope, J., dissenting:

The town council of Darlington, in this state, by an ordinance adopted on the 24th day of June, 1895, declared that it should be unlawful for any person to keep any hog or hogs within the limits of the town of Darlington after the 1st day of January, A. D. 1896, and that any person who shall transgress this ordinance shall be punished by a fine of not less than \$10 or by imprisonment not exceeding thirty days. The defendant, J. J. Ward, violated this ordinance by keeping one hog in said town, which hog was allowed to run at large in a lot of 2 acres owned by said J. J. Ward. Mr. Ward was summoned for trial for said offense, and, appearing before the mayor according to the summons, admitted that it was true that he kept such hog on a 2 acre lot in said town, but denied that he was guilty of any offense thereby; that neither the board of health nor the town council have the power to pass the ordinance in question. He was adjudged guilty, and ordered to pay a fine of \$20. From this judgment he appealed to the circuit court. When this appeal was heard it was dismissed, and he now appeals from such judgment to this

court. The judgment of the circuit court and the grounds of appeal will be reported.

In considering this appeal I admit I have been greatly perplexed. Certain it is that the right of property is here involved, and it is equally certain that the power of the governmental agencies to protect public health is also hereby involved. If the question could be narrowed down to a question of private right, as opposed directly by the rights of the public, I should have no difficulty in subordinating the former to the latter, for in *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L.

808, this court held: "It is the office of the judges to make such a construction as will redress the mischief and advance the remedy; . . . that the law will never, by any construction, advance a private interest to the destruction of a public; but, on the contrary, will advance the public interest as far as it is possible, though it be to the prejudice of a private one." The case just cited arose from these facts: The corporation of the Wentworth Street Baptist Church was organized after the year 1836. It owned a lot of land in the city of Charleston, which it desired to use as a burial ground for its members. But the city council, in the year 1836, had by ordinance declared it unlawful to so use any lot of land in said city except in certain instances. When, therefore, the church asserted its right to use its land as it pleased by burying its dead therein, this suit was brought to prevent such use, and the court held that the private right must be subordinated to that of the public, and the church was compelled to desist from such burials.

Of course, the police power is made thus to subordinate private rights to those of the public. In our own state there have been repeated recognitions of this law, when in the hands of municipal corporations, which have derived their right to its exercise, within their limits, by express grant from the general assembly of the state. Primarily, of course, this right exists in the latter body. These decisions have related to sales of intoxicating liquors; to the regulations of burials in towns and cities; to regulations touching the observance of the Sabbath Day; to the roaming at large, upon the streets of incorporated cities and towns, of horses, cattle, and swine; to the regulation of the area of land in said towns and cities which may lawfully be cultivated; and also, to the presence of a conductor upon street-railway cars when electricity was the motive power; and other kindred subjects. *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410; *State, George, v. Aiken*, 42 S. C. 222, 26 L. R. A. 345; *Charleston v. Wentworth Street Baptist Church*, 4 Strobb. L. 806; *Charleston v. Benjamin*, 2 Strobb. L. 508; *Kennedy v. Souden*, 1 McMull. L. 328; *Crosby v. Warren*, 1 Rich. L. 385; *Summerville v. Pressley*, 33 S. C. 56, 8 L. R. A. 854; *State, Columbia Electric Street R. Light & P. Co., v. Sloan*, 48 S. C. 21.

The exercise of this police power by the state legislature, or the cities or towns where the legislature clothes them with the right to exercise this power, is not questioned by the appellant here. His contention is that this police power cannot be exercised by the legislature

itself, nor by its creatures, known as municipal corporations, without restraint. In other words, his proposition is that, in order that police power may be used by either the legislature or municipal corporations, there must appear affirmatively that its use is reasonable. I must confess that there is not only authority, but sound reason, for this contention. As was well said by Mr. Justice Miller in announcing the unanimous conclusion of the United States Supreme Court in the case of *Yates v. Milwaukee*, 77 U. S. 10 Wall. 505, 19 L. ed. 987: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or the state, within which a given structure can be shown to be a nuisance, can by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." Similar views were expressed in the case of *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, and in the very recent case of *State, Columbia Electric Street R. Light & P. Co., v. Sloan*, 48 S. C. 21, Mr. Justice Gary held: "It is not necessary to cite authorities to sustain the general proposition that street railways are subject to *reasonable regulations* by the authorities of the municipality, where they are located, under its police powers." (Italics mine.) "In this case, whether the ordinance is *reasonable* is not before the court for consideration." (Italics mine.) From this quotation it would seem that the majority of this court regarded that it was necessary that such regulation by the city council of Columbia of street railways should be reasonable. Now, in a densely-populated city, it would be entirely reasonable to forbid the presence of a hog in any inclosure; but in a small town such as Darlington, where, as it appears from the "case" itself, Mr. Ward has a lot of 6 acres whereon he resides, fronting on the principal street for residences, it might be another matter altogether. The health officer of the town of Darlington reports Mr. Ward's premises as cleanly and in proper condition. Is there anything in the habits of this animal to put it under the ban? Certainly nothing in the record here discloses any such objection. The decision of the board of health so declares, and the town council enforces by its ordinance such declaration of the board of health. Is the property of the corporators thus to be held at the mercy, so to speak, of these governmental agencies? It is true that the maxim of the law is *Sic utere tuo ut alienum non laedas*, but how is it made to appear that one hog in a large lot infringes upon the rights of the public as to health? From time immemorial in this commonwealth the right to own hogs has been recognized in the citizen. Is this right of property to be struck down upon the simple *ipse dixit* of a board of health or town council without any showing whatever that the presence of this species of property is prejudicial to health in a thinly settled town? If courts have the right to inquire into the reasonableness of an exercise of the police power in any given case, surely this is an instance where the same should be done. We would be under-

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stood correctly. This ordinance of the town of Darlington does not pretend to exercise control or regulate the manner in which a hog is kept by any corporator. It denies absolutely his right to keep the same within the town. We recognize the distinction so clearly pointed out in the case of *McCullough v. Brown*, 41 S. C. 220, 23 L. R. A. 410, including the dissenting opinion therein, and also that of *State, George, v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, existing between alcoholic liquors and lotteries on the one side, and all other species of property on the other. The sale of alcoholic liquors for drink and the sale of lottery tickets are under the ban of society everywhere, but other personal property is not. As we before remarked, hogs are recognized as a legitimate species of property, and therefore, in order for their presence in the town of Darlington, in the lot of a corporator as its owner, something more must be done than was done in this case to justify the denial to the defendant of his right to have his property on his own premises freed from this ordinance. I do not feel that a law, such as the police power, needs any more discussion at my hands. It is too well understood to justify any extended notice of its general effects. The case of *McCandless v. Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440, is in point here, together with the other cases herein previously cited. I think, therefore, that the conclusion of this court should be, "It is the judgment of this court that the judgment of the circuit court be reversed," but, two of the justices agreeing with the circuit judge, it will be otherwise.

McIver, Ch. J., dissenting:

I concur in the conclusion reached by Mr. Justice Pope in this case, and only desire to add a few words indicating the difference between this case and that of *Summerville v. Pressley*, 33 S. C. 56, 8 L. R. A. 854, much relied upon in support of the judgment below. In that case the ordinance there in question distinctly recited that "it is necessary for the protection of the public health of Summerville that the soil should not be cultivated beyond a limited extent," and there does not appear to have been any evidence adduced in that case contradicting such recital. The court was therefore bound to assume, and did assume, that some limitation upon the cultivation of the soil, within the corporate limits of that town, was necessary to the preservation of the public health. In the present case, however, no such fact appears. It is not recited in the ordinance, and there was no evidence that the keeping of a hog in a 2-acre lot, not shut up in a pen, was detrimental to the public health. Indeed, the evidence in this case tended to show the contrary, for it is stated in the "case" that the premises of the appellant have passed the inspection of the health officer. This court, certainly, cannot, in the face of common experience to the contrary, and without any evidence whatever, assume that the mere fact of keeping a hog, not in a small pen, but allowed to run at large in a 2-acre lot, would be detrimental to the public health. Indeed, so far as appears in this case, there is nothing to show that the ordinance in question was passed with any view to the pres-

ervation of the public health. The ordinance does not purport to regulate the manner in which private property shall be kept or used, but simply prohibits the keeping of the kind of property therein specified within the corporate limits of the town of Darlington; and, so far as I can perceive, it might just have well have prohibited the citizens of that town from keeping on their premises in said town a horse or a cow or any other domestic animal, or indeed any other

species of property; and surely an ordinance to that effect could not be claimed to fall within the proper limits of municipal authority. Without going into any consideration of the other interesting questions, so ably discussed in the argument for appellant, it seems to me clear that the municipal authorities of the town of Darlington had no power to pass any such ordinance as that in question here.

MAINE SUPREME JUDICIAL COURT.

Ira K. FARRINGTON *et al.*

v.

William L. PUTNAM *et al.*, Exrs., etc., of
Ira P. Farrington, Deceased, *et al.*

(90 Me. 405.)

A bequest to an incorporated charitable institution of property in excess of the amount which such corporations are allowed by general statute to take and hold, if it is not prohibited by the statute of wills or by the charter of the corporation or by the law which authorized its organization, and there is no penalty for taking in excess of the limitation, is not void but merely voidable, and can be avoided by the state alone.

(June 4, 1897.)

EXCEPTIONS to rulings, and appeal from the decree of the Supreme Judicial Court for Cumberland County in favor of defendants in a suit brought to have certain provisions in the will of Ira P. Farrington, deceased, declared to be invalid. *Exceptions overruled. Decree affirmed.*

The facts are stated in the opinion.

Messrs. Orville D. Baker and Clarence Hale, for plaintiffs:

The Maine Eye and Ear Infirmary, having already the full amount of property allowed it by the statutes of this state, is incompetent to take any further property under the bequest of this will.

The heirs are the proper parties to assert against the Maine Eye and Ear Infirmary that it is incompetent to take the property under the bequest in the will.

Davidson College v. Chambers, 8 Jones, Eq. 258; *Cromie v. Louisville Orphans' Home Soc.* 8 Bush, 365; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Re McGraw*, 111 N. Y. 66, 2 L. R. A. 387; *Wood v. Hammond*, 16 R. I. 98.

The language of *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, is itself a *dictum*, and is not supported by a single one of all the authorities it cites, save the case in New Jersey, which is likewise a *dictum*, and an overruled *dictum* at that.

There is a class of cases where the courts

NOTE.—On the question as to the right of private persons to confess the power of a corporation to take or hold property, see note to *Hanson v. Little Sisters of the Poor (Md.)* 32 L. R. A. 93.

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have held that a devise to a corporation was valid in cases where it was claimed, notwithstanding a corporation had general power to take and hold property for its general corporate purposes yet the special devise in question was not necessary to those purposes, or was being applied to some illegal use.

Hamsher v. Hamsher, 182 Ill. 273, 8 L. R. A. 556; *Hayward v. Davidson*, 41 Ind. 212; *Chambers v. St. Louis*, 29 Mo. 543.

It will be observed as to this class of cases: (1) that the authority of these tribunals is not to be compared with that of the courts of Rhode Island, New Jersey, and New York; (2) that the doctrine is merely asserted and assumed without examination of its grounds, and without any inquiry into the vital distinction between deeds and wills.

Cases relating to executed deeds conveying property in excess of the limitations of the charter are all governed by the one principle of executed conveyances.

They can have no application to the case at bar, but must logically rest on two principles wholly inapplicable to a case of devise under a will.

The first difference is that by every deed a quasi estoppel is raised against the grantor, and all claiming under him, forbidding him or them to dispute his voluntary grant, whether made with or without consideration.

A deed at the moment of delivery becomes an executed contract and transfer. It transfers the title at that moment by virtue of its own conveying power. It requires no act of the court to aid or complete it, but would require the positive interference of the court in order to divest the title thus acquired. A residuary bequest under a will is the diametrical opposite of all this. It is not an executed, but an inchoate, transfer. It does not operate at all till death, nor even after death has it any conveying power of itself alone unaided by the action of the court.

4 Bacon, Abr. *444; *Davidson College v. Chambers*, 8 Jones, Eq. 262; 2 Wms. Exrs. 45; 2 Woerner, American Law of Administration, § 453; 7 Am. & Eng. Enc. Law, p. 418; *State, Hounsom, v. Moore*, 18 Mo. App. 406; *Hanscom v. Marston*, 82 Me. 295; *Loring v. Steinsman*, 1 Met. 204.

It would be illegal, and so impossible for a probate court to decree distribution, and it is illegal and impossible for this court to pass such a decree as would call for an illegal distribution of property and for an illegal vesting

of more than \$100,000 in the Maine Eye and Ear Infirmary.

Grant v. Bodwell, 78 Me. 480.

At common law the executor's assent to a specific legacy divests him of the legal title and perfects the inchoate title of the legatee, so that the latter may bring trespass, trover, replevin, or ejectment therefor, even against the executor.

2 Woerner, American Law of Administration, § 458; *Andrews v. Hunneman*, 6 Pick. 126, and English authorities cited; *Matthews v. Turner*, 64 Md. 109; *Eberstein v. Cump*, 87 Mich. 176.

Under our own statute the decree of distribution provided for by Rev. Stat. chap. 65, § 27, practically takes the place of the executor's assent required by the common law.

Woerner, American Law of Administration, § 569.

No action can be brought by persons entitled to the residue till after such decree of distribution.

Cummings v. Cummings, 148 Mass. 348.

You cannot ask the aid of a court of justice to carry out an illegal contract.

Sykes v. Beadon, L. R. 11 Ch. Div. 170; 1 Perry, Tr. § 160; 1 Jarman, Wills, 6th ed. *68; *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 575; *Aubert v. Mace*, 2 Bos. & P. 871; *Watts v. Brooks*, 3 Ves. Jr. 612; *Hunt v. Knickerbacker*, 5 Johns. 827; *Davis v. Old Colony R. Co.* 181 Mass. 274, 41 Am. Rep. 221; *Case v. Kelly*, 183 U. S. 28, 38 L. ed. 515; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

The bequest to the infirmary failing in both will and codicil, the two thirds of the residue thus bequeathed do not fall into the balance of the residuum, but descend to the heirs as intestate property.

1 Jarman, Wills, *322; *Upham v. Emerson*, 119 Mass. 512; *Humble v. Shore*, 7 Hare, 247, 1 Hem. & M. 550, note; *Cheslyn v. Cresswell*, 3 Bro. P. C. 246; *Sykes v. Sykes*, L. R. 3 Ch. 301; *Lightfoot v. Burtall*, 3 New Rep. 112, 83 L. J. Ch. N. S. 188, 1 Hem. & M. 546; *Re Barker*, L. R. 15 Ch. Div. 635; *Stetson v. Eastman*, 84 Me. 366.

As a matter of statute construction, all devises or even conveyances to the infirmary, in excess of \$100,000, are absolutely void.

Head v. Providences Ins. Co. 6 U. S. 2 Cranch, 127, 2 L. ed. 229; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 552; *People, Atty. Gen., v. Utica Ins. Co.* 15 Johns. 368, 8 Am. Dec. 250; *Bank of Michigan v. Niles*, 1 Dougl. (Mich.) 401, 41 Am. Dec. 577.

But if this statute does not absolutely avoid, it at least prohibits.

Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; *Sharp v. Teese*, 9 N. J. L. 438, 17 Am. Dec. 480; *People, Atty. Gen., v. Utica Ins. Co.* 15 Johns. 368, 8 Am. Dec. 254; *Bartlett v. Vinor*, Carth. 252; *Mitchell v. Smith*, 1 Binn. 110, 2 Am. Dec. 421; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 708; *DeCamp v. Dobbins*, 31 N. J. Eq. 689.

Forfeiture of charter is an unavailing remedy.

2 Morawetz, Priv. Corp. § 1028; 5 Thomp. Corp. §§ 6608, 6609, 6612, 6628.

If the decree of forfeiture could divest the 88 L. R. A.

corporation of the excess of property illegally held by it, it could only be on the ground that it was a charitable, not a business, corporation, and that its property came by gift, and not by purchase; and, if this distinction were supported, then it would lose by its dissolution, not this particular property only, but all its property, including the \$100,000 of estate it now lawfully holds.

5 Thomp. Corp. §§ 6745, 6746, and cases; *Bank of Vincennes, State Bank v. State*, 1 Blackf. 267, 12 Am. Dec. 234; 2 Morawetz, Priv. Corp. §§ 1031, 1032; Field, Corp. § 491.

Forfeiture would be at best but a clumsy and barbarous device for accomplishing results, confounding the innocent with the guilty, and wholly unworthy of a court of justice.

Shelford, Mortmain, pp. 10, 11; *Brown v. Wood*, 17 Mass. 74; *Green v. Chelsea*, 24 Pick. 78.

The vital distinction between executed and executory conveyances or contracts is clearly recognized by the following cases:

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 407, 36 L. ed. 754; *United States v. Northern P. R. Co.* 152 U. S. 300, 38 L. ed. 449; *Land v. Coffman*, 50 Mo. 254; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 289.

All persons capable of holding property, and such persons only, may be beneficiaries.

2 Pom. Eq. Jur. § 987, note 2; *Atkins v. Kron*, 5 Ired. Eq. 207; Lewin, Tr. 105; 2 Kent, Com. *62; *Skrine v. Walker*, 3 Rich. Eq. 262; *Pool v. Harrison*, 18 Ala. 514; 27 Am. & Eng. Enc. Law, p. 23; *Coleman v. San Rafael Turnp. Road Co.* 49 Cal. 518; *Baird v. Bank of Washington*, 11 Serg. & R. 418.

The trust here, being illegal in its nature and object, is void, and no court can execute it.

Miller v. Lerch, 1 Wall. Jr. 210; *Coleman v. San Rafael Turnp. Road Co.* 49 Cal. 518; *Baker v. Clarke Institution*, 110 Mass. 91; *First Nat. Bank v. Stencart*, 107 U. S. 677, 27 L. ed. 592; *Case v. Kelly*, 183 U. S. 21, 33 L. ed. 518; *Heiskell v. Chickasaw Lodge No. 8, I. O. O. F.* 87 Tenn. 668, 4 L. R. A. 699.

Messrs. Symonds, Snow, & Cook, for defendants:

A decree of the probate court having jurisdiction cannot be impeached collaterally, and can only be set aside upon appeal.

Rev. Stat. chap. 63, § 28; *Harlow v. Harlow*, 65 Me. 448; *Decker v. Decker*, 74 Me. 467.

It was incident at common law to every corporation to have a capacity to purchase and alien lands and chattels unless they were specially restrained by their charters or by statute.

Bl. Com. Sharswood's ed. bk. 1, p. 479; Kent, Com. 12th ed. bk. 2, p. 282; Morawetz, Priv. Corp. 2d ed. § 327; Beach, Priv. Corp. § 377; 5 Thomp. Corp. §§ 5770, 5782.

Limitations upon the inherent right of a corporation to take, hold, and enjoy property, real and personal, are matters of municipal policy to be determined and enforced by the state alone in such manner and at such time as seems to it best.

The Banks v. Poitiaux, 8 Rand. (Va.) 136, 15 Am. Dec. 706; *Chambers v. St. Louis*, 39 Mo. 543.

A corporation, being the creation of the state,

is amenable, so far as the right to take and hold property is concerned, to the state alone. The state may waive a strict compliance of the charter, and may elect whether it will insist upon a forfeiture.

Heard v. Talbot, 7 Gray, 113; *Briggs v. Cape Cod Ship Canal Co.* 187 Mass. 71; *People, Longenecker, v. Nelson*, 133 Ill. 565; *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 L. R. A. 293; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Whitman Gold & S. Min. Co. v. Baker*, 8 Nev. 38; *Rainey v. Laing*, 58 Barb. 453; 5 Thomp. Corp. § 5787.

Where a corporation is authorized by law to take and hold property for specific purposes and to a definite amount, the question whether it can take and hold property for other purposes or in excess of the amount named cannot be raised collaterally by private persons, but only by direct proceedings by the state which created the corporation.

Fleckner v. Bank of United States, 21 U. S. 8 Wheat. 838, 5 L. ed. 631; *Rungan v. Coster*, 39 U. S. 14 Pet. 122, 10 L. ed. 382; *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Cocell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 552, *Southern P. R. Co. v. Orton*, 6 Sawy. 159; *National Bank v. Whitney*, 108 U. S. 99, 26 L. ed. 443; *Jones v. Hershank*, 107 U. S. 174, 188, 27 L. ed. 401, 405; *Hickory Farm Oil Co. v. Buffalo, N. Y. & P. R. Co.* 32 Fed. Rep. 22; *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 817; *Detroit v. Detroit City R. Co.* 56 Fed. Rep. 867; *Seymour v. Slide & Spur Gold Mines*, 153 U. S. 523, 38 L. ed. 807; *Reorganized Church of Jesus Christ of L. D. S. v. Church of Christ*, 60 Fed. Rep. 987; *Hough v. Cook County Land Co.* 78 Ill. 23, 24 Am. Rep. 230; *Alexander v. Tolleston Club*, 110 Ill. 65; *Barnes v. Suddard*, 117 Ill. 287; *Hamsher v. Hamsher*, 132 Ill. 278, 8 L. R. A. 556; *Bushnell v. Consolidated Ice Mach. Co.* 138 Ill. 67; *Hanson v. Little Sisters of the Poor*, 79 Md. 434, 32 L. R. A. 293; *Leasure v. Hillegas*, 7 Serg. & R. 813; *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Goundie v. Northampton Water Co.* 7 Pa. 238; *The Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Bone v. Delaware & H. Canal Co. (Pa.)* 2 Cent. Rep. 836; *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa, 101; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192; *De Camp v. Dobbins*, 29 N. J. Eq. 86; *Hayward v. Davidson*, 41 Ind. 212; *Baker v. Neff*, 73 Ind. 68; *Mallett v. Simpson*, 94 N. C. 87, 55 Am. Rep. 594; *Humbert v. Trinity Church*, 24 Wend. 587; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Rainey v. Laing*, 58 Barb. 453; *Lancaster v. Amsterdam Improv. Co.* 140 N. Y. 576, 24 L. R. A. 822; *Heard v. Talbot*, 7 Gray, 113; *Baker v. Clarke Institution*, 110 Mass. 88; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Com. v. Wilder*, 127 Mass. 1; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656; *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243; *Thornton v. National Ech. Bank*, 71 Mo. 224; *Franklin Ave. German Sac. Inst. v. Roscoe Rd. of Edu.* 75 Mo. 408; *Wherry v. Hale*, 77 Mo. 20; *Hotelman v. St. L. R. A.*

Kansas City Horse R. Co. 79 Mo. 632; *Reagan v. McElroy*, 98 Mo. 349; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261; *Barrow v. Nashville & C. Turnp. Co.* 9 Humph. 304; *Heiskell v. Chickasaw Lodge, No. 8, I. O. O. F.* 87 Tenn. 668, 4 L. R. A. 699; *Gilbert v. Hale*, 9 S. D. 164; *Whitman Gold & S. Min. Co. v. Baker*, 8 Nev. 386; *Russell v. Texas & P. R. Co.* 68 Tex. 646; *Galveston, H. & S. A. R. Co. v. State*, 81 Tex. 595; *Schwab Clothing Co. v. Claunck* (Tex. Civ. App.) 29 S. W. 922; *Atty. Gen. v. Avon*, 33 Beav. 67; *Robinson v. London Hospital Governors*, 10 Hare, 19; *Devlin, Deeds*, §§ 120, 121; *Beach, Priv. Corp.* § 878; *Dill. Mun. Corp.* 3d ed. § 574; *Ehrman v. Union Cent. L. Ins. Co.* 35 Ohio St. 324; 5 Thomp. Corp. §§ 5737, 5795, 5799, 6033; *Pritchard, Wills & Administration*, 153, note 43; *Morawetz, Priv. Corp.* §§ 332, 338, 671; *Perry, Tr.* 2d ed. § 45.

The gift in this will to the Maine Eye and Ear Infirmary is a gift in trust for charitable purposes, and to a corporation which has been recognized by repeated resolves of the legislature of the state of Maine as a public charity. All the purposes of this trust, the precise charitable intent which the testator had in mind, can just as well be served with an individual or another corporation appointed by the court for trustee in place of the infirmary.

Swoasey v. American Bible Soc. 57 Me. 523; *De Camp v. Dobbins*, 81 N. J. Eq. 671; *Chapin v. School Dist. No. 2*, 35 N. H. 445; *Fellows v. Miner*, 119 Mass. 541; *Darcy v. Kelley*, 153 Mass. 436; *Perry, Tr.* 2d ed. § 545.

Peters, Ch. J., delivered the opinion of the court:

Ira P. Farrington, the testator whose will is called in question by this bill in equity, died at his home in Portland, December 17, 1894, leaving a will dated July 9, 1891, and a codicil dated January 4, 1893. The will was probated in January, 1895, in the probate court below and approved by this court in the next April afterwards. The will, after a most generous provision for his widow, and numerous bequests to his relatives, besides several large bequests to certain local charities other than those to be herein named, contains the following residuary clause:—"Fifth. All the rest and residue of Estate, Real and Personal or Mixed, wherever situate, which I may own at my decease, or which I may then have the right to dispose by Will, including all and any of the foregoing legacies, devises, and other provisions which may in whole or in part lapse or for any reason fail, I give the Maine Eye and Ear Infirmary in the city of Portland, incorporated according to the statutes of Maine, the Maine General Hospital and the Portland Public Library, share and share alike, upon trusts, nevertheless, as follows:

"The one third given said Eye and Ear Infirmary shall be maintained as a separate fund designated as 'The Farrington Fund,' held, invested and reinvested, and the net income thereof applied forever annually or oftener, to the Charitable purposes of the Corporation.

"Likewise the one third given the Maine General Hospital shall be in the same manner maintained as a separate fund, designated as 'The Farrington Fund,' held, invested, and reinvested, and the net income thereof applied for-

ever annually, or oftener, one half for the support of free beds, in its hospital, to be known as 'the Farrington Free Beds,' and the other half to the general Charitable purposes and the maintenance of the Corporation.

"And likewise the one third given the Portland Public Library shall be in the same manner maintained forever as a separate fund designated as 'The Farrington Fund,' held, invested, and reinvested, and the net income thereof applied forever annually, or oftener to the support of the Library of said Corporation.

"Provided, nevertheless, that whatever principal sum or sums may come hereunder to the Portland Public Library shall be paid to the city of Portland on the following trusts, namely,—

"To pay thereon perpetually interest semi-annually at the rate of four (4) per cent per annum, to the Portland Public Library said interest to be applied as aforesaid by said Portland Public Library to the support of its Library.

"Said fund shall be entered on the books of the city as 'The Farrington Fund for the Benefit of the Portland Public Library,' and the interest so paid by the city shall be entered on the books of the Portland Public Library as interest from such 'Farrington Fund.'

"If the city shall decline to accept the same on the trust aforesaid, or if for two years after request in writing by my executors to accept the same as aforesaid, the city shall neglect so to accept, I direct that said principal sum or sums be paid to said Portland Public Library to be held, invested, and reinvested and the net income thereof applied as hereinbefore set out."

The testator names Hon. William L. Putnam and Hon. Thomas H. Haskell as executors, and confers certain authority over his estate on them as such executors as follows: "I give the executors full possession, management, and control of all my real estate wherever situate, subject to the devise of my beloved wife; and I authorize them from time to time to lease, sell, or exchange the same, or any part thereof and to receive the proceeds of such leases and sales and all other incomes or other proceeds thereof, for the purpose of fully executing this will, reminding them, however, that their authority over my estate whether real or personal is given solely for the purpose of closing and distributing the same as heretofore mentioned directed, with a prudent regard for obtaining fair prices within a reasonable time to be taken therefor."

The codicil is as follows:

"I hereby republish and reaffirm said will except as herein modified.

"The gift of the one-third part of the rest and residue of my estate to the Maine General Hospital by the fifth clause of said will and all gifts and devises in any part of said will to said Maine General Hospital, I hereby revoke; and I hereby give, devise, and bequeath, all the same one third and all other said gifts and devises, to the Maine Eye and Ear Infirmary, to hold to the use of it and its successors and assigns forever; the same to be in addition to, and not to effect or change, the gifts and devises to said Maine Eye and Ear Infirmary

in said will contained. I double the gift of \$20,000, to the Home for Aged Men of Portland."

The Eye and Ear Infirmary is a charitable association organized under the general statute which authorizes the formation of such corporations. Rev. Stat. chap. 55, § 1. Numerous kinds and classes of persons and associations are permitted by this section to be organized into corporations, including all social, military, literary, scientific, temperance, moral, musical, agricultural, and many other societies and organizations. Section four of the chapter prescribes as follows: "Such corporations may take and hold by purchase, gift, devise, or bequest, personal or real estate, in all not exceeding \$100,000 in value, owned at any one time, and may use and dispose thereof only for the purposes for which the corporation was organized." The constitution of the infirmary, a public record, declares the purpose of the institution as follows: "The object of the corporation shall be the establishment and maintenance of an infirmary in Portland, Maine, where a daily clinic may be held for the treatment, free of charge, of poor persons throughout the state, suffering from diseases of the eye and ear."

The bill alleges that the infirmary had at the death of the testator property to the full amount of \$100,000 in value, and that any additional amounts to be received through this will would be in excess of the limit allowed by its charter and in disregard of the statutes of the state; and so it further alleges "that the said Maine Eye and Ear Infirmary is incompetent to receive and incapable of holding any property beyond the amount which it now possesses, and that the bequests and devises made to it under item 5 of the said will and under the codicil to said will of said Ira P. Farrington are invalid and void, and revert to the heirs of Ira P. Farrington." The bill includes the infirmary and the executors as respondents, the prayer of the same being that the parties be enjoined, the one against paying over, and the other against receiving, the devises and bequests in execution of the intention of the testator.

Both of these respondents, the executors and the corporation, filed general demurrers to the bill, which were sustained by the justice before whom the case was heard below, and the case comes to us on exceptions and a final decree in favor of the respondents. Mr. Justice Strout of this court, by whom the issues were decided, filed a written judgment in the case from which we reproduce that portion of the same which bears upon the questions we propose now to discuss, reading as follows: "This is a bill in equity, and comes before the court on demurrers. The will of Ira P. Farrington contains a bequest to the Maine Eye and Ear Infirmary. The complainants allege that that corporation is authorized to hold property to the amount of \$100,000, and no more; and that it now holds property to that amount, and therefore cannot take the legacy given to it by the will. As the demurrer admits the facts, it must be assumed that the legatee now holds the full amount of property which it is entitled to hold. It is admitted to be a public charitable institution. Can it take the legacy, or

devise? The gift is from the residue of the estate, after payment of legacies, and may include both real and personal property.

"At common law, corporations were entitled to take and hold real or personal property to any amount, if it was reasonably useful and convenient in attaining its legitimate ends. In England, so large an amount had been acquired and held by its corporations, particularly the ecclesiastical, that as a measure of purely public policy the statute of mortmain was enacted to prevent the accumulation of real estate in ecclesiastical corporations. That statute has not been generally adopted in this country; but it has been deemed wise in many instances to limit in the charter, or by general law, the amount of property to be held by corporations. In this state, by statute, corporations are entitled to hold and convey lands and other property. Rev. Stat. chap. 66, § 2. This authority is unlimited, unless the charter, or general law under which the corporation is created, or some statute, imposes a limit. A limit of \$100,000 is imposed by the statute under which this corporation was created. Taken in connection with the common law, and the general statute upon the subject, it is apparent that the limitation upon this class of corporations, not applicable to many others, was a matter of public policy. As such, it is for the state alone to take advantage of its breach, if it chooses, or it may waive it; and consequently private parties cannot be permitted to assert against the corporation a violation of the limitation. The decided weight of authority is to this effect and the principle is deemed sound.

"A devise of land operates a conveyance upon probate of the will. The devisee takes by purchase. The title may be defeated, if the subject of the devise is required for the payment of debts. A bequest of personalty also is perfected in the legatee, at the date of the probate of the will, subject to the same contingency, although the time of payment may be deferred by the provisions of the will or the contingencies of administration.

"The will, in this case, gave to the infirm-ary one third of the residue of the estate, after payment of legacies, in trust, to be invested and kept invested, the income only to be applied to the charitable purposes for which the institution was organized. The codicil added another third of the residue to the gift, but said nothing about trust; but the fair construction of the codicil, taken in connection with the trust created by the will, is that the trust attaches to the entire two thirds. The effect of the codicil was to increase the one third in the original will to two thirds. No other change was intended by the testator. The whole scheme in his mind was charity. The gift was to a public charity, administered by the corporation created for that purpose.

"The infirm-ary can take the gift, upon the trusts specified, and hold it against all except the state, although the amount is in excess of the limitation in the statute.

"If, however, the infirm-ary should be regarded as incompetent to take the property in trust, it being devoted by the testator to a public charitable use, the court would appoint a trustee to carry into effect the testator's bounty. A public charity, definite in its ob-

jects as this is, is never allowed to fail for want of a trustee, and if the trustee originally appointed is incapable, from any cause, to take the property and execute the trust, a competent trustee will be appointed."

The question on the first branch of the case, therefore, is whether these devices and bequests are absolutely void as the complainants contend, or whether they are merely voidable according to the view of the question taken by the respondents. After very much examination of the authorities pro and con, and careful consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel very much impressed with the theory, stated in many of the cases, that a charter is a contract between the state and the corporation; and that for any misuse or abuse of its privileges or powers the corporation is amenable to the state only, no individual having anything to do with the question. As applicable to the present case, the principle is that, if the infirm-ary, by accepting these bequests and devices, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law which the state can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the state does not interfere for the violation, it waives it and permits the infirm-ary to retain the property.

The general statute under which this infirm-ary was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached and none intended more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute cannot by any possibility be harmful to the community, as the state can make it as stringent as it pleases at any time. But thus far the state has had no motive either to amend the statute or to enforce forfeitures for violation of its provisions. And in one section of the chapter relating to general organizations the legislature allows devisees, bequests, and gifts to towns for the establishment, or increase of public libraries, without imposing any limitation whatever. Rev. Stat. chap. 55, § 10. There cannot be an objection that such absorption of property excludes capital from taxation, because that is a matter wholly within the control of the legislature.

An over strict construction of the law and of the rights of parties under the law in the case before us is neither expedient nor reasonable. Here is an institution, and the only one of the kind in the state, and virtually a state charitable institution of the most beneficent and humane kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the state suffering from diseases of the eye and ear. This testator, who had been always a director in the institution and finally its president, knowing and fully appreciating its condition and necessities, after making provisions for other local charities, and giving to his next of kin preferred bequests according to his own judgment as to what they should have

out of his estate, made, not while in the extremities of sickness, but nearly five years before his death, these legacies and devises for the use of the infirmity. Presumably he and those whose assistance he obtained to aid him in executing his purposes never dreamed that there was any obstacle in the way of his giving or the infirmity receiving the bounties which he so strongly desired to be charitably expended. And now what a spectacle is presented if equity be successfully invoked to take advantage of this accident or mistake, equity, whose boasted vocation is to relieve against accident and mistake, in order to wrest from this institution these donations for the benefit of distant relatives and heirs! What a public misfortune it would have been, if on account of the limited amount of capital it is by its charter privileged to hold, it had turned out that our oldest college in this state was prevented from receiving the munificent bequests lately tendered to it by deceased citizens of the states of California and New York, such donations not having as yet been actually received, and the state itself powerless to allow the college to take the gifts merely on account of such limitation!

It will be noticed that most of the authorities on which the complainants rely concede that the rule which we would apply to devises is at all events applicable to gifts by deed, the argument being that in such a case as this a deed would be valid and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that in the one case the transaction is executed and in the other case that it cannot be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference, a formal, but not substantial, distinction. Each mode of transfer needs the protection and aid of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee; the title of such devisee being liable to be defeated if the estate be necessary for the payment of debts or the expenses of administration. Section 15, chap. 74, Rev. Stat., reads as follows: "No will is effectual to pass real or personal estate unless proved and allowed in the probate court." This will has been approved by the probate courts below and above with no questions or exceptions thereto pending. But it is said the bequests of the personal estate cannot be carried into effect until a distribution has been ordered and the executors' accounts have been approved. We think that even this fine technicality may be avoided by the executors, if need be. They

would be justified in paying all the property left in their hands as residuary estate without any order therefor, should the devisees be willing to accept it and discharge the executors from their responsibilities. A good many estates are settled by the parties interested without any aid or order from the probate court.

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable and a devise absolutely void. The true and conclusive answer, however, to this indefensible position of the complainants is that it is utter assumption on their part in declaring a devise like this to be void, when it is voidable merely, and can be rendered void in no way other than by the act of the government itself. No wrongful act by a corporation renders its charter void or creates any forfeiture without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold, also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrongfully uses or disposes of its property, could any party but the state intervene to punish the corporation for such transgression?

Now what is there illegal, let us ask, in this court or in the probate court below acting in the furtherance of bequests that are simply voidable and consequently valid until they have been declared to be otherwise upon the intervention of the state? If the state has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the state, or the error is waived or permitted by the state? What right has the judicial branch of the government to dictate what the state should do against its will or its policy, and decide a question for the state which the state can better decide for itself? What right has the court to deprive the state of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator or will waive or overlook it? Certainly the state should not be prevented from making such election. If courts at the instigation of heirs can refuse to act upon voidable bequests as valid until avoided by the state, then, as a matter of course, the state can practically never have any opportunity to exercise its discretion in such a case any more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the state. The court could not exercise any broad discretion in the solution of the question, while the state could. It certainly is an excellent policy to refer such questions to the discretionary power of the state, which can determine them, according to the circumstances, upon the great principles of justice and generosity, and in conformity with the wishes and welfare of the whole community. Among so many societies and associations as are organized under the general statute there will always be exceptional cases where, from

their amount of business or other causes they have come to exceed the limitation of capital allowed them, and it is reasonable that the state should have the privilege, if it pleases, of relaxing the statutory restraints in such exceptional cases. And the circumstances of the present case make the strongest appeal for the protection of this devise against the loss of the generous gifts to it from one who loved the institution as he would have his child, and who devoted to its interests his time and services, and, as he supposed, a goodly share of his estate which had been earned by his industry and economy for a long lifetime. And it may not be amiss to state the fact that the legislature has lately increased the limitation of capital which the infirmity may hold from one hundred thousand to one million of dollars.

There is but little authority, either English or American, favoring the conclusion that bequests or devises not strictly authorized by law are to be considered void instead of voidable. This will be seen in the examination of cases in this country to be made in the progress of this discussion. But it may also be worth the while to notice what application has been made of the principle by the English courts in view of the statutes of mortmain as existing in that country. In *Grant on Corporations*, a reputable English work on the subject, at page *101, the author states the doctrine as follows: "The meaning of the term 'unlicensed corporation' is this. As was observed above, the conveyance of lands to a corporation was not made void to all intents and purposes by the statutes of mortmain, but only voidable at the option of the lords and the Crown; consequently if the mesne lords and the Crown all consented to waive the escheat, each in their respective rights, the corporation to whom the land was granted enjoyed the property unmolested. In process of time the rights of the lords becoming difficult to trace, a license from the Crown was generally considered sufficient to ascertain the right of property to the corporation; and this license it became usual for corporations to obtain from the Crown, enabling them to take lands to such a value, notwithstanding the statutes of mortmain. In strictness, however, the license to hold in mortmain was only a waiver of the right of the Crown to enter on the lands alienated; for as no royal charter can *per se* take away the property, or prejudice the interest of the subject, such license did not abrogate the right of the mesne lords to enter, and therefore with respect to them the corporation was not secure until the lapse of the periods respectively limited for the assertion of their rights. In fact the King's license had only the effect of waiving the Crown's right to the escheat, etc., etc." The author further says: "The question is of the more importance, as there is no doubt that many corporations have greatly exceeded the limits of their license, and hold such surplus lands without any right derived from it for their doing so. It is clear, however, that if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is, that they may take, though, unless they can obtain an extension by the Crown of their license they cannot hold the

lands, unless the mesne lords and the Crown choose to sleep upon their respective titles."

The cases in this country, most of them which favor the principle that an estate in the condition this is goes to the heirs of a testator rather than to the devisee, seem to inculcate the idea that the heirs may waive their right so as to allow the estate to pass to the devisee. And we have not the slightest doubt that, but for the interference of the heirs in the present case by this bill in equity, no obstacle would have stood in the way of a complete administration of the testator's estate according to his clearly expressed intention. No court would have had the least hesitation in following the ordinary course of procedure, or would have entertained the thought, *suo moto*, of instituting inquiry to see whether the bequests in question were valid or not. But why should a bequest, invalid when not consented to by the heirs, become unobjectionable when such consent is obtained? If illegal as coming from the testator, why not just as illegal when coming from the testator and his heirs? Such considerations as these go to show how illogical and untenable a position it is to denominate the devises and bequests in the present will absolutely void.

Each side relies on certain authorities in defense of its position, and between the two sides many have been referred to. The first one relied on by the complainants, and probably one of the earliest decisions on the question in this country, is *Davidson College v. Chambers*, reported in 1857, in 8 Jones, Eq. 253. The same question arose there that exists here, and the case was decided according to the contention of the complainants in this case. It went on the theory that as the college was seeking to obtain an illegal bequest, the law could not assist it to do so, and that the bequest was absolutely void. It was a severe and technical decision, reasoned out without the aid of authorities as few in this country existed to throw light on the subject at that time. But the opinion admits that its severe doctrine did not apply to real estate and only to personal property. Should that be the law in this state, and we do not see why not if the law of that case is to prevail here, it may turn out that the residuary clause here is valid as operative only on real estate. But in our judgment the dissenting opinion in that case by Nash, Ch. J., is more satisfactory than the prevailing opinions delivered by the two associate justices. The argument of the chief justice is more in consonance with the doctrine which has grown up since that day. The chief justice, after declaring that the restriction as to amount of corporate property is merely directory, and that the bequest was not void but at the most voidable, goes on to say: "If the restriction is a condition, it is a condition subsequent, for a breach of which no action can be taken against a corporation but by the sovereign, and with the latter, and its officials, it is a matter of discretion, whether a forfeiture will be enforced or not. To work a forfeiture of chartered privileges, there must be something more than accidental negligence, excess of power, or mistake; there must be something wrong arising from wilful abuse or neglect. . . . There is here no forfeiture, for none has

been judicially pronounced. Let it be granted that by taking the whole of the property devised, the total amount in value would exceed what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendant, the executor or the next of kin, take advantage of the breach of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties or their privies can take advantage of a breach of a condition. Now, neither Mr. Chambers [donor] nor his executor, nor his next of kin, are any parties or privies to the contract,—upon what principle, then, is it, that the executor can refuse his assent to the legacy to the college, or upon what principle can the next of kin claim it, or any portion of it? And the chief justice considers many English cases in support of his plain propositions, and we are only prevented from quoting more at length from his opinion by the want of space.

The next case cited by the complainants is that of *Cromie v. Louisville Orphans' Home Soc.* 3 Bush, 365, decided in 1867. And this case we consider more favorable to the party against whom it is cited than to the party citing it. It appears that a citizen of Kentucky made different bequests in his will and among them one to an incorporated society in the state of New York, which already possessed all the property that the laws of New York allowed it to have for its capital. The testator's heirs contested the validity of the bequest on that account. The opinion of the court is peculiar and savors a little of judicial sectionalism. While it was admitted that the remedy for taking an excess of capital would be in a forfeiture of some kind, and that the forfeiture would belong to the state of New York, still it was thought inexpedient to send it there because that state might apply the proceeds of any forfeiture for purposes different from the objects to which the same would be applied in Kentucky; and so it was held that, as Kentucky could not avail itself of any forfeiture for the fault of a foreign corporation, and as New York should not have it under the circumstances, the heirs of the testator living in Kentucky better have the benefit of the same. But the court speaks significantly on the legal question as follows: "The question of title is between the corporation and the owner of the forfeited right. . . . The limitation in this case is a mere matter of state policy, and the state of New York alone can take advantage of its violation." And then the court goes on to justify its withholding from New York what it admits belongs to that state, and its giving the same to the heirs, in the manner following: "But notwithstanding this legal conclusion, should a court of equity enforce the devise against the heirs when, if the limitation has been transcended, the state of New York may take from the devisee the excess over the maximum of the prescribed value, and this court might thus give it, whatever it may be, to an object never contemplated by the testator, and to which he never would have devised it? The answer is, clearly not." The opinion concedes the point precisely as the defense in the present case claims it to be, but avoids its enforcement on account of the pe-

culiar situation of the parties to be affected by the result.

The case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, is cited by the complainants as an authority favoring the position espoused by them. The opinion on this point is not fortified by any authorities, is quite brief as far as relates to the present question, and gives as a reason for its conclusion that "unlimited trusts of this character might become an unmitigated evil." But, let us ask, is that a question for the courts to determine, or is it for the state? a judicial, or is it a governmental, power or policy? Cannot the state by its representative officers regulate the tendency of the so-called evil with their power of instituting proceedings for forfeitures and escheats, or cannot the state by its legislative power entirely prevent it by penalties or provisions, to that end whenever it sees fit to do so?

But the opinion in the case cited admits as much when it goes on to say: "Doubtless the restriction upon corporations is a governmental regulation and one of policy, and to be enforced by the government." That is precisely what the respondents are contending for. Then the opinion adds: "But an individual whose interests will be affected . . . may assert and insist upon the limitation as a restriction." There is precisely the difference between that case and this. The effect of the reasoning in that case is that such an excessive bequest is voidable only and not void, but that it may be avoided by the government or by the heirs of the testator. On the other hand, the present respondents admit that such a bequest is voidable, and contend that it can be avoided only by the state,—that the bequest is not of itself a forfeiture, but at most a cause for forfeiture. It seems to us inconsistent to declare that the heir has the same right as the state, for in such case, as we have said before, the heir would practically have the exclusive right of repudiation and the state have none. Should not the state control its own policy and action on the question? Nor do we see how the apprehended evil of trusts is going to be prevented by regarding deeds of trust voidable and devises void.

The complainants also rely very much on the *Cornell University Case*, reported, in 1888, under the title of *Re McGraw*. 111 N. Y. 66, 2 L. R. A. 887, a strongly stated case and in point here, excepting as the New York policy differs from the policy maintained elsewhere, and as the municipal law there differs from the statutes of other states and especially from the statutory system of our own state. It is there held that such devises and bequests as these are absolutely and irrevocably void, and in this respect the case is not wholly consistent with the views expressed by the same court in the *Chamberlain Case* already commented on, and is in great advance of any doctrine expressed in any previous case in that state. The result is reached by an interpretation "of the general statutes of the state relating to the organization and holding of property by corporations of the class of Cornell University as the same have been affected by the terms of the special charter granted to it." While in our own state we have no statute affecting the question outside

of the terms of the corporate charter itself, or of the general law authorizing the charter, the New York Code contains clauses touching the ability of corporations to acquire property which her court construes to be expressly and utterly prohibitory. The provisions are of themselves severe and they are also strictly and severely construed by the New York court. This same case came before the Supreme Court of the United States afterwards, and that court declined to review the decision of the New York court of appeals upon the ground that no Federal question was presented, inasmuch as the decision sought to be reviewed was based upon the charter of the University and the municipal law of the state of New York. *Cornell University v. Fiske*, 186 U. S. 152, 34 L. ed. 427. The statute of wills in New York is disabling and restraining in its character and prohibits a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise. Her statutes on analogous subjects have been restrictive and her decisions have been accordingly. Its Code forbade a charitable trust to be created upon real estate. Its decisions decline to uphold a trust when a trust exists without a trustee, differing therein from the decisions of other states. Mr. Schouler (Schouler, Wills, § 26, note) says: "Under the policy of the New York Code an unincorporated association appears to be treated with little favor as the beneficiary of a devise." The same restrictive policy led its highest court to hold that a mortgage to a national bank to secure future advances as well as past indebtedness was void (*Crocker v. Whitney*, 71 N. Y. 161) and this doctrine was overruled by the more liberal policy of the United States Supreme Court in *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443. In *Rainey v. Laing*, 58 Barb. 453, the supreme court of New York in a carefully argued and considered case precisely like the present decided that the devise was valid as against all parties but the state, and the difference between that opinion and the one rendered by the court of appeals is that the one proceeds upon the liberal policy more generally entertained by courts and the other was governed by the more restricted and peculiar policy of the Code and courts of New York. The case of *Wood v. Hammond*, 16 R. I. 98, is also relied on by the complainants as an authority of importance in their favor, a case which follows the opinion of the New York court in the *McGrave Case*, and in point corroborates that opinion. See also *Coggeshall v. Home for Friendless Children*, 18 R. I. 696. The only other case cited on this branch of the case in behalf of the complainants is *DeCamp v. Dobbin*, 31 N. J. Eq. 671, and as the defense also relies on the same case reported in an earlier volume, we will defer commenting on that authority until we make a cursory review of some of the adjudged cases cited on the other side of the question.

In opposition to the doctrine attempted to be maintained by the complainants, the respondents have cited quite an array of cases, both of a direct and indirect bearing on the question, some of which will receive our examination.

The first on the list is *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, a case of devise

precisely in point, where Gray, J., delivering the opinion of the court, said: "But there are two conclusive answers to this argument. 1st., Restrictions imposed by the charter of a corporation upon the amount of property it may hold cannot be taken advantage of collaterally by private persons, but only . . . by the state which created it." This case is assailed in the argument of counsel in several ways, and, we think, without actual effect. It is said that it is brief, but its brevity indicates the assurance which the learned justice felt that his proposition was correct. It is also objected to the force of the opinion that two grounds are given for the result to stand upon. But the ground invoked by the respondents is first given as of first importance, and this as well as the other ground is declared to be conclusive. It is further objected that the cases cited in support of the proposition of the opinion are not pertinent to the issue. The opinion does not discuss the very fine distinction, which the complainants contend for, between a gift by devise and a gift by deed, for the reason undoubtedly that the court entertained the belief that there is no real difference between the two, and that either is voidable only, and not void. And so the cases in support of the opinion are cited from both classes of the authorities. One voidable mode of gift cannot differ from any other voidable mode in its consequences and effect. And if it be admitted that a devise of the kind in question is only voidable, all that the complainants are contending for falls to the ground. The learned counsel for the complainants does not notice the fact that the same case came to the supreme court by appeal from the circuit court below, where it was elaborately discussed by counsel and court, on this and other points, Mr. Justice Bradley of the supreme court sitting in the capacity of a circuit judge, and delivering the opinion of that court, reported in 3 Woods, 443, in which opinion the learned justice, among other things, remarks as follows: "It seems to us, however, that the gift to the Georgia Historical Society is not void. . . . This, if the society accepted the trust, may have been cause of forfeiting its charter; but the gift would none the less be vested in it, to hold otherwise would be to render the society exempt from any inquiry on the subject at the suit of the state. . . . Certain things are *ultra vires* of a corporation; but when it has the power to hold property, and is forbidden to hold beyond a certain amount, the matter being one of degree merely, or of more and less, this is not a question of *ultra vires*, but of violation of its charter. A contrary rule would involve many absurdities [the court here stating some of them]. The corporation may be amenable to the penalty of violating its charter. Individuals cannot call it in question; its tenants must continue to pay its rents, and its debtors their debts; the state alone has the right to proceed against it. The state may or may not see fit to do so. It would depend on the circumstances of the case, the greatness of the excess, the causes which led to it, etc. The state may condone the offense. The legislature may relieve by enlarging its powers." The late Justice Bradley was famed as an original thinker, and his idea that

if the contrary rule prevailed a corporation could never be punished for accepting a bequest which gave it property of value above the limit allowable, because it could defend upon the ground that the bequest was completely void, is certainly original and forcible.

A similar, if not the same, question arose in *National Bank v. Whitney*, 108 U. S. 99, 26 L. ed. 448, affecting the present case in several respects. The case was first decided by the New York court of appeals and its decision reversed by the Supreme Court of the United States. The national banking act allowed banks instituted by its authority to take mortgages on real estate for certain specified purposes "and no other." This bank took a mortgage on real estate to secure past indebtedness and also for such future advances as the bank might furnish the mortgagor. The latter branch of the transaction was directly forbidden by the banking act, the security not being for one of the purposes permitting it to be taken, and was declared by the New York court to be utterly void, but by the supreme court to be voidable only until rendered void by some action on the part of the Federal government. In the appellate court Field, J., in the opinion says: "Disregard of them only laid the association open to proceedings by the government. The impending danger . . . of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress." "The consequence insisted upon did not follow; that the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so." All of this reasoning is as fitting in the present case as in that. There is nothing in the statute or charter of the infirmary stating that either deed or devise to it bestowing more property upon it than \$100,000 shall be void. We have already sufficiently discussed the position that the law commits no wrong to actively participate in the execution of merely voidable bequests, for the reason that such bequests are to be considered valid by the courts until vacated or avoided by the state through its representative officers. But that fallacious position of the complainants, as we think it is, was involved in the case cited. The bank was the plaintiff, asking for the aid of the law, not for defending a possession, but for obtaining possession. It never had any actual possession of the land or its proceeds. Subsequently mortgagees of the same property had the possession first of the land and then of its proceeds. The bank was not sent out of court as a party unworthy on that account the protection of the court. Feeling the force with which this case presses against their position the complainants contend that there is a substantial difference between that case and this. We think, however, that the principle supporting both cases is essentially the same, and must seem to be so to the mind of an impartial investigator. The legal authors so estimate it, as will be seen hereafter.

Vidal v. Philadelphia, 48 U. S. 2 How. 127, 11 L. ed. 205, may also well be regarded as a significant authority on the question, where Story, J., says: "If the trusts were in themselves valid in point of law, it is plain that nei-

ther the heirs of the testator, nor any other private persons, could have any right to inquire into, or contest the right of the corporation to take the property, or to execute the trusts; but this right would exclusively belong to the state in its sovereign capacity, and in its sole discretion, to inquire into and contest the same by a quo warranto, or other proper judicial proceeding."

In harmony with these Federal cases is the very recent decision of the same question by the Maryland court of appeals in the case of *Hanson v. Little Sisters of the Poor*, 79 Md. 484, 82 L. R. A. 298 (affirmed January, 1897 in *Congregational Church Bldg. Soc. v. Kerrett*, 85 Md. 79, 85 L. R. A. 693), in which the court gives its reasons for preferring the adoption of the doctrine of the Federal courts rather than that promulgated in the *Cornell University Case* by the court in New York. In that case the proceeding was, as it is here, by a bill in equity brought by the heirs to have the devise declared void. The court in its opinion states the question and its decision of it clearly where it says: "It cannot be denied that this corporation had power to take and hold any estate and property not exceeding the charter limits, and the devise, therefore, was not void on its face, and must be held valid as to all the world until it has been determined, at the instance of the state, that the charter has been violated. If they have violated the law of their being they have committed a wrong not against any particular individual, but against the state, and this wrong can only be inquired into by a proceeding on the part of the state."

. . . In other words, the corporation can take property to any amount, but can hold it, as against the state, only to the amount provided by its charter." How does the active participation of a court, in promoting the administration of such a devise, become wrongful, as the complainants contend, so long as the wrong on the part of the corporation is not inquired into by the state, and the state, instead of urging objection, by its legislature, consents thereto? Of course, in no sense can the state be considered as any party to the present proceedings. The meaning of the argument of the court in the case cited is that, while it is the law that a charitable corporation shall hold only the amount of capital prescribed by its charter, it is also the law that no one besides the state can, in any suit or proceeding properly take notice of such transgression by the corporation.

In the case cited the court also says: "The contrary doctrine would make it very hazardous to take title from a corporation with such a limitation on its charter, and if the objection could be made by anyone, title to property once held by such corporations would cease to be marketable, litigation would be promoted, and courts would be constantly called on to decide the very difficult questions of fact, as to whether the property of a corporation does or does not exceed in value the charter limits. In the case now before us the estimates of the witnesses differ greatly, and a devise or bequest would be held valid or void according to the estimate adopted by the court. We think this is one of those cases which may be put in the class with those referred to by the late Justice

Miller in his dissenting opinion in *Fritts v. Palmer*, 182 U. S. 293, 88 L. ed. 321, where he says: "I can conceive of cases where corporations have been authorized to acquire a limited amount of real estate, such as the legislature may conceive to be useful and necessary to the purpose for which they are organized, . . . in which the question as to whether they have exceeded that amount . . . may be one for the state alone, and not of any private citizen." The counsel for the present complainants argues that the objection of inconvenience should have but the slightest influence on a question where so much principle is involved. We think, however, that the position of the Maryland court in this respect is not to be underrated. Certainly, titles affected in the way above-named would be much more hazardous if a devise of the kind be declared void, instead of voidable, for a devise to all intents and purposes void must remain so through all the mutations of ownership, and the heirs might never be shut out from reclaiming the property thus illegally devised. Many fixed principles of the law have been established on grounds of policy merely, even by the creation of legal fictions if necessary to reach a just result. There are policies within a policy, questions within a question, the smaller controlling the greater question as the rim of a wheel is supported and controlled by its spokes. The difficulty of applying the restrictive rule is a circumstance worth consideration. In one of the New York cases where, under the policy acted on in that state, a part of the bequest only could be received, the decree of the court was that so much of the bequest of money might be taken as would at 7 per cent per annum create an annuity of \$4,000; and undoubtedly the same fund would produce to-day not more than half as much annuity. Do not such considerations help to induce the belief that the liberal policy advocated by the defense is the better policy?

Another case is cited by the defense over which there is some contention between the parties as to its value as a precedent, the case of *De Camp v. Dobbins*, 29 N. J. Eq. 86. The exact question arose there as it exists here, and Chancellor Runyon decided it on the same line on which the question was disposed of in the cases of the Federal supreme court, although the chancellor thought the same result might be reached also upon another ground disclosed by the facts. The case appears again on appeal in 81 N. J. Eq. 689, when the first decree was affirmed, Beasley, Ch. J., writing an opinion sustaining the decree upon a ground other than that selected by the chancellor and in opposition to the latter's opinion. The counsel here assumes that the whole court adopted the views of Chief Justice Beasley. The case does not show such a thing. In closing his opinion the chief justice says: "I shall vote to affirm the decree," and thereupon it is stated by the reporter that the decree below was unanimously affirmed. It is not intimated upon what ground the numerous members of that court cast their votes, whether upon the opinion of the chancellor or that of the chief justice, and there was no occasion that it should appear. On the contrary, we think we are justified in the inference that the chan-

cellor was supported by the court excepting the chief justice, and we notice that another court has the same supposition. *Wood v. Hammond*, 16 R. I. 98, cited *supra*. The chancellor stated (29 N. J. Eq. 41) the essential conclusion arrived at in his opinion as follows: "If such limitations did in fact exist, it would not incapacitate the corporation from taking the gift, although its property at the time of receiving the gift was of the full annual value of \$2,000. If a corporation takes land by grant or devise in trust or otherwise which by its charter it cannot hold, its title is good as against third persons and strangers; the state alone can interfere." 1 Perry, Tr. § 45; *Wade v. American Colonization Soc.* 7 Smedes & M. 663, 45 Am. Dec. 324. And again, if the limitation did in fact exist, the legislature might remove the restriction and permit the corporation to execute the trust or authorize it to receive the gift and administer the trust notwithstanding the limitation. This court will not suffer a trust to fail for want of a trustee, but will uphold the trust for a reasonable time, when necessary in order to enable the trustee to obtain the requisite authority to take and execute it: cites *Bridges v. Pleasants*, 4 Ired. Eq. 28, 30, 44 Am. Dec. 94; *Inglis v. Sailor's Snug Harbor*, 28 U. S. 8 Pet. 99, 7 L. ed. 617.

In *Hamsker v. Hamsker*, 182 Ill. 273, 8 L. R. A. 556, where the validity of a devise was involved, it is said in the headnote of the case: "Whether the corporation exceeds its power in receiving land by gift or devise, is a question alone for the state." And in the opinion the court says: "If the Young Men's Christian Association of Decatur has exceeded in extent its power of holding real estate, appellant, [heir] we conceive, cannot take advantage of the fact." *Alexander v. Tolleston Club*, 110 Ill. 65. Where a corporation may, for some purposes, acquire and hold the title to real estate, it cannot be made a question by any party, except the state, whether the real estate has been acquired for the authorized uses or not. *Hayward v. Davidson*, 41 Ind. 214. There being capacity to purchase or to receive by devise, whether the corporation, in so purchasing or receiving, exceeds its power is a question between it and the state, and does not concern appellant."

In a peculiar case or devise in Massachusetts, *Baker v. Clarke Institution*, 110 Mass. 88, the court says: "The purposes and object of the trust are distinctly set forth. If its full execution had been found to be impossible by reason of the continued incapacity of the *cestui que trust* to take the whole fund, it might have become necessary and proper for the court to declare a resulting trust, as to the excess, in favor of the next of kin, to be applied by law," citing the New York case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, for that proposition. Later in the opinion the court says: "But even if it was intended to evade or disregard the limit of legal capacity, we are not prepared to hold that it would render the bequest invalid, either in whole or for the excess." And the court further adds: "But we cannot doubt that the removal by the legislature of such a restriction upon the capacity of the corporation, before the complete execution of the trust, will enable it to receive the whole fund for its

benefit, although [for peculiar reasons not important here], it could not do so at the time the will took effect." Here, certainly, is seen the idea of the court, that the excessive bequest was no more than a voidable act, indirectly said as strongly as if directly expressed. Mr. Schouler in his work on Wills, § 24, under the belief that receiving an excessive amount of capital is a voidable act merely, as will be seen by a later reference to his text, says, in a note: "Enabling acts of this character are frequently met in the special legislation of American states at each session, that of Massachusetts for instance."

Chambers v. St. Louis, 20 Mo. 548, is a case of a devise of property to a municipal corporation for certain purposes, and the question was as to what extent the corporation could take and hold the property. In this case the court, among other things, said: "It is a matter between the state and the city. The law is only directory in relation to corporations taking lands. It imposes no penalty nor does it in terms avoid the conveyance. Nowhere is a corporation in express terms prohibited from taking and holding lands. . . . It is not for the courts in a collateral way to determine the question of misuser by declaring void conveyances made in good faith." The city was authorized to acquire land necessary only for its municipal purposes. The case of *Hayward v. Davidson*, 41 Ind. 212, involved a similar question upon a devise to county commissioners for the benefit of a county, and was decided the same way as was the case in Missouri.

We have already referred to the case of *Rainey v. Laing*, 58 Barb. 453, as differing entirely from the *McGraw* or *Cornell University Case*, for the reason that it was decided on a policy generally prevailing in the American courts rather than on the statute of wills in the state of New York, which statute is, as construed by its court of appeals, intensely prohibitory in its character. In the case cited (*Rainey v. Laing*) the court said: "That the question whether the property, with that which the synod already held, would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors, for the construction of the will, that that question was not to be determined collaterally, but only in a direct proceeding by the state. That the condition imposed in the act incapacitating the synod being, not against its taking, but against taking and holding, the corporation could take; but whether it could hold was another question, not necessary or proper in this collateral way to be considered—a question purely of public policy, with which individuals had no concern, but in which the state, as the sovereign, was alone interested, and which it might either raise or waive, according to its pleasure."

Another case of devise, relied on by both parties, *Heiskell v. Chickasaw Lodge*, No. 8, I. O. O. F. a late case reported, in 1889, in 87 Tenn. 668, 686, 4 L. R. A. 699. The case holds that as to a devise, where the charity is definite, heirs and other devisees cannot question the legal capacity of the trustee to hold and administer the trust, but the state alone can do so. At the time the devise took effect, the corporation held more than the amount pre-

scribed in its charter. The same case also held, in deference to the decision in the *Cornell Case*, that there is a difference whether the funds bequeathed have been actually received or not by the donee, while we do not understand the latter case as admitting that a devise or bequest of the kind would be otherwise than void under any circumstances. But Mr. Pritchard, a Tennessee author, explains, in a note to his work on Wills, published as lately as 1894, that the Tennessee court was misled by not noticing the grounds upon which the *Cornell University Case* was decided by the New York court. And we quote below a portion of this note, numbered 18 to section 153 of the work referred to, as being instructive because of its references to many cases, and nests of cases in books, and particularly because it contains a clear explanation of why and how the New York policy, as illustrated in the *Cornell University Case*, differs from the policy of other states on the same question. The note discusses the English statutes of mortmain, and says that by the English statutes of mortmain, beginning with 9 Henry III., corporations were prohibited from taking or holding lands without the King's license, and that they were therefore excepted from the operation of the statutes of wills. The note then says that these statutes were never adopted in Tennessee, and then continues: "In Pennsylvania, however, no corporation can take or hold lands unless specially authorized by act of the legislature. *Gouldie v. Northampton Water Co.* 7 Pa. 233; *Watts's Appeal*, 78 Pa. 370. The exception contained in the English statute of wills was incorporated into the New York statute of wills, and under it, it was held that a devise of land directly to a corporation was void, but that a devise to a natural person in trust for a corporation was good. *McCartee v. Orphan Asylum Soc.* 9 Cow. 437, 18 Am. Dec. 516. A later statute of that state provides that devises of land may be made to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. 2 N. Y. Rev. Stat. 57, §§ 1-3. This statute renders devises directly or indirectly to a corporation void in the prohibited cases. *Downing v. Marshall*, 23 N. Y. 366, 30 Am. Dec. 290; *Bascom v. Albertson*, 34 N. Y. 584; *King v. Rundle*, 15 Barb. 150; *Re McGraw*, 111 N. Y. 66, 84, 3 L. R. A. 387. This statute operates upon the testamentary power. Consequently a devise made in New York to a foreign corporation is void, although the foreign corporation has authority by its charter to receive the devise. *White v. Howard*, 46 N. Y. 144, 165; *United States v. Fox*, 94 U. S. 815, 24 L. ed. 192; *Royce v. St. Louis*, 29 Barb. 650. But a New York corporation can take by devise in Connecticut although the devise would be prohibited if made in New York. The reason is that the corporation carries with it its charter, but not the law of devise of New York. *White v. Howard*, 38 Conn. 342; *Thompson v. Swoope*, 24 Pa. 474; *American Bible Soc. v. Marshall*, 15 Ohio St. 537. But see *contra*, *Starkeveather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 183; *United States Trust Co. v. Lee*, 73 Ill. 142, 24 Am. Rep. 226.

A devise of land in New York to the United States is bad (*Re Fox*, 63 Barb. 157, 52 N. Y. 530, 11 Am. Rep. 751; *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192), but good in Massachusetts where there is no limitation as to devises to corporations. *Dickson v. United States*, 125 Mass. 311, 28 Am. Rep. 230. Corporations are usually limited as to the amount or value of real estate which they may hold, but, even where the corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only, unless, as in New York, there is some statute declaring the devise itself void. *The Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 594; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Boird v. Bank of Washington*, 11 Serg. & R. 411; *DeCamp v. Dobbins*, 29 N. J. Eq. 36; *Hough v. Cook County Land Co.* 73 Ill. 23, 24 Am. Rep. 230; *Barrow v. Nashville & C. Turnp. Co.* 9 Humph. 804. In *Heiskell v. Chickasaw Lodge No. 8*, 1 O. O. P. 87 Tenn. 668, 686, 4 L. R. A. 690, it is stated that there is a distinction between the case where a corporation is actually holding property in excess of the limitation of its charter and the case where a devise is made to it and the property devised has not yet come to its possession, and it is said that in the first case no one but the state can raise the question or enforce the forfeiture; but in the second case the heirs or residuary legatee may raise the question, because the gift would be void and the property would go the same as if it had not been made. Dickinson, Sp. J., cites *Re McGraw*, 111 N. Y. 66, 2 L. R. A. 387, to sustain this distinction. He seems to have overlooked the fact that the statute of wills in New York expressly declares such devises void. There can be no objection to the heirs making the question where the testamentary power is thus expressly limited by statute. In the absence of such a statute the devise is not void as fully shown by the authority cited above, and the heirs could no more attack it before the corporation went into the possession of a realty devised than afterwards. See extended note to *Page v. Heineberg*, 94 Am. Dec. 378, 381-387 [40 Vt. 81]; *Barrow v. Nashville & C. Turnp. Co.* 9 Humph. 804; *Dockery v. Miller*, 9 Humph. 781; *Fellows v. Miner*, 119 Mass. 541; 1 Morawetz, Priv. Corp. 332, 333, 678; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Runyan v. Coster*, 39 U. S. 14 Pet. 122, 10 L. ed. 882."

The foregoing cases, with one exception, are where the question is discussed as to the ability of corporations to acquire by devise or bequest property exceeding the amount which their charters expressly allow them to possess. In addition to those authorities, many others are cited by the counsel for the respondents which affect the question in a less direct but more general way, and are important as containing discussions of the general principle at stake, and as indicating the common judicial sentiment on this and kindred questions; some of them bearing with special force on the question by analogy to it, others being the private opinions to some extent of individual justices perhaps, but all of them combined operating with much force and effect on the particular

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issue involved. The same idea pulsates through them all. Some of them are the following:

In *Heard v. Talbot*, 7 Gray, 113, in discussing the relations in which a corporation stands towards the state as well as towards individuals interested in the same question, the following remarks made in the opinion of the court appear: "Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the government by the acceptance of the charter, and, upon due proceedings had, might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals therefore cannot take it upon themselves in the assertion of private rights, to insist on breaches of the contract by the corporation, as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings only instituted against the corporation. . . . Therefore, it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the government."

In *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 231, is a learned discussion by Gray, Ch. J., in the course of which he says: "There is a clear distinction . . . between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, . . . and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance;" to which proposition many and various cases are cited. In commenting on a former case between the same parties, it is in the opinion said as follows: "The objection that the corporation had no right to trade in gravel or land was raised by the defendant by way of defense to a bill in equity by the corporation for specific performance of his second agreement. . . . There can be no doubt of the correctness of the decision overruling the objection. The corporation by its purchase had acquired a title to the land, which was good against all the world, except possibly by the commonwealth."

It was upon the distinction above stated that it was held, in *Brunswick Gas Light Co. v. United Gas Fuel & L. Co.* 85 Me. 532, that one gas company could not sell its charter, inclusive of rights obtained through the exer-

cise of the principle of eminent domain, to another gas company without the consent of the legislature. The same distinction is aptly stated, in a South Dakota mining case, *Gilbert v. Hole*, 2 S. D. 164, in this way: "There is a difference between exercising power entirely foreign to the nature of a corporation and exercising legitimate powers to an improper extent. In the former case, the acts done might be absolutely void; in the latter, they would only be voidable by a proper proceeding on the part of the state." The general rule illustrated by some of the preceding cases is also well put in case of *Alexander v. Tolleton* (7th, 110 Ill. 65, where the headnote reads thus: "Where a corporation, by the law of its creation, is authorized in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, it cannot be made a question by any party, except the state, whether its real estate has been acquired for the authorized uses or not, or is in excess of the capacity of the corporation to take and hold. The state alone must assert her policy in that regard." In another Illinois case it is said: "A third person cannot in a collateral proceeding question the power of a corporation to hold real estate; only the state can do this, and in a direct proceeding." *Barnes v. Suddard*, 117 Ill. 287.

But the present suit is not either instituted or controlled by the state. It is a collateral proceeding by private parties. The state is not thereby exercising her policy, and if the suit can be sustained the state will have no opportunity whatever to express by any act its assent or dissent in relation to the conduct of the corporation accepting the bequests. The state is neither directly nor indirectly represented in the litigation. What can be plainer! But the corporation is using the state's machinery for their purposes, it is said. Is not that the business of the state whether such use of her procedure shall be had or not? Cannot the court wait until the state through her officials comes into court asking for any judicial assistance?

In *Briggs v. Cape Cod Ship Canal*, 137 Mass. 71, the point of many cases is expressed in these words: "The act of incorporation is a contract between the commonwealth and the corporation; whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition." Even the North Carolina court feels some amelioration of its rigid doctrine maintained in *Davidson College v. Chambers*, the first case cited on complainants' brief, when, in *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 595, thirty days after its first decision, it says: "Conceding that the railroad company had not purchased the land in question, nor used it for the purpose contemplated by the charter, the deed from Hardison to it vested the legal title and its right to purchase and hold the land could not be collaterally assailed. No one but the state could take advantage of the defect that the purchase was *ultra vires*."

The case of *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656, is the only one 33 L. R. A.

looking towards the present question, but it contains a germ of the true principle when it decides that, in an action by a corporation, the defendant cannot take an advantage of any use or abuse of its corporate powers.

The law authors are nearly or quite unanimous in their concurrence on the exact question presented for our determination. In *Devlin on Deeds*, vol. I. § 120, it is laid down that "if a charter of a corporation forbids it to purchase or take lands a deed made to it is void." And the author in the next following section (121) ascribes to the state the discretion of applying any remedy, saying that "the general rule is that the state alone can take advantage of the clause of the charter prohibiting a corporation from holding land." In *Beach on Private Corporations*, § 878, it is said that "no party except the state can object that a corporation is holding real estate in excess of its rights." And it seems to us that it is a consistent deduction from that proposition to say that no party but the state can object to any effort by a corporation to acquire real estate. How can a thing be wrong in the beginning and right in the end? How can it be logically said that a contemplated act is wrong and as soon as consummated is right? It would seem as if the first step towards a wrong act would constitute less offense than the last step would.

Says Mr. Perry, in his reliable work on *Trusts*, § 45: "If a corporation takes land by grant or bequest in trust or otherwise, which by its charter it cannot hold, its title is good as against third persons and strangers; the state only can interfere."

The quotation below from *Schouler on Wills* (§ 24) directly implies that the bequests he is speaking of are merely voidable, for if void a legislature at its will could not cure the difficulty. The author says: "But limitations and restrictions under the act of incorporation should here be regarded, to the extent, at least, of procuring an enabling act from the legislature to hold the property where the original charter privileges would otherwise be transcended. In Massachusetts and many other states no disability to take by either devise or bequest is imposed by the statute of wills upon corporations. But the American rule is not uniform. Under the New York Code, for instance, it is expressly declared that no devise to a corporation shall be valid unless the corporation be expressly authorized by its charter or by statute to take by devise."

The text of the section, in *Prichard on Wills*, § 158, an extended note to which we have already incorporated in this opinion, on a review of the authorities says that when a corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the state only unless, as in New York, there is some statute declaring the devise to be void. It is said in *Morawetz on Private Corporations*, § 671, as follows: "The statute of New York prohibiting devises of real estate to corporations, unless expressly authorized by their charter or by statute to take by devise, renders prohibited devises absolutely void; and it has been held that the legislature cannot by subsequent enactment validate a devise which is void under

the statute, for this would impair the vested rights of the heir.

A distinction should be observed between the effect of laws restricting the power of testators to devise their property to corporations, and laws restricting the power of corporators to take property. Such laws differ both in their application and in their legal effects." Again the author says in another section (§ 882) as follows: "A distinction should be observed between those laws whose object is to regulate corporations in respect to their power of acquiring and holding property, and laws whose object is to restrict the power of testators to dispose of their property. Laws of the former description are enacted in pursuance of a general policy of preventing corporations from acquiring the ownership of real estate in the absence of express authority from the state. But laws prohibiting devises to corporations are intended to restrict the testamentary capacity of testators, and their object, in many instances, is to prevent testators from being driven by the improper use of religious influence to devise their property to religious institutions, and thus disinherit their heirs."

Mr. Thompson, the learned and able commentator on Corporations, in his work which is the latest of any in this country on the subject, considers carefully the precise point in dispute between the present parties; and, in a lengthy section, fairly and fully states the effect of the authorities on both sides, and expresses his own opinion on the point in very positive terms in the manner following: "According to one view, if the amount of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then, in so far as the devise is in excess of that limit, it is void, and the title vests in the heirs. In such a case, the principle that the state alone can question the right of the corporation to hold the lands does not, in the opinion of some of the courts, apply, but the heirs of the testator can raise the question. Nor, in such a case, is the construction put upon the language of the statutes of mortmain applicable, making a distinction between the power to take and the power to hold; but such a statute, in the absence of some plain expression showing the contrary intent, is construed as prohibiting a taking where the prescribed limit has been reached. But other courts have taken the view that here, as in other cases, the question of the capacity of the corporation to take is one which can be raised by the state alone. And this is the only view sustainable on the analogies of this question. That view is, that a devise to a corporation, incapable for that or any other reason from taking, is good as against everyone save the state; just as is a deed to a corporation or to an alien; so that whenever the state waives its objection to it, that is an end of the discussion. But under the former view the devise is void only as to the excess; it is good up to the statutory limit, though there may be difficulty in determining that limit. Moreover under this doctrine, an act of the legislature passed subsequently to the death of the testator, enlarging the power of the corporation to take, will not affect the rights of the heirs, because the

title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it." *Thomp. Corp.* § 5787.

The author, in § 6083, characterized the question as follows: "These considerations bring us to the somewhat new and growing doctrine, that whether a corporation has acted in excess of its granted powers, or in the face of an expressed or implied statutory prohibition, is one which cannot be raised in litigation between it and a private party, or between private parties, but can only be raised by the state, in a direct proceeding, either to forfeit the franchises of the corporation, or to subject it to punishment for doing the unlawful act." Other extracts from Mr. Thompson's book could be profitably added hereto, if it were reasonable to usurp so much space.

The complainants quote a part of a section from the same author as follows (§ 5800): "This principle [that the state alone can interfere] has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law." This might be misleading if read without the omitted portion of the section which is as follows: "It has, for instance, no application to a case where a suit in equity is brought to compel the specific performance of a contract to convey land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with the building and operating of its road, but merely for speculative purposes. In such a case the specific performance was refused on the ground, among others, that the company had no power under its charter to take and hold land for such purposes." It is evident enough from the omitted extract, as well as from the citation in the note to the section that the meaning of the author is not inconsistent with his avowals in other sections of the work. The section applies to cases when a corporation has no power to be exercised and not merely where it exercises an excess of power of the same kind as that authorized by its charter. See, on this point, *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513.

The complainants quote in their brief an article in the *Harvard Law Review* (January, 1896) in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful question, the view taken in the *McGraw Case* and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones v. Habersham*, 107 U. S. 174, 27 L. ed. 401, in which Mr. Justice Gray wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the court, he evidently not being aware that the same case was first deliberately considered and decided by

the circuit court where Bradley, J., of the supreme court, delivered the opinion. Gray, J., stating that fact in the first line of his own opinion. The complainants also cite a bare remark in Bigelow's edition of Jarman on Wills, in note on page 63 of 6th edition, in which the editor seems to regard the doctrine that such a gift is invalid as the better doctrine.

But that learned author, in his brief note on the subject, takes no notice of the distinction between a want of testamentary capacity to give and a mere lack of authority in the corporation to take.

Taking now a retrospective glance at the cases and authorities on both sides which we have noticed in the foregoing pages, we feel impressed with the correctness of the statement of Strout, J., at the hearing of this case below, that the decided weight of authority is in favor of these respondents on this "new and growing question" as the author Thompson expresses it. Upon closing his discussion of the direct cases cited on his opening brief, the learned counsel for the complainants says: "But if the decisions of New York are claimed to rest upon the provisions of special New York statutes, what has the counsel to say as to all the other cases cited by the plaintiffs from North Carolina, from Kentucky, from New Jersey, and from Rhode Island?" We have substantially, according to our view, answered the questions ourselves by saying that the force of the opinion of the two judges in the North Carolina case is much lessened by the able minority opinion of the chief justice in the case and by the fact that the majority opinion yields the question as to devises of real estate; that the Kentucky case is a better authority for the respondents than for the complainants; that it is not sure that the complainants have any support in the New Jersey case outside of that contributed by the chief justice in his opinion; and that the Rhode Island case evidently follows the decisions in New York. How little authority then have the complainants to rely on outside of the *McGraw Case* in New York? We have no reason to doubt the correctness of the result of the decision in that case as based upon exceptional statutes in that state not existing elsewhere. And, should we undertake any criticism of that opinion, it would be that while the case was decided upon the statutory policy of that state, the opinion endeavors to bend into line with its policy the policy of other states where no such peculiar conditions are found to exist.

The counsel for the complainants has very critically reviewed the cases cited against them, and in some respects, as seems to us, upon purely theoretical rather than practical grounds. Their argument would sweep away much of the more direct authority, and all of the auxiliary cases as about worthless. This is too extreme. Of course, the cases of each class are not entirely alike, and may be of various degrees of force as authorities. But they all go to illustrate as well as to bring out the underlying principle on which a settlement of the case before us depends, and most or many of them are enough alike in support of the principle involved as to be regarded as leaves from the same tree.

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The counsel rebels against regarding the national bank cases as fitting precedents in support of the question here, but they are so regarded in some cases and by some authors, which shows how other minds than ours are influenced by them. So the counsel protests just as strongly against the alien cases as being of any importance as authority. But that class of cases is constantly cited in the books as supporting by analogy such a position as the respondents stand upon here. Deeds to aliens may not be of principal importance, but it seems to us that devises to aliens, which are good at common law, are clearly cases in point and of more consequence as precedents than any other analogous authority. Does not the will containing a devise to an alien have to be approved with the same formalities as are required of the will of the present testator, and is the land devised any more in the possession of the devisee in the one case than in the other? It is argued in behalf of complainants that there is this distinction between an alien as devisee and a corporation as such; that in the case of an alien the disability is personal and does not attach until proved by some direct and not collateral proceeding, as bankruptcy must be proved in the case of a bankrupt or as felony must be proved in the case of a felon, before the full consequences of such a condition fall upon them. There must be a conviction. Is not that the very contention of the respondents here? What is there in this will which should lead a court to establish any illegality except by a direct proceeding for the purpose? And why should the law be any more generous to a bankrupt or a felon in the dispensation of its favors than to a charitable association? At common law, and by the statute law of some of the states, an alien can take real estate by devise and hold the same until office found to take it away from him. It is also argued for the complainants that executory contracts of an illegal nature where the illegality is participated in by both parties cannot be enforced by one party against the other, the parties being equally in fault. That principle is not applicable here. The executors and the corporation are not parties contending against each other. They are on the same side of this suit. It is admitted by the corporation that it would be a transgression of the law of its organization to accept the bequests unless the state actively or passively consents to it, and its silence is its consent. But what wrong has the testator committed by his act? The only contract that can be pertinently discussed here is that between the state and the corporation, and the state can do no wrong.

A few of the more important propositions pertinent to the case may, in conclusion, be briefly re-stated as these: That there is no restraining clause in our statute of wills preventing the testator from making these devises and bequests; that they are regular and valid on their face, nothing in the will indicating that the corporation might not be a competent trustee to administer the gifts; that the testator had no suspicion that there would be any question over the provisions of his will; that, if the bequests fail, it will be an accident caused by mistake of the testator respecting a fact or as-

to the legal construction of such fact; that the same bequests (and devises) could have been safely made to almost any individual or to any one of many charitable corporations in the state instead of to this corporation; that there is a very narrow difference, if there be any, between selecting this institution and selecting any other suitable trustee for the execution of the trusts committed to it, such a corporation as this being merely a technical and meta-physical entity through which the benefit of the trusts were to go to poor persons suffering from certain diseases; that the heirs could have no voice or interest in the matter, unless accidentally so through the innocent mistake of the testator, they having no lien on the estate of either a legal or moral kind; that there are no words in the charter of the corporation, or in the statute authorizing its organization, that forbid its holding more than the amount limited by the statute, nor any penalties attached whereby to punish any transgression of the limitation, the only punishment intended being the risk of a forfeiture of the bequests or of the charter; that the limitation is chiefly directory and regulative, and, if impliedly prohibitory, incidentally and mildly so; that the charter is a contract between the corporation and the state in which no person is legally interested but the parties thereto, the same general rules of interpretation apply as in other contracts; that if the corporation fails to keep its side of the contract the state can take advantage of the default or not as it pleases; that the transgression may be so slight in its consequences that the state will forgive the offense, or forgive it because occasioned by some accident or resulting while the corporation is acting in good faith, or the state may, acting

through its prosecuting officers, punish the offense for the public good; that the state may by its legislature authorize the corporation to increase its capital before the act is done, or, if the increase be made without authority, may ratify the act afterwards either by some legislative provision or, as may be done between any other contracting parties, by its silence and any other acts indicating consent; that from the foregoing propositions it is clearly deducible that bequests like the present are voidable only, and may be avoided by the state alone, and are in no sense to be regarded as void; that a policy arose as to what better be done in the circumstances of each particular case, and that the policy belongs to the state and not to the court and is an executive and not a judicial right, for the court would decide the question in the case for all cases and all time, while the state may decide the question differently at different times according to its discretion and the public good. This right the state has never surrendered and the court cannot take it from the state. But it would surely deprive the state of its privilege if the court fails to act upon these bequests as valid bequests until, in proper and independent proceedings, such bequests are declared to be void.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that if this corporation cannot act some other party may be appointed by the court that can.

Exceptions overruled. Appeal dismissed, and the decree below affirmed.

MICHIGAN SUPREME COURT

Frederick W. STOCK

v.

Township of JEFFERSON *et al.*, *Appts.*

(.....Mich.....)

1. An injunction will not be refused to restrain the diversion of water from a milldam to one who has acted promptly in asserting his rights on the ground that the injury to him from the diversion of the water will be trivial compared with that suffered by the persons seeking to make the diversion in case they are not permitted to do so.
2. The improvement of highways, draining of lands, and general improvement of the country will not justify the diversion of water from a mill without compensation and due process of law.

(September 14, 1897.)

NOTE.—For some cases as to the rights of riparian owners, with respect to diversion of water, see *Uibricht v. Eufaula Water Co.* (Ala.) 4 L. R. A. 572, and note; also *Gould v. Eaton* (Cal.) *ante*, 181.
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A PPEAL by defendants from a decree of the Circuit Court for Hilldale County in favor of plaintiff in a suit to enjoin the diversion of water from plaintiff's mill. *Affirmed.*

The facts are stated in the opinion.

Messrs. Chester & Twiss, for appellants:

Where the loss to complainant is disproportionate to that entailed upon the defendant by a perpetual injunction, it should not be granted.

Potter v. Saginaw Union Street R. Co. 88 Mich. 297, 10 L. R. A. 176; *Hall v. Rood*, 40 Mich. 46, 29 Am. Rep. 528; *Buchanan v. Grand River & G. Log Running Co.* 48 Mich. 384; *Big Rapids v. Comstock*, 65 Mich. 78; *Miller v. Cornwell*, 71 Mich. 270. See also *Cornwell Mfg. Co. v. Swift*, 89 Mich. 522.

The court attempts to regulate the rights of the parties to this water or the use of the lands it overflows. This the courts are reluctant to do.

Hoxsie v. Hoxsie, 38 Mich. 77; *Bradfield v. Derrell*, 48 Mich. 9.

Where a bill prays for an injunction, and for damages, and for other relief, and it ap-

pears that an injunction is not necessary to the full and adequate relief of complainant, but that he can be fully compensated by damages, the injunction will not be granted.

Mullin v. Pennsylvania R. Co. 125 Pa. 189.

An injunction will not be granted where it will cause great injury to the defendants, and might be of serious detriment to the public without corresponding advantage to complainant.

Torrey v. Camden & A. R. Co. 18 N. J. Eq. 298. See cases cited 10 Am. & Eng. Enc. Law, p. 800, and note; *Logansport v. Uhl*, 99 Ind. 581, 50 Am. Rep. 109, 113.

Injunction will ordinarily not be allowed where the injury sought to be restrained is only trivial in its nature.

Ulbricht v. Eufaula Water Co. 86 Ala. 587, 4 L. R. A. 572; 1 Pom. Eq. Jur. § 418; *Miller v. Cornwell*, 71 Mich. 270; *Turner v. Hort*, 71 Mich. 128; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 528; *Mullin v. Pennsylvania R. Co.* 125 Pa. 199.

Laches is a lock to the door of equity which few keys if any, are strong enough to open. Certainly none will open it when it has caused the expenditure of money which cannot be repaid.

Pierce, Railroads, p. 168; *Atty. Gen., Eston, v. New York & L. B. R. Co.* 24 N. J. Eq. 57; *Potter v. Saginaw Union Street R. Co.* 88 Mich. 297, 10 L. R. A. 176, and cases cited; *Thomas v. Woodman*, 28 Kan. 217, 88 Am. Rep. 156; 4 High, Inj. § 884; *Logansport v. Uhl*, 99 Ind. 581, 50 Am. Rep. 109; *State, Youngster, v. Paterson*, 40 N. J. L. 246; *Griffin v. Augusta & K. R. Co.* 70 Ga. 164.

Judgments are conclusive only on parties and privies.

Voss v. Morton, 4 Cush. 27, 50 Am. Dec. 750; *Alexander v. Walter*, 8 Gill, 289, 50 Am. Dec. 688; *Hunter v. Hatton*, 4 Gill, 115, 45 Am. Dec. 121; *Lawrence v. Haynes*, 5 N. H. 88, 20 Am. Dec. 554; *Smith v. Williams*, 44 Mich. 240; *Stone v. Welling*, 14 Mich. 514. See *Boyd v. Baynham*, 5 Humph. 886, 43 Am. Dec. 438; *Cooley, Const. Lim.* 5th ed. p. 61; *Black, Judgm.* § 600 and note.

A nuisance must give way to public improvements.

Peoples v. Detroit White Lead Works, 83 Mich. 471, 9 L. R. A. 722; *Grand Rapids v. Weiden*, 97 Mich. 82; *Big Rapids v. Comstock*, 65 Mich. 78.

Injunction will not be granted against the diversion of water where complainant did not object until the work was completed.

Jacox v. Clark, Walk. Ch. (Mich.) 249; *Big Rapids v. Comstock*, 65 Mich. 78; *Trout v. Lucas*, 54 N. J. Eq. 861.

Rights already lost and wrongs already perpetrated cannot be corrected by injunctions.

Mead v. Cleland, 62 Ill. App. 294; *State, Youngster, v. Paterson*, 40 N. J. L. 246; *Griffin v. Augusta & K. R. Co.* 70 Ga. 164.

Messrs. Frankhauser Brothers, for appellee:

Complainant was entitled to that water, and when he has shown that he has shown all that is necessary to entitle him to maintain such a suit.

Angell, Watercourses, 6th ed. p. 625, § 449; 86 L. R. A.

Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102.

It is not essential that actual perceptible damage should be shown, it being sufficient ground for equitable relief that there is a violation of the right by diverting the stream from its full natural flow.

High, Inj. § 873; *Chace v. Watsaw Water Works Co.* 79 Hun, 151; *Michigan Land & I. Co. v. Cleveland Sawmill & L. Co.* (Mich.) 3 Det. L. N. 46; *Peck v. Clark*, 142 Mass. 436; *Cottrick v. Swinburne*, 105 N. Y. 508; *New York Rubber Co. v. Rothery*, 183 N. Y. 293; *Bennett v. Murtaugh*, 20 Minn. 151; *Ware v. Allen*, 140 Mass. 513.

The exercise of the right of flowage for fifteen years and upwards creates a prescriptive right and gives title to the property, so far as the right to flow is concerned, as fully as if the right were conveyed by deed.

Conklin v. Boyd, 46 Mich. 56; *Gregory v. Bush*, 64 Mich. 87; *Shearer v. Middleton*, 88 Mich. 621; *Hoag v. Place*, 98 Mich. 450, 18 L. R. A. 89; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 519; 28 Am. & Eng. Enc. Law, pp. 980, 981; *Lund v. New Bedford*, 121 Mass. 286; *Chapman v. Copeland*, 55 Mass. 476; *Smith v. Rochester*, 88 Hun, 612, 104 N. Y. 674; *Gilsinger v. Saugerties Water Co.* 66 Hun, 178.

A tortious act can never be the foundation of an equitable right.

Campau v. Campau, 19 Mich. 116; *McOredie v. Buxton*, 31 Mich. 883; *Putnam v. Reynolds*, 44 Mich. 118; *Williams v. Barber*, 104 Mich. 31; *Koopman v. Blodgett*, 70 Mich. 610.

An estoppel *in pais* is a representation, either by act or by word, or even in some cases by silence, made by one party to another for the purpose of influencing the latter in reference to the title or boundary line of the property about to be purchased by the latter.

Tiedeman, Real Prop. § 725, and other cases cited.

A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth.

2 Story, Eq. Jur. § 1558b, and cases there cited in footnote; 7 Am. & Eng. Enc. Law, p. 15; *Bigelow, Estoppel*, pp. 557, 570; *Gooding v. Underwood*, 89 Mich. 187.

There can be no estoppel unless a party is misled to his injury.

Plumb v. Grand Rapids, 81 Mich. 881; *Fletcher v. Aldrich*, 81 Mich. 186; *Thirlby v. Rainbow*, 98 Mich. 164; *Ladd v. Brown*, 94 Mich. 136; *Northern Michigan Lumber Co. v. Lyon*, 95 Mich. 584; *Leonard v. Spencer*, 108 N. Y. 338.

Where the foundation of the estoppel is in mere silence, it cannot be relied on, if the means for ascertaining the true state of the case is afforded by the public records.

Hill v. Blackwelder, 118 Ill. 283; *Thor v. Olson*, 125 Ill. 865; *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556. See also *Robbins v. Moore*, 129 Ill. 80; *Knoebel v. Kircher*, 88 Ill. 308.

The former decree and injunction were binding on all parties, for the reason that it was a decree *in rem*; it fixed the contour of that country, and made a record of it.

Freem. Judgm. § 606, pp. 508-509; *Woodruff v. Taylor*, 20 Vt. 65; 2 Smith, Lead.

Cas. pp. 595, 596, 6th Am. ed. p. 660; Black, Judgm. chap. 20, § 792; *Benson v. Connors*, 68 Iowa, 670; Bigelow, Estoppel, 283; *Pitman v. Albany*, 34 N. H. 577.

Moore, J., delivered the opinion of the court:

September 4, 1894, the complainant commenced this proceeding, praying for an injunction compelling the defendants to fill up a ditch they had dug to lower Pleasant lake, and carry the water therefrom south and east into the St. Joseph river, and then into the Maumee, and then into Lake Erie; complainant alleging that the waters from Pleasant lake had always run to the north and west, and through a chain of lakes and St. Joseph river to his mill, and from there on into the waters of Lake Michigan. Prior to 1858 a flouring mill was built at Hillsdale, which mill was run by water taken from the St. Joseph river. This river has its source in a chain of lakes four or five in number, the largest of which is Baw Beese lake, and the furthest of which is Lake Pleasant. In 1858 parties began to dig a ditch to carry the water in the direction in which the defendants have taken it. The then owners of the mill filed in the circuit court of Hillsdale county a bill, praying for a writ of injunction to restrain the parties from pursuing their work. A decree was rendered in that case, in accordance with the prayer of the bill. In 1869 the complainant became the owner of the mill in question, and has owned and operated it ever since. The defendant township and George E. Porter, highway commissioner, caused a ditch to be dug in the summer of 1893 and 1894, for the purpose of improving the highway in the township of Jefferson, in which there was a sink hole, which gave the township authorities a great deal of trouble. In the summer of 1898, while defendants were digging this ditch, complainant saw and talked with a number of those engaged in the work, and notified them the water they were diverting belonged to him, that he used it for the purpose of conducting his business in the city of Hillsdale; and on April 24, 1894, when defendants resumed their work on the ditch, complainant caused a copy of the decree that was made in 1858 to be served upon the highway commissioner, and forbade their continuing their work. As they failed to do so, this bill was filed. The case was heard in open court. In addition to hearing the testimony, the trial judge visited the premises, and saw what had been done, and the topography of the country. The judge found that much of the water which naturally flowed out from Lake Pleasant and from the big marsh about one of the other lakes would come down to the mill pond of the complainant if not diverted, and that Mr. Stock, as owner of the mill, had a right in the waters which naturally flowed from Lake Pleasant and this big marsh into his mill pond, and that the defendants were not justified in the action they had taken in digging this ditch, and that the effect of it was to divert the water from the mill, and granted a decree in the case, enjoining the defendants from diverting the waters which would naturally come to complainant's mill pond, and directing that the ditch be filled up at a certain

point, to a certain depth, from which decree defendants appeal.

While the testimony is conflicting, we have no doubt, from an examination of the record, that the conclusion of the learned trial judge that the digging of this ditch was without legal right, and that its effect was to divert from complainant's mill a very considerable quantity of water to which he was entitled, is fully justified by the evidence. There can be no question from the record that the complainant was legally entitled to the use of all the water that would naturally come to his mill pond. The defendants were not riparian proprietors on the stream, and there is no question of the adjustment of the rights of several riparian proprietors on the same stream of water. So far as defendants diverted water to which complainant was entitled, they were trespassers.

It is the claim of the defendants that the loss to the complainant caused by the diversion of the water is trivial, while the damage the defendants would sustain if a permanent injunction is granted would be very great, and that, therefore, the injunction ought not to be allowed; citing *Potter v. Saginaw Union Street R. Co.* 88 Mich. 297, 10 L. R. A. 176, and cases there cited; *Torrey v. Camden & A. R. Co.* 18 N. J. Eq. 298; 10 Am. & Eng. Enc. Law, 800, and note; *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 112. None of these authorities establish the doctrine that, where one trespassed against acts promptly after notice of the trespass, equity will not interfere where the trespass is of a continuing nature, and is irreparable in its character. An examination of these cases will show either that it was doubtful if any damage would be done, or the complainant had not acted promptly in appealing to equity. It does not appeal to one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his trespass.

We think it clearly appears from the testimony that a large amount of water has been diverted from complainant's mill to which he was entitled, and that the conversion will continue if the action of the circuit judge is not sustained. It is doubtless true that many owners of lowlands about Pleasant lake and the large marsh are benefited by the cutting of this ditch, but one man is not to be deprived of property rights because to do so would benefit others more than he is injured. "It has always been settled that the owner of realty is entitled to the aid of equity to prevent permanent and continually recurring injuries to the enjoyment of his property. To deprive him of such enjoyment is to deprive him of the property itself, wholly, or to the extent of the mischief. Neither can it be allowable for wrongdoers to rely on their own wrong to change or lessen his means of redress. When they do mischief it is their own fault if they render a stringent remedy necessary, and they, and not the party injured, must take the consequences." *Koopman v. Blodgett*, 70 Mich. 610; *Hall v. Ionia*, 88 Mich. 498; *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191. In the case of

Koopman v. Blodgett, 70 Mich. 610, it is said: "A person owning a suitable place for a mill site cannot be deprived of it because someone else has wrongfully interfered with the stream above him. Without either such a lapse of time as will bar suit or indicate acquiescence, or some act of estoppel, rights of property are not to be barred." In the case at issue the complainant and his grantors had maintained a mill at this place for more than forty years, and whenever an attempt was made to direct the water in the manner it has been diverted by the defendants the courts were appealed to. Counsel says complainant stood by, and allowed defendants to incur large expense, and that he is estopped from appealing to equity now. We cannot agree with counsel in his contention. The defendants knew the complainant was opposed to what they did. He forbade their acts, and when they continued them, he caused a copy of a decree made more

than forty years ago, in favor of his grantors, to be served upon them, and, when they paid no attention to all this, without unreasonable delay he appealed to the court. If they have expended considerable sums of money in committing this trespass, it is their own fault, and they must lose it.

It is urged very earnestly by counsel that Mr. Stock's right to maintain his dam and to use the water that would naturally come to his mill must give way to the right of the public to improve the highways, to drain lands, and to generally improve the country. It is sufficient reply to this argument to say that it has long been the fundamental law of the land that a man is not to be deprived of his property without due process of law, and without compensation.

Decree is affirmed, with costs.

The other Justices concur.

ARKANSAS SUPREME COURT.

NEBRASKA MEAL MILLS, *Appt.*,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

(..... Ark.)

1. A railroad company is not liable for delivery to the consignee to whom goods are billed, without notice to it that the bill of

NOTE.—To whom may delivery be made under bill of lading.

NEBRASKA MEAL MILLS v. St. Louis S. W. R. Co. presents a rather unusual state of facts. The bill of lading made the goods deliverable to the consignee absolutely without any mention of order or assigns. In most of the bills of lading there has been some qualification of the absolute right of the consignee. In many of them the property is deliverable to order, in which event the cases agree that the carrier cannot safely deliver without such order or knowledge that it has not been given.

Goods deliverable to order.

If the property is consigned care of the consignee to order of the one making advances on the bill of lading, the carrier will be liable to the latter in case he delivers to the consignee without the latter's order. *Stone v. Chicago, M. & St. P. R. Co.*, 88 S. D. 1.

By issuing bills of lading stipulating for a delivery to order the ship becomes bound to deliver to no one who has not the order of the shipper. It is no excuse for a delivery to the wrong person that the indorsee of the bill of lading was unknown and that notice of the arrival of the vessel could not be given to him. If the consignee cannot be found it is the duty of the carrier to retain the goods until they are claimed, or to store them for the owner. And he has no right under any circumstances to deliver them to a stranger. *The Thames v. Seaman ("The Thames")*, 81 U. S. 14 Wall. 98, 20 L. ed. 804.

If the goods are shipped subject to the order of the consignor the carrier will not be justified in delivering them without such order by the fact 88 L. R. A.

lading has been forwarded to a bank with a draft attached for collection, although the bill of lading is not produced.

2. The right of a carrier to deliver to the consignee is not affected by a statute declaring bills of lading negotiable and any person to whom the same are transferred to be held the owner so far as to give validity to any pledge, lien, or transfer upon the faith thereof, and that no property specified therein shall be delivered except on the surrender and cancellation of the

that one of the employees of the shipper said that the property was for a certain person. *Sawyer v. Chicago & N. W. R. Co.* 22 Wis. 408.

In *Brandt v. Bowlby*, 2 Barn. & Ad. 332, where the cargo was deliverable to the order of certain persons, the carrier delivered without their order, but defended upon the ground that the property had vested in the one to whom it was delivered, and that therefore the damages would be no more than nominal; but the court held that the property had not vested in him and that full damages could be recovered.

Although the shipment is made to the order of the consignor the carrier will not be liable if it has delivered to the order of one whom the shipper has held out as his general agent with authority to give orders as to the delivery of shipments. *Watson v. Hoeseac Tunnel Line Co.* 13 Mo. App. 263.

If the contract of the carrier calls for delivery to the order of the consignor the carrier by delivering to a third person has the burden of showing that he is the true owner. *Wolfe v. Missouri P. R. Co.* 97 Mo. 473.

If the goods are to be delivered to the consignee or his order the carrier will not be justified in delivering to a general agent of the consignor. *Wilson Sewing Mach. Co. v. Louisville & N. R. Co.* 71 Mo. 208.

Where the shipper has retained the bill of lading himself and the carrier delivered the property to the consignee without the order of the shipper, the court said where any person holding property as carrier which he knows to belong to one person and to be subject to his order voluntarily gives that property to another without the owner's

bill of lading, except in cases where the bill of lading has been transferred.

(*Battle, J., dissents.*)

(June 5, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for alleged wrongful delivery of certain property which had been placed in defendant's possession for transportation. *Affirmed.*

authority it is evidence of a conversion. *Lealie v. Canada C. R. Co.* 44 U. C. Q. B. 21.

Must deliver to holder of bill of lading.

Under ordinary circumstances where the goods are deliverable to order or assigns there must be a delivery to the holder of the bill of lading, and delivery to the consignee who does not hold the bill of lading is not sufficient.

In *Walker v. Detroit, G. H. & M. R. Co.* 49 Mich. 446, it is said that carriers must recognize transfers of bills of lading, and unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee.

The carrier will be liable if he delivers to the consignee while the bill of lading is in the hands of a third person who has advanced money on it. *Alderman v. Eastern R. Co.* 115 Mass. 233.

It is the duty of the carrier to ascertain whether or not a bill of lading was delivered to the shipper, and if so to retain the property until demanded by one claiming under that title, and to deliver in accordance with it. *Furman v. Union P. R. Co.* 106 N. Y. 573.

A delivery of goods by a common carrier otherwise than in accordance with the bill of lading is in the carrier's wrong and at his risk. *Pennsylvania R. Co. v. Stern*, 119 Pa. 24.

The carrier may be liable for delivery to a person who does not hold the bill of lading. *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 298; *St. Louis & T. H. R. Co. v. Rose*, 20 Ill. App. 670; *Merchants' Despatch & Transp. Co. v. Merriam*, 111 Ind. 6; *Garden Grove Bank v. Humeston & S. R. Co.* 67 Iowa, 526; *Gibbons v. Farwell*, 63 Mich. 344; *Union Stock Yards Co. v. Westcott*, 47 Neb. 300; *Collins v. Burns*, 43 N. Y. 1.

A steambot cannot avoid its liability for the loss of the goods by showing that it delivered them to the owner of a wharfing boat lying in front of the place to which the goods were destined. *Wayne v. The General Pike*, 18 Ohio, 421.

It is immaterial that prior to the making of the advance on the bill of lading the carrier has improperly parted with control of the property, as the improper delivery of the property will not relieve the carrier of its liability to the indorsee of the bill of lading. *First Nat. Bank v. New York C. & H. R. R. Co.* 85 Hun, 160.

The directions of the bill of lading must control over the marks on the packages. *Moore v. Henry*, 18 Mo. App. 35.

If the goods which are shipped by separate bills of lading are included by the delivery clerk in one bill of charges and delivered to the person paying the bill, the carrier will be liable to the person whose property is by the mistake wrongfully delivered. *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249.

In *Sanquer v. London & S. W. R. Co.* 16 C. B. 163, 3 C. L. Rep. 811, the carrier delivered some butter to persons to whom he had been in the habit of delivering at a different place from where the 38 L. R. A.

Statement by Riddick, J.:

The appellant corporation delivered to the Missouri Pacific Railway Company a car load of meal for shipment to E. D. Russell at Altheimer, Arkansas. The railway company thereupon gave to said consignee a bill of lading, in which it was stipulated that said meal was to be transported from Stella, Nebraska, to Altheimer, Arkansas, and there delivered to the consignee, E. D. Russell. The appellant then, without notice to the railway company, drew a sight draft on said Russell for \$182.30, the price of the meal, and attached it to the

packages were marked for delivery, and he was held liable for not delivering to the holder the bill of lading; but the question does not turn upon the rights given upon the bill of lading, but upon the assumption of the carrier as to the proper delivery and whether or not there had been a ratification.

In case the carrier signs a bill of lading to deliver the cargo to a certain person, and afterwards signs another to deliver a portion of it to another person, he will be liable to the consignor in case he fails to comply with the latter bill. *Stille v. Traverse*, 3 Wash. C. C. 43.

And in *Anderson v. Clark*, 2 Bing. 20, where the consignee refused to accept the draft and the carrier redelivered to the consignor, he was held liable to the consignee for neglecting to deliver in accordance with the bill of lading.

If the consignee refuses to accept or to make an appointment under the bill of lading, the carrier will be justified in delivering to the agent of the consignor at the port of discharge. *Shepard v. De Bernales*, 13 East. 565.

In *Low v. De Wolf*, 8 Pick. 101, it was held that where it became necessary at an intermediate port to unload a portion of the cargo which could not be restowed, and so was delivered by the master to a third person to be sold on account of the owner, the master will not be held liable to an assignee of the bill of lading for the amount transmitted to the owner, the bill of lading being "to order or assigns," and the master not knowing of the assignment.

Necessity of production of bill of lading.

The almost universal rule is to require a production of the bill of lading before making a delivery.

Unless the carrier has stamped the bill as not negotiable he is bound to recognize the validity of transfers and to deliver the property only on the production and cancelation of the bill. *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 196, 60 Am. Rep. 440.

A railroad company may for its own protection exact the production of the bill of lading before making delivery of the goods to the consignee. *Bas v. Glover*, 63 Ga. 745.

A clause in a bill of lading requiring the presentation to the carrier of the bill of lading properly indorsed as the evidence whereon delivery shall be made is valid. *Bishop v. Empire Transp. Co.* 1 Jones & S. 99.

If the bill of lading provides for a delivery of the property to the consignee upon presentation of the duplicate, the carrier will be liable in case he delivers without requiring production of the duplicate. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

In *McEwen v. Jeffersonville, M. & I. R. Co.* 33 Ind. 368, 5 Am. Rep. 216, the bill of lading stipulated for a delivery to the consignee upon his production of the duplicate bill of lading, and the carrier delivered without such production. It

bill of lading, and had the same forwarded to a bank at Pine Bluff, Arkansas, for collection. The bank presented the draft for payment, but Russell was insolvent, and failed to pay. The St. Louis Southwestern Railway Company, which had received the meal as connecting carrier, having no notice that a draft had been drawn on Russell and sent for collection, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal to him without requiring the production of the bill of lading. The appellant brought this suit against the railway company to recover damages, alleging that the delivery under such circumstances was wrongful and resulted to its injury. The finding and judgment were in favor of the defendant.

Messrs. Bridges & Wooldridge, for appellants:

The railway company is liable to the shipper, if it delivered the meal without requiring the consignee to surrender and cancel the bill of lading, and by reason thereof plaintiffs were damaged.

When goods are consigned without reservation on the part of the consignor the prima facie legal presumption is that the consignee is the owner. The fact of consignment does not vest an absolute title in the consignee. His title is not complete until the bill of lading comes into his hands.

2 Am. & Eng. Enc. Law, p. 242.

It was the duty of the carrier to ascertain whether a bill of lading was delivered to the shipper, and, if so, to retain the property until

was argued that the stipulation was for the benefit of the carrier to aid identification, but the court held that it was for the benefit of the consignor, and that the delivery without compliance with the stipulation rendered the carrier liable.

In *Cole v. Wabash, St. L. & P. R. Co.* 21 Mo. App. 443, it is stated in the separate opinion that if the carrier delivers the goods to the wrong party he does so at his peril, wherefore the law is that the carrier has the right for his necessary protection to demand the bills of lading before delivery, or, in case of a demand by the rightful owner, to require reasonable evidence of his identity.

The carrier will be liable for delivering without the production of the bill of lading. *Bristol & West of England Bank v. Midland R. Co.* [1891] 2 Q. B. 663.

A delivery to the consignee is at the peril of the carrier unless at the time of delivery the consignee surrenders the bill of lading made or indorsed to himself. *Gates v. Chicago, B. & Q. R. Co.* 42 Neb. 379; *Union P. R. Co. v. Johnston*, 45 Neb. 57.

A carrier which delivers goods intrusted to him for carriage, without production of the bill of lading describing the goods, is liable in trover for their value to a bona fide holder of the bill of lading taken for value before the delivery of the goods at destination. *First Nat. Bank v. Northern R. Co.* 58 N. H. 253.

In *City Bank v. Rome, W. & O. R. Co.* 44 N. Y. 126, it is said it is the law that a carrier is bound to ascertain whether a bill of lading was delivered to the shipper, and if delivered he must retain the property until it is demanded by one claiming under that title.

If by the terms of a bill of lading the goods are to be delivered to a named consignee or his assigns, the master is not entitled to deliver the goods to the consignee without the production of one of the parts of the bill of lading. *The Stettin*, L. R. 14 Prob. Div. 142.

If the bill of lading is indorsed as security for a draft the carrier will be liable in case he delivers to the consignee while the draft is outstanding unpaid and the bill of lading is not surrendered. *The Thames*, 7 Blatchf. 226.

A carrier which transacts business for a certain firm between two places without ever requiring bills of lading to be delivered up as a condition for delivery of the freight will be liable to a third person to whom the bill of lading has been transferred for value without notice of the irregularity in the mode of transacting the business. *Walters v. Western & A. R. Co.* 56 Fed. Rep. 369.

If a bill of lading is attached to a draft on which money is advanced the carrier will be liable to the one making the advances in case he delivers the cargo to a purchaser from the consignee without

requiring the bill of lading to be delivered up. *Walters v. Western & A. R. Co.* 63 Fed. Rep. 391.

Where the goods are consigned to the order of the consignor, and the bill of lading is indorsed in blank and negotiated for value as security for a draft, the carrier has no right to deliver the goods without production of the bill of lading or authority from the holder thereof. *Boatmen's Sav. Bank v. Western & A. R. Co.* 81 Ga. 221.

If a shipper takes a bill of lading to himself as consignee, and the carrier delivers the goods to another with his consent but without surrender of the bills of lading, a subsequent assignee of the bill of lading, though acquiring it without notice and for value, will have no recourse against the carrier. *Alabama Nat. Bank v. Mobile & O. R. Co.* 42 Mo. App. 284.

The fact that a person claiming the property gives an undertaking to deliver the bill of lading as soon as he receives it will not justify the carrier in delivering to him. *Merchants Bank v. Union R. & Transp. Co.* 69 N. Y. 373, affirming 8 Hun. 249.

But in *Ramish v. Kirschbraun*, 107 Cal. 659, it appears that the carrier was in the habit of delivering the property in advance of the arrival of the bill of lading upon the giving of a bond for its protection.

The carrier will be liable in case it delivers in violation of the express notice not to deliver without production of the bill of lading. *Foggan v. Lake Shore & M. S. R. Co.* 40 N. Y. 8, R. 718.

The delivery of the goods by the carrier to a person unauthorized to receive them, without requiring production of the bill of lading but relying on his representation that he is the holder of it, is a conversion. *Forbes v. Boston & L. R. Co.* 133 Mass. 154.

In *Nathan v. Giles*, 5 Taunt. 558, 1 Marsh. 220, it is assumed that if the shipowner delivered without production of the bill of lading he would be liable to the indorsee upon the latter's demand for the cargo.

If the goods are delivered without production of the bill of lading the carrier assumes the burden of showing that the delivery was to the proper person. *National Bank v. Atlanta & C. Air Line R. Co.* 26 S. C. 216.

If the carrier delivers without the production of the bill of lading he takes upon himself the risk of its previous transfer for value to an innocent indorsee. *Midland Nat. Bank v. Missouri, K. & T. R. Co.* 62 Mo. App. 531.

If by a course of dealing the carrier has acquired a habit of delivering to the consignee without objection from the holder of the bills of lading it may continue to treat the consignee as agent of the holder of the bill of lading, and will not be liable for delivering to him without a surrender of the bill of lading. *Ontario Bank v. New Jersey S. R. Co.* 59 N. Y. 610.

demand by one claiming under that title, and to deliver in accordance therewith.

City Bank v. Rome, W. & O. R. Co. 44 N. Y. 186; *Furman v. Union P. R. Co.* 106 N. Y. 579.

Defendant railway company could have protected itself by demanding of the consignee a production and cancellation of the bill of lading.

Bass v. Glover, 68 Ga. 746; 2 Beach, Railways, § 951; *Furman v. Union P. R. Co.* 106 N. Y. 579; *Merchants' Despatch & Transp. Co. v. Merriam*, 111 Ind. 6; *McKuen v. Jeffersonville, M. & I. R. Co.* 88 Ind. 864, 5 Am. Rep. 216; *Walker v. Detroit, G. H. & M. R. Co.* 49 Mich. 446; *Wells, F. & Co. v. Oregon R. & Nav. Co.* 32 Fed. Rep. 51.

If the carrier delivered the goods to the consignee without requiring him to surrender

If the carrier delivers upon order of the consignee he will not be liable to one to whom the consignee subsequently assigns the bill of lading the surrender of which the carrier did not require. *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.* (Iowa) 71 N. W. 255.

The New York statute prohibits the delivery by a common carrier of property covered by a bill of lading except upon surrender and cancellation of the bill. *Colgate v. Pennsylvania Co.* 102 N. Y. 120, affirming 81 Hun, 297.

The fact that the words "Not negotiable" are upon the back of the bill of lading is not sufficient to satisfy the requirement of the New York statute that no delivery shall be made without a surrender of the bill of lading unless it contains the words "Not negotiable" upon its face. *First Nat. Bank v. New York C. & H. R. Co.* 85 Hun, 160.

In *Howard v. Shepherd*, 9 C. B. 297, 19 L. J. C. P. N. 8. 249, where the suit was for delivering the property to one who was not the holder of the bill of lading, it appeared that the declaration did not allege the production of the bill of lading by the plaintiff, so no breach of his duty to the plaintiff was shown and judgment went against him; but it is said the duty of the shipowner was to keep the goods until some person presented the bill of lading to him at the point of destination.

In one case it was held that where the property was bought under a fictitious name and consigned to the purchaser by that name, and a bill of lading mailed to him, which was not delivered because no person of that name was known, the carrier was not liable for delivering the property to him, although he did not produce the bill of lading, and was known by another name to the station agent, because of which he claimed the goods as agent for the consignee. *Dunbar v. Boston & P. R. Corp.* 110 Mass. 28, 14 Am. Rep. 576.

The bill of lading may be controlled by subsequent communications or by statutes.

In *Mitcheil v. Chesapeake & O. R. Co.* 17 Ill. App. 231, the carrier was held justified in delivering without production of the bill of lading upon seeing a telegram to the consignee telling him to do the best he could. That anything he did would be satisfactory.

So it was held that a bill of lading requiring delivery to the owner or his assigns may be controlled by a subsequent letter directing the master to manage as A B and C D have directed with regard to goods shipped by them. And the master will be justified in doing as either of the parties mentioned direct. *Forrester v. Dodge*, 12 Mass. 555.

In Texas there is a statute requiring delivery upon payment of freight.

The carrier is justified in refusing to deliver goods until the bill of lading is produced, notwithstanding L. R. A.

and cancel the bill of lading, and the draft was not paid, it would be liable to the shipper for such loss.

Gates v. Chicago, B. & Q. R. Co. 42 Neb. 879; *Pennsylvania R. Co. v. Stern*, 119 Pa. 24; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287; *Bank of Commerce v. Bissell*, 73 N. Y. 615; *Newcomb v. Boston & L. R. Corp.* 115 Mass. 280; *Weyand v. Atchison, T. & S. F. R. Co.* 75 Iowa, 578, 1 L. R. A. 650; *Second Nat. Bank v. Cummings*, 89 Tenn. 669; *Alderman v. Eastern R. Co.* 115 Mass. 238; *Midland Nat. Bank v. Missouri P. R. Co.* 182 Mo. 423.

A bill of lading in this state is not only assignable, but it is made a negotiable instrument, the same as a promissory note or bill of exchange.

Sandels & H. Dig. § 509.

standing security is offered. 4 Tex. App. Civ. Cas. § 245.

Under this statute it has been held that a carrier cannot rightfully refuse to deliver the goods after inspecting the bill of lading on the ground that the bill is not surrendered to him if the consignee tenders the freight charges as contained in the bill and executes a receipt for the goods. *Dwyer v. Gulf, C. & S. F. R. Co.* 69 Tex. 707; *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 435.

But a railroad company is not liable for failure to deliver goods to an unidentified consignee where he fails to produce the bill of lading though he may offer security. *Gulf, C. & S. F. R. Co. v. Freeman* (Tex. App.) 9 Ry. & Corp. L. J. 497.

Although it has been held that under the Texas statute prescribing a penalty for refusal to deliver freight it is not necessary to entitle the consignee to the penalty that he should have presented his bill of lading when making demand for the property. *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 7 L. R. A. 478; *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 435, reversed on another point on rehearing, 26 S. W. 745.

The point made in *NEBRASKA MEAL MILLS v. ST. LOUIS SOUTHWESTERN R. CO.* that, if the bill of lading makes the property deliverable to the consignee absolutely, delivery may be safely made without production of the bill of lading, does not seem to have been presented in any other case. It would seem that there might be some ground for distinction between cases where the consignment was absolutely to the consignee and those where it was to his order or assigns. But there is language in some of the above cases holding that the carrier cannot safely deliver without a production of the bill of lading, which is broad enough to include all cases whether made to order or assigns or not.

Shipper's rights.

The doctrine of stoppage *in transitu* is not within the scope of this note, but some cases have arisen in which the rights of the shipper under the bill of lading have been considered.

On delivery of goods to a carrier and a receipt of a bill of lading therefor making the property deliverable to the consignee, the consignor loses all control over the goods except the right of stoppage *in transitu*. *Armentrout v. St. Louis, K. C. & N. R. Co.* 1 Mo. App. 158.

After shipment the carrier holds the property for the lawful holder of the bill of lading. If the bill is drawn in the consignee's favor, the consignor's possession and control are gone. *Schindler v. Smith*, 18 La. Ann. 476.

If the shipper takes the bill of lading in his own name the carrier cannot rightfully deliver the property to any other person except on his order

Plaintiffs had a right to rely upon the statute requiring the production and cancellation of the bills of lading. Defendant was bound to take notice of the same. The statute was as much a part of the contract as if it had been inserted in the bills of lading.

Colgate v. Pennsylvania Co. 109 N. Y. 120; *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* 99 Ala. 416.

The intention of the parties was an important question and should have gone to the jury, for a delivery to a carrier is considered as a delivery to the consignee only when and as it is in agreement with the terms and intention of the shipment.

Taylor v. Turner, 87 Ill. 296; *Emery Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Scharff v. Meyer*, 133 Mo. 428.

A connecting carrier's liability for a failure

to carry out the original contract with the shipper is the same as that of the carrier issuing the bill of lading, and the law imposes upon it the same duties.

St. Louis, I. M. & S. R. Co. v. Weekly, 50 Ark. 397.

Messrs. Samuel H. West, J. M. Taylor, and J. G. Taylor, for appellee:

A bill of lading is defined to be a written acknowledgment by a common carrier of the receipt of certain goods described therein, and an agreement to transport them to their place of destination, to be there delivered in good order to the consignee or his assigns.

2 Beach, Railways, § 951.

A clause requiring the presentation to the carrier of bills of lading, properly indorsed, as the evidence on which the delivery of the goods is to be made, is valid.

or transfer of the bill of lading. *Young v. East Alabama R. Co.* 80 Ala. 100.

In *First Nat. Bank v. Crocker*, 111 Mass. 163, it is said that where by the terms of the bill of lading the goods are to be delivered to the consignor's order the carrier is his agent and not the agent of the consignee.

If the carrier delivers to the consignor at an intermediate station without surrender of the bill of lading it will be liable to a subsequent assignee of the bill of lading who receives it before the goods would in due course have arrived at destination. *Ratzer v. Burlington, C. R. & N. R. Co.* 64 Minn. 245.

If the shipper has received a bill of lading and forwards it to the point of destination he cannot demand back the goods before the ship sails without indemnifying the carrier against liability to a holder of the bill of lading at the port of destination. *Tindall v. Taylor*, 4 Bl. & Bl. 219, 3 C. L. Rep. 190, 24 L. J. Q. B. N. S. 12, 1 Jur. N. S. 112.

If the bill of lading is attached to a draft upon the consignee the carrier will be liable to him in case he delivers the property while in transit to the shipper after the consignee has taken up the draft. *Wells, F. & Co. v. Oregon R. & Nav. Co.* 23 Fed. Rep. 15, 12 Sawy. 519.

If the shipper has exercised his right of stoppage *in transitu* the vessel is not liable for refusal to deliver to the consignee under the bill of lading. *The Vidette*, 34 Fed. Rep. 306; *The E. H. Pray*, 27 Fed. Rep. 474.

If the order for stoppage is withdrawn the carrier will be liable for refusal to deliver to an assignee for value of the bill of lading. *Schmidt v. The Pennsylvania*, 4 Fed. Rep. 543.

The fact that one of the bills is marked "duplicate" does not change its effect, but if it is indorsed for value the consignor will lose control over the property and the carrier will be liable to the indorsee if it permits the consignor to control the delivery. *Missouri P. R. Co. v. Heldenheimer*, 32 Tex. 196.

If the bill of lading requires delivery to the consignee or his assigns no action can be maintained by the shipper without a surrender of the bill of lading or the consent of the consignee. *Shepard v. Heineken*, 2 Sweeney, 525.

Duplicate bills.

If the carrier issues an original bill of lading to shipper's order and another duplicate for the shipper's protection with no mark making the original void in case of delivery on the duplicate it will be liable to an assignee for value of the original in case it redelivers to the shipper on the duplicate. *Midland Nat. Bank v. Missouri P. R. Co.* 132 Mo. 492.

If duplicate bills are issued which are not stated 38 L. R. A.

to be duplicates the carrier will be liable in case it delivers on one of them to the holder of another for value without notice that the second is outstanding. *Midland Nat. Bank v. Missouri P. R. Co.* 132 Mo. 492.

The fact that a duplicate bill of lading is procured and presented by a person claiming the goods, which is not assigned or indorsed by either the consignor or consignee, will not justify the carrier in delivering the goods to him without further identification. *Cavallaro v. Texas & P. R. Co.* 110 Cal. 318.

Delivery may be made to the one first producing the bill of lading although a duplicate had been previously assigned for value to a third person. *Glyn v. East & West India Dock Co.* L. R. 7 App. Cas. 591, 52 L. J. Q. B. N. S. 146, 47 L. T. N. S. 309, 31 Week. Rep. 208, 4 Asp. M. C. 580. Affirming L. R. 6 Q. B. Div. 492, 50 L. J. Q. B. N. S. 62, 43 L. T. N. S. 534, 29 Week. Rep. 318, citing *The Tigress, Brown & L. 38*, 32 L. J. Adm. N. S. 97, 9 Jur. N. S. 361, 3 L. T. N. S. 117, 11 Week. Rep. 578, as holding that the master would have been justified in delivering to the holder of the first bill of lading presented.

In *Fearon v. Bowers*, 1 H. Bl. 364, note, where the question was between rival claimants under duplicate bills of lading, and the suit was against the captain for wrongful delivery, it is said that according to the usage of trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading. But this statement was limited in L. R. 7 App. Cas. 591, to the extent that if he had notice of both he must determine at his peril which was the better claim.

In *Barber v. Meyerstein*, L. R. 4 H. L. 317, 39 L. J. C. P. N. S. 187, 22 L. T. N. S. 808, 18 Week. Rep. 1041, it is said that in case of duplicate bills of lading the shipowner having no notice of a first dealing with a bill of lading may, on the second being produced by another party, be justified in delivering the goods to that party.

Shipping receipts.

In *Bailey v. Hudson River R. Co.* 49 N. Y. 70, where shipping receipts were taken but not forwarded to the consignee, and the consignor subsequently changed the destination of the property, the carrier was held liable for a delivery to the changed consignee on the ground that the title had passed to the original consignee at the time of the shipment, and that the consignor then lost control over the property.

If a receipt has been given for the goods by the master of the ship, the holder of the receipt, and not of the bill of lading subsequently issued without surrender of the receipt, is entitled to control

Porter, Bills of Lading, § 397.

A compliance with the bill of lading, or shipping contract, is all that is required of the carrier.

North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 738, 81 L. ed. 288; *Louisville & N. R. Co. v. Hartwell*, 18 Ky. L. Rep. 745.

We need not discuss the statute making bills of lading negotiable because the bill of lading in this case was never assigned or negotiated in any way, and the rights of the parties stand as they did without the enactment of Sandels & Hill's Digest referred to by counsel; for all agree that the statute is only declaratory of existing law relating to the transfer of bills of lading.

Durr v. Hervey, 44 Ark. 306, 51 Am. Rep. 594.

the delivery of the goods. *Craven v. Ryder*, 3 Marsh. 127, 6 Taunt. 433, Holt, 100.

The one who pays drafts with railroad receipts attached for a cargo of grain has a right to the property which will entitle him to maintain an action against the carrier in case he delivers to a third person upon the order of the consignee without a production of the receipts. *Newcomb v. Boston & L. R. Corp.* 115 Mass. 230.

The receipt of an express carrier is not of equal importance with a regular bill of lading. In *Ten Eyck v. Harris*, 47 Ill. 268, it appeared that the package was delivered without surrender of the receipt which reached the hands of a third person for value. The court says "when evidence of delivery was introduced it became a question of identity to determine to whom the delivery was made." The implication seems to be that delivery to the consignee would exonerate the carrier, although the receipt was outstanding and in the hands of a person who had advanced money on it.

Indorsement required.

Possession of the bill of lading by one other than the consignee without indorsement does not authorize the carrier to deliver to him, although there is a custom at the place to deliver under such circumstances. *Louisville & N. R. Co. v. Barkhouse*, 100 Ala. 543.

If the bill of lading is to the order of the consignee, the carrier will not be justified in delivering to the consignee, although he presents the bill of lading, unless it is indorsed. *Weyand v. Atchison, T. & S. F. R. Co.* 75 Iowa, 573, 1 L. R. A. 630.

If the goods are deliverable to the shipper's order the carrier has no right to deliver to any person unless he manifests his right to the property by the exhibition of the bill of lading indorsed by the shipper. And if the carrier delivers without such indorsement it will be liable to the true owner of the property or to one having the actual possession of the bill of lading as collateral security for the value of the property. *Douglas v. People's Bank*, 86 Ky. 176.

In *Sword v. Young*, 89 Tenn. 126, it was held that the holder of an unindorsed bill of lading should be required to identify himself as the proper consignee before the carrier would be justified in delivering it to him.

But in *Tracy v. Storer*, 5 La. 367, it was held that if the carrier had delivered all but two packages out of eighty-eight to the holder of the bill of lading he could not justify a refusal to deliver the other two on the ground that there had been no assignment of the bill of lading.

Wrongful holder.

The mere possession of the bill of lading is not in all cases sufficient.

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It is like in this respect to a negotiable note. The maker of the note may pay the same to the payee at any time without requiring a surrender or cancellation of his note, and after doing so may be compelled to pay the note to an innocent indorsee thereof for value, etc., before maturity; yet if such note were not transferred, indorsed, or assigned by the payee to anyone, no one would pretend that the maker had incurred any liability because he had paid his note; he has but performed his contract and that is the end of such transactions.

Shaw v. Merchants' Nat. Bank ("Shaw v. R. R. Co.") 101 U. S. 557, 563, 25 L. ed. 892, 898; *Pollard v. Finton*, 105 U. S. 7, 8, 36 L. ed. 998, 999; *Gurney v. Behrend*, 3 El. & Bl. 622; *Friedlander v. Texas & P. R. Co.* 180 U. S.

If the bill of lading is obtained without authority or by fraud it will not affect the right of the owner to stop the goods in transit. *Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457.

One holding under a stolen bill of lading cannot retain the possession as against a claim of the carrier for a return of the property. *Shaw v. Merchants' Nat. Bank* ("Shaw v. R. R. Co.") 101 U. S. 557, 25 L. ed. 892.

Where the shipping receipts were stolen by the consignee, who procured bills of lading upon them which he negotiated for value, the carrier was held liable for delivery under the bills of lading against the orders of the consignors. *Brower v. Peabody*, 13 N. Y. 121.

The carrier cannot withhold the property from the true owner because one who has procured the bill of lading by fraud has indorsed it to a bona fide holder for value. *Decan v. Shipper*, 85 Pa. 229, 78 Am. Dec. 384.

In *Hazard v. Abel*, 15 Abb. Pr. N. S. 412, it was held that a warehouseman who issued his receipts for grain delivered by the carrier which were indorsed to the consignee's agent was not liable for delivering upon them, although the bill of lading had been delivered for value by the agent to a third person. The agent, having no authority to deliver the bill of lading, could not transfer a good title to the assignee.

It has, however, been held that the master of a vessel who has issued a bill of lading to a person returning a shipping receipt which was issued to the true owner cannot be required to deliver to the true owner unless the bill of lading is returned or fully indemnified against, although the possession of the receipt was obtained from the shipper by false representations. *Keyser v. Harbeck*, 3 Duer, 373.

So, where the seller thought he was consigning the goods to the order of a reputable merchant, and mailed the bills of lading to him, but they were obtained by another person of the same name who presented them to the carrier who then delivered the goods to him, the merchant having refused them, the carrier will not be liable for a misdelivery. *Bush v. St. Louis, K. C. & N. R. Co.* 3 Mo. App. 62.

Effect of order to notify certain person.

The fact that the bill of lading contains a direction to notify a certain person of the arrival of the goods is no indication that he has any interest in them. *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 237.

The carrier will be liable if he delivers the goods to the consignee while the shipping receipt contains directions to notify the consignee and deliver to the order of the consignor who has forwarded

424, 82 L. ed. 994; *Meyerstein v. Barber*, L. R. 4 H. L. 817.

A carrier is justified in delivering goods in accordance with the terms of the bills of lading to the consignee, notwithstanding the consignor has transferred the bill of lading, when such delivery is justified by custom, and this without being liable to a holder of such a bill of lading.

Forbes v. Fitchburg R. Co. 183 Mass. 159.

Riddick, J., delivered the opinion of the court:

The bill of lading under which the meal was forwarded by defendant railway company stipulated that it was to be transported to Altheimer, Arkansas, and there delivered to the consignee, E. D. Russell. It is admitted that the railway company performed its contract in strict accordance with its terms. But it is said

the receipt with a draft attached for collection. *Libby v. Ingalls*, 124 Mass. 608.

Directions in a bill of lading to notify a certain person of the arrival of the shipment at the place of destination is no authority to the carrier to make delivery of such shipment to the person so to be notified without the production of the bill of lading. *Union Stock Yards Co. v. Westcott*, 47 Neb. 800.

The carrier is not justified in delivering to the person whom he is directed to notify if the property is deliverable to the order of a third person whose order is not obtained. *Bank of Commerce v. Bissell*, 72 N. Y. 615.

If the bill of lading is to the order of the consignor with directions to notify the consignee, a delivery to the consignee without the order of the consignor will render the carrier liable for the loss thereby occasioned. *Wright v. Northern C. R. Co.* 8 Phila. 18.

If a bill of lading is given to the order of the shipper with directions to notify J. B., a connecting carrier, with notice of the terms of the bill of lading will be liable for the damage in case it delivers to J. B. without the order of the shipper. The court says the duty of a common carrier is not merely to carry safely, but also to deliver to the person designated by the terms of the shipment, or to his order, at the place of destination. There are no conditions which will release him from this duty except such as would also release him from the safe carriage of the goods. The carrier cannot relieve himself from responsibility by turning the goods over to a person not entitled to receive them. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 128 U. S. 737, 31 L. ed. 287.

Rights of true owner.

The carrier will be justified in delivering the property to the order of the true owner, although it is contrary to the terms of the bill of lading, the goods having been shipped and the bill of lading procured by one having no title to them. *Heintz v. The Idaho* ("The Idaho"), 98 U. S. 575, 28 L. ed. 978.

The carrier may be justified in delivering to the true owner although he has given a bill of lading to a third person as shipper. *Young v. East Alabama R. Co.* 80 Ala. 100.

As against the consignor it may be a good defense to the carrier that he delivered to the true owner. *Bates v. Stanton*, 1 Duer, 79; *Sheridan v. New Quay Co.* 4 C. B. N. S. 618, 28 L. J. C. P. N. S. 58, 5 Jur. N. S. 248; *National Bank v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L. R. A. 268; *Brunswick v. United States Exp. Co.* 46 Iowa, 677; *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143.

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that the consignee, Russell, had not paid for the meal; that the consignor had drawn upon him for the price of the meal, and had forwarded the draft, with the bill of lading attached thereto, to a bank for collection, thus showing an intention that Russell should not have the meal without first paying for it. The answer to this argument is that, if it be true that the consignor did not intend that the meal should be delivered until the payment of the purchase price, yet it is also true that the railway company had no notice of such intention. The meal was billed "straight" to the consignee, and, as the railway company had no notice of the intention of the consignor to retain the ownership and control of the property, it was justified in presuming that the consignee was the owner thereof, and was discharged by a delivery to him at the place specified in the bill of lading. *Sweet v. Barney*,

The carrier may justify if he delivers to the true owner. *Western Transp. Co. v. Barber*, 56 N. Y. 544. The court says the bailor can confer on the bailee no better title than he himself has except in cases of negotiating bills of lading and like cases. This thought is not elaborated, however, so as to show the limits of the exception or whether or not the exception would extend to the protection of a person who had advanced money on the bill of lading to a bailor who had no title to the property.

But if the carrier undertakes to justify delivery to a third person, on the ground that he was the true owner, he has the burden of proof to establish that fact. *Cleveland, C. C. & St. L. R. Co. v. Moline Plow Co.* 18 Ind. App. 225.

So the carrier will be liable if he surrenders the property to a person having merely a telegram from the sheriff to stop the property, that the sheriff will be there on the next train with attachment. *Nickey v. St. Louis, I. M. & S. R. Co.* 86 Mo. App. 79.

Delivery on carrier's copy.

The carrier cannot be required to deliver the cargo upon his copy of the bill of lading while the other copy is outstanding. *The Saugerties*, 44 Fed. Rep. 625.

If the carrier delivers the cargo on his own copy of the bill of lading without requiring the production of the others he will be liable to a third person into whose hands the duplicate has come for value. *The Mary Bradford*, 18 Fed. Rep. 189.

Incidents of delivery.

If the holder of the bill of lading receives due notice of the arrival of the vessel, and the bill of lading provides that the property shall be at the risk of the consignee as soon as it leaves the ship's tackle, the shipowner will not be liable if it is taken away by a third person after it is placed on the wharf. *The Santee*, 7 Blatchf. 186.

In *The Ben Adams*, 2 Ben. 445, which was a case of the mixing of the cargo, the court says the carrier is responsible for the value of the goods if he delivers them to a wrong person, even though by mistake or imposition.

If the bill of lading is signed before any property is placed on board it will not convey any title to property subsequently put on board for another purpose, so as to render the carrier liable to one who pays a draft on the faith of it, in case he makes other disposition of the cargo. *The John K. Shaw*, 32 Fed. Rep. 491.

There is no duty to deliver until the freight is paid. *Frothingham v. Jenkins*, 1 Cal. 42, 38 Am. Dec. 285.

But the carrier cannot hold the goods for the payment of prior freight due from the consignor if

23 N. Y. 835; *O'Dougherty v. Boston & W. R. Co.* 1 Thomp. & C. 477; *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58; *McEwen v. Jeffersonville, M. & I. R. Co.* 83 Ind. 368, 5 Am. Rep. 216; *Hutchinson, Carr.* § 180; *Elliott, Railroads*, § 1436.

It is argued for appellant that the railway carrier had no right to deliver to the consignee except upon a production of the bill of lading. To this argument we reply that the carrier must deliver in accordance with the bill of lading, and if it delivers without requiring the production of the bill of lading it assumes the consequence of a wrong delivery. But in this case the delivery was made strictly in accordance with the requirement of the bill of lading which evidenced the contract made with plaintiff, and he therefore has no right to complain. Counsel for appellant have cited *Furman v. Union P. R. Co.* 106 N. Y. 579, and *Merchants'*

Despatch Transp. Co. v. Merriam, 111 Ind. 6, as sustaining the contention that, under the circumstances here, the railway company was guilty of negligence in making the delivery without requiring a production of the bill of lading. But a broad distinction between those cases and the one at bar is that in neither of those cases were the goods billed "straight," and in neither of them were the goods delivered to the person to whom the bill of lading stipulated the delivery should be made. In the case of *Furman v. Union P. R. Co.* the goods were delivered to Lucca Brothers, who the court held were not the consignees. In the second case cited (*Merchants' Despatch Transp. Co. v. Merriam*) the goods were shipped from Boston consigned to G. & C. Merriam, Louisville, Kentucky. After they arrived at Louisville they were delivered by the carrier to Turner, without requiring the production of

they are consigned absolutely to the consignee. *Bacharach v. Chester Freight Line*, 133 Pa. 414.

The carrier cannot be held liable for the loss in case its agent is made the agent of the shipper to collect the price before the goods are delivered, the bill of lading being indorsed and delivered to him, in case he permits the delivery without requiring payment of the price. *Cox, v. Columbus & W. R. Co.* 91 Ala. 322.

If the indorsee of the bill of lading does not notify the carrier that he has it, but permits the consignee to deal with the property as his own and consign it to a third person, and to control its movements so that it is delivered to one who pays for it, the indorsee will be estopped by his negligence from attempting to hold the carrier liable for a delivery if the carrier was not aware that the bill of lading had been issued. *National Bank v. Philadelphia & R. R. Co.* 163 Pa. 467.

But in *Joslyn v. Grand Trunk R. Co.* 51 Vt. 32, it was held that although the indorsee of the bill of lading knew that the property had been delivered to the consignee and that he was consuming it in his business, and took no steps to prevent it, it did not estop him from looking to the carrier for indemnity for his loss when the consignee became insolvent without paying the draft.

These are certain cases dealing with the place of delivery rather than the person to whom it should be made, which are not within the scope of this note, of which the following are examples:

The interposition of statutory or prohibitory laws may justify the shipowner in his neglect to deliver at a certain port according to the terms of a bill of lading. *Bradstreet v. Heron, Abb. Adm.* 209.

If because of refusal to permit the property to be landed at the point of destination because of its inflammable character the custom is for the principal consignee to select a near-by place for the discharge of the cargo, and the other consignees to receive their property there, and after the selection the property of a small consignee is not permitted by the yardowner to be landed because of a difference between him and the owner, whereupon the shipowner lands it at another place near by, no action will lie against him for failure to deliver according to the bill of lading. *Blossom v. Smith*, 3 Blatchf. 316.

Exceptions in bills of lading.

Delivery to the wrong person is not a loss within the meaning of an exception in the bill of lading for loss of the property. *Baltimore & O. R. Co. v. McWhitney*, 36 Ind. 426.

An exception in the bill of lading of liability for loss from any act of the mariners will not include

a misdelivery of the property. *Guillaume v. Hamburg & A. Packet Co.* 43 N. Y. 212, 1 Am. Rep. 512.

A clause that if the property is not taken away when it is ready for delivery it will be deposited at the expense of the consignee, and at his risk of fire, loss, or injury, does not include loss by wrongful delivery. *Collins v. Burns*, 4 Jones & S. 518.

A stipulation as to the measure of damages in case of loss will not govern in case of a delivery to the wrong person. *Erle Despatch v. Johnson*, 87 Tenn. 460.

Instructions for collections.

If the bill of lading requires the carrier to collect the charges before delivering the property the carrier will be liable in case he delivers without making the collection. *Meyer v. Lemcke*, 81 Ind. 208.

If the bill of lading stipulates that the goods shall not be delivered to the consignee until he has paid a certain amount of money, part of the purchase price, the carrier will be liable for delivery without fulfillment of the condition. *The John Owen v. Johnson*, 2 Ohio St. 142; *The Argyle v. Worthington*, 17 Ohio, 460.

The carrier will be liable if it disobeys the positive order of the consignor not to deliver the property until the consignee pays a draft which has been forwarded against the bill of lading, if the bill of lading has been kept from the possession of the consignee. *Louisville & N. R. Co. v. Hartwell*, 18 Ky. L. Rep. 745; *Hartwell v. Louisville & N. R. Co.* 15 Ky. L. Rep. 778.

Conflicting claims.

Where after the bill of lading has been issued a third person claims a lien on the property for the purchase price the master will be excused from not delivering under the bill of lading if he gives the consignee immediate notice of the claim and takes steps to arrest the action of the court until the consignee can assert his title. And if the carrier bonds the property he should inquire into the validity of the consignee's title, and if there is any doubt call upon the claimants to litigate their rights among themselves or refuse to deliver the property if he finds that the consignee is a mere agent for the consignor and not a consignee for value. *Wilson v. Churchman*, 4 La. Ann. 462.

Acts of third persons.

The carrier is not liable if the servants of the assignee of the bill of lading, into whose possession the property has gone without notice of the title of their principal, redeliver the property to the ship-

the bill of lading. The company was held liable because it delivered the goods to the wrong person. In both of these cases it was said that the carrier was guilty of negligence in not requiring the production of the bill of lading before delivery of the goods, for the reason that such bill would have shown that the person to whom delivery was made was not the consignee. In each of those cases the carrier failed to deliver the goods in accordance with the terms of the bill of lading. The delivery was made to a person not named as consignee in the bill of lading, and the carrier was held liable for a wrong delivery. But those cases can be no authority for holding a carrier liable for a delivery made to the person named as consignee in the bill of lading and in exact accordance with its terms. It is further said that, apart from the common law, the railway company is liable under the provisions of our statute. *Sandels & H. Dig. §§ 509, 510.* These sections provide that warehouse receipts and bills of lading, given for goods, wares, merchandise, cotton, grain, and other commodity, shall be negotiable by written indorsement, and that "any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour, or other produce or commodity, so far as to give validity to any pledge, lien, or transfer given, made, or created thereby as on the faith thereof, and no property . . . specified in such bills of lading or receipts shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, 'Not negotiable,' plainly written or

stamped on the face thereof, shall be exempt from the provisions of this act." But we are of the opinion that this act does not affect the right of the carrier to deliver except in those cases where the bill of lading has been transferred. Bills of lading are frequently transferred as security for loans and advances, and the purpose of this statute was to protect those who make advances upon the faith of such transfers. The case of *Colgate v. Pennsylvania Co.* 103 N. Y. 120, cited by counsel for appellant, arose under a statute similar to our statute. But in that case the bill of lading had been transferred by the consignee named therein, and, as it was issued without the words, "Not negotiable," upon it, the court said that the carrier was bound to know that it "may have passed into other hands and become the property of other than the consignee." The carrier was held liable because by an assignment of the bill of lading the title of the property had been transferred from the consignee to the plaintiff in that case. The case thus came squarely within the scope of the statute, which, to protect purchasers and others advancing money upon bills of lading, required the carrier to deliver only upon surrender of such bills of lading. But in this case the bill of lading was not transferred, the rights of no third party are involved, and neither the statute nor the decision just referred to has any bearing upon the question to be determined; and so, without discussing them, we may say, of the other cases cited by counsel for appellant, they do not, in our opinion, sustain the contention that the railway company is liable under the facts of this case.

If, as counsel for appellant contends, the

per. *Missouri, K. & T. R. Co. v. McFadden*, 89 Tex. 188.

If a carrier receives goods under a bill of lading containing instructions to deliver them to the order of the consignor, and forwards them to their destination by other carriers whom he does not properly instruct, by reason of which the goods are delivered without the consignor's order, the carrier will be liable. *North v. Merchants & M. Transp. Co.* 146 Mass. 315.

But the initial carrier will not be liable for a delivery without production of the bill of lading, if at the time it delivers the goods to the connecting carrier, which takes the goods to destination, it informs him that the goods are not to be delivered until the bill of lading is produced. *Rickerson Roller Mill Co. v. Grand Rapids & L. R. Co.* 67 Mich. 110.

Consignment to consignor's agent.

It has been held that if the consignment was to the agent of the consignor the carrier was under no obligation to honor his claims, but that the sole duty was to the consignor.

Thus, if the consignee is a mere agent of the consignor the carrier may be justified in withholding the property from him in favor of an assignee in bankruptcy of the shipper. *Lineker v. Ayeshford*, 1 Cal. 75.

The consignee, if only an agent for the consignor, has no greater rights than his principal, and, in case the principal has acquired no rights to the property as against a third person, the agent cannot compel a delivery to himself under the bill of lading against a claim of the true owner. *Wilson v. Churchman*, 4 La. Ann. 452.

This rule appears to have arisen, in part at least, 88 I. R. A.

from rulings which held that the agent could not maintain an action for nondelivery to him.

In *Coxe v. Harden*, 4 East, 211, it was stated that it seems that the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of the principal will give him no right to maintain an action for the wrongful delivery of the goods.

In *Waring v. Cox*, 1 Campb. 369, where the consignor indorsed the second bill of lading to his agent for the purpose of stopping the goods in transit, it appeared that the goods were delivered under the first bill of lading before the second bill was presented, and it was held that the second indorsee could not maintain an action for misdelivery. The ruling is put upon the ground that he had no title to the goods, not having paid value for them.

But it seems to have been held by Lord Ellenborough in a case cited in *Paley on Agency*, 364, that the agent to whom the goods are consigned may maintain an action for their nondelivery to him under the bill of lading.

It has also been held that an indorsee of a bill of lading cannot maintain an action upon it in his own name. *Thompson v. Dornay*, 14 Mees. & W. 403, 15 L. J. Exch. N. S. 320.

But in *Haille v. Smith*, 1 Bos. & B. 563, it was held that the indorsement of the bill of lading transferred the title to the indorsee so that the carrier would be liable to him in case he delivered the cargo to assignees of the consignor.

So it has been held that an indorsee has sufficient title to sue for nondelivery of the goods. *Morison v. Gray*, 2 Bing. 280.

Upon the question of delivery by a carrier to an impostor in the absence of a bill of lading, see *note* to *Pacific Exp. Co. v. Shearer* (Ill.) 37 L. R. A. 177.

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bill of lading represented the meal, and the ownership of the meal was in appellant so long as it held the bill of lading, still, as such owner, it unconditionally directed the carrier to deliver the meal to Russell. It would seem unreasonable to believe that the legislature intended to impose a liability upon the carrier in favor of the consignor for obeying and carrying out the directions of such consignor in regard to the delivery of the consigned property, for such intention would be contrary to common principles of reason and justice. To justify the court in arriving at such a conclusion, the language of the act to that effect should be so plain and direct that it would not be reasonable to give it a different meaning. The language of this act does not, in our opinion, justify any such conclusion. On the contrary, the purpose of it, as before stated, was to protect persons not parties to the bill of lading originally, but who for a valuable consideration acquired an interest in the property represented by it through transfer of the bill of lading to them. There was certainly no occasion for an act of this kind to protect the

rights of the consignor, for he is a party to the contract of shipment, and can protect himself by stipulations therein. In this case the appellant could have protected itself against the failure of the consignee to pay for the meal by making the consignment to its own order, or, after the meal had been consigned to Russell, it might, upon discovery of his insolvency, have effected the same purpose by stoppage *in transitu* and notice to the railway company not to deliver until payment of the draft to which the bill of lading had been attached. But the appellant failed to do this, and the railway company in good faith delivered the meal in accordance with its contract and the directions of appellant, as shown by the bill of lading. Under such circumstances, it seems to us, notwithstanding the able argument of counsel for appellant, that this claim for damages has neither the letter of the law nor any principle of justice to sustain it. *Judgment affirmed.*

Battle, J., dissents.

MONTANA SUPREME COURT

MACNAUGHTAN COMPANY, *Appt.*,

v.

Thomas McGIRL, *Respt.*

(.....Mont.....)

The purchase and solicitation of wool by an agent of a foreign corporation for shipment to other states wherein the principal business of the corporation is done is a business directly pertaining to interstate commerce which the foreign corporation is entitled to engage in without complying with a state statute imposing conditions upon its right to do business in the state.

(July 10, 1897.)

A PPEAL by plaintiff from a judgment of the District Court for Yellowstone County in favor of defendant in an action brought to recover money alleged to have been advanced by plaintiff to defendant. *Reversed.*

Statement by **Hunt, J.:**

The plaintiff and appellant herein, a corporation organized and existing under the laws of the state of New Jersey, at the time of this suit and of the transaction which brought it about, was doing a commission business, as a wool commission merchant, in the states of New York and Massachusetts and the state of Montana. The complaint alleged that in July, 1892, the defendant, at Billings, Montana, consigned a wool clip to plaintiff, in New York, to be sold by plaintiff for defendant on sixty

days' credit, the proceeds thereof to be paid to defendant by plaintiff, less the commission on sales, interest on moneys advanced, freight and interest thereon, discount on sales not due, cartage, and advances. It is alleged that plaintiff, to accommodate defendant, deposited in the hands of defendant, on account of the transaction between the parties, the sum of \$7,019.20, as an advanced payment in case of the sale of said wool, on the net proceeds thereof, to be kept by defendant on account of the net sales of the wool if the said wool sold for enough, less commission and charges, to amount to \$7,019.20, but that any amount over and above the net proceeds of the sale of the wool, or the difference between the net proceeds of the sale and the \$7,019.20, if any, should be subject to a drawback by the plaintiff, and be to and for the use of plaintiff, and to be returned to plaintiff by defendant if the net proceeds of the wool did not amount to the sum advanced; that pursuant to this agreement the defendant's wool was consigned to plaintiff; and that some time thereafter it turned out that on the accounting pertaining to the transaction between plaintiff and defendant a balance was found due and owing by defendant to plaintiff, inasmuch as the wool did not sell for a sufficient sum to fully pay plaintiff for its advances to defendant, and the charges agreed to be paid. Judgment was asked for the amount claimed to be due as a drawback. The defendant admitted that he had consigned the wool to plaintiff to be sold for him, and that he had been paid by plaintiff, as an advance on said consignment of wool, the sum of \$7,019.20, but denied all of the alleged agreement concerning the shipment of the wool subject to the drawback claimed by plaintiff.

NOTE.—The restrictions on interstate commerce business by a foreign corporation are considered in a note to *Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311.

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For an affirmative defense the answer also averred that there was to be no drawback, and that, if the wool did not sell for an amount sufficient to cover the advance made by the plaintiff, it would bear the loss. Among other defenses pleaded, it was averred that plaintiff could not maintain his action for the reason that plaintiff was a corporation organized under the laws of the state of New Jersey, and had not complied with chapter 24, div. 5, Gen. Laws, Mont. Comp. Stat., in that it had not filed in the office of the secretary of state, or with the county clerk of Yellowstone county, a duly authenticated copy of its charter or certificate of incorporation, and the statement required by § 442 of the law referred to, and in other respects had not complied with said law, or with the provisions of an act of the third legislative assembly of the state of Montana entitled "An Act to Provide the Conditions upon Which Foreign Corporations May Do Business in This State," approved March 8, 1893. The cause was tried to a jury, and evidence heard. The court then, of its own motion, instructed the jury that inasmuch as the plaintiff was a foreign corporation, and had not complied with the act of the third legislative assembly providing the conditions upon which foreign corporations might do business in Montana, the act and contract of the plaintiff with the defendant was void as to the corporation, and could not be enforced in the district court, and that it was the duty of the jury to find for the defendant. In accordance with this instruction of the court, a verdict was rendered for the defendant for costs. A motion for a new trial was made and overruled. The plaintiff appeals.

Mr. Gib. A. Lane, for appellant:

It cannot be said that plaintiff is within the prohibitory clause of the act of March 8, 1893, as it has not begun to carry on business in this state since said act was passed, even if it were a foreign corporation.

Powder River Cattle Co. v. Ouster County Comrs. 9 Mont. 149.

Section 2 is wholly unconstitutional as discriminating between citizens of the states when it attempts to make a contract void and not enforceable as to one of the parties thereto, i. e., the corporation, and by implication holds it good and enforceable as to the other party, if a citizen of this state.

Cooper Mfg. Co. v. Ferguson, 118 U. S. 727, 28 L. ed. 1187.

This act cannot be construed as having a retrospective operation.

Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; 1 Kent, Com. 455; Taylor, Civil Law, 168; Story, Const. § 1893; 2 Bouvier, Law Dict. 475, title *Retrospective*; Mont. Const. § 13, p. 61.

The act of 1893 was not pleaded and could not apply if it had been. A plea of the failure to comply with the statute is necessary.

Tabor v. Goss & P. Mfg. Co. 11 Colo. 419; *Utley v. Clark-Gardner Lode Min. Co.* 4 Colo. 369; *C. J. L. Meyer & Sons Co. v. Black*, 4 N. M. 352; *Singer Mfg. Co. v. Effinger*, 79 Ind. 264; *Elston v. Piggott*, 94 Ind. 14; *Knapp, S. & Co. v. National Mut. F. Ins. Co.* 80 Fed. Rep. 607.

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One single transaction between plaintiff and defendant is not "carrying on business," even if it were in this state.

Tabor v. Goss & P. Mfg. Co. 11 Colo. 419.

Mr. O. F. Goddard, for respondent:

The term "foreign corporation" means a corporation organized under the laws of another state or a foreign country.

8 Am. & Eng. Enc. Law, p. 329.

A foreign corporation has its domicile in the state from which it derives its existence. Its right to transact business elsewhere is dependent upon comity.

8 Am. & Eng. Enc. Law, pp. 380-385, and notes; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Powder River Cattle Co. v. Ouster County Comrs.* 9 Mont. 145; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657; *State, Atty. Gen. v. Fidelity & C. Ins. Co.* 49 Ohio St. 440, 16 L. R. A. 611; *State, Atty. Gen., v. Western Union Mut. L. Ins. Co.* 47 Ohio St. 167, 8 L. R. A. 129; *Liverpool, L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029.

Hunt, J., delivered the opinion of the court:

The plaintiff, a corporation of New Jersey, doing business in that state, and in the states of New York and Massachusetts, as wool commission merchant, sent an agent into Montana to solicit consignments of wool to its eastern houses, there to be sold on commission by plaintiff for the benefit of certain consignors, woolgrowers of the state of Montana. It had various transactions of this nature with woolgrowers in Montana. In the particular case before us the exact terms of the agreement between the plaintiff and the defendant gave rise to this litigation, but the facts were undisputed that plaintiff advanced a large sum of money to defendant upon his wool, and that the defendant's wool was consigned to plaintiff at New York, to be sold there by plaintiff, who was to credit defendant with the amount of the sale. The real contention between the parties was whether the shipment so made was subject to a drawback by plaintiff against defendant if the wool did not net a sufficient sum in New York to cover plaintiff's advances to defendant, including interest, costs, etc., or whether the burden of any loss that there might be was to fall entirely on plaintiff. The defendant availed himself of several defenses, including the one upon which the court directed a finding in his favor, namely, that the contract sued on was void as to the corporation, and could not be enforced in favor of the corporation. By an act of the legislative assembly of the state of Montana, approved March 8, 1893, every foreign corporation, before it commenced to do business in Montana, was required to file a certificate with the secretary of the state, designating an agent, who must be a citizen of Montana, upon whom service of process might be had, and also stating the principal place of business of such corporation in this state. It was also provided by § 2 of said act that, if any foreign corporation failed to comply with the provisions of the law, all its contracts made and entered into with citizens of this state should be void as to the corporation, and that no court of this state should enforce the same in favor of the corpo-

ration. Inasmuch as plaintiff did not comply with the statute just cited, the important question raised is whether or not, if the plaintiff's facts alleged in its complaint are true, and the defendant does in reality owe to plaintiff the amount sued for as a drawback, plaintiff can recover on its contract. It has been repeatedly laid down by the Supreme Court of the United States that interstate commerce carried on by corporations is entitled to the same protection against the exactions of a state which is given to such commerce when carried on by individuals. We are aware that the construction put upon § 2, art. 4, of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states, has been generally uniform, to the effect that the language of that clause relates only to natural persons, and not to artificial bodies, as corporations, and that the privileges and immunities guaranteed by the language referred to mean those of the general nature granted to a state's own citizens, and not those special privileges conferred upon corporate bodies. *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451; *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519, 10 L. ed. 374; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857; *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 826, 30 L. ed. 1200, 1 Inters. Com. Rep. 808. But, in the carrying on of interstate commerce, corporations are guaranteed the same rights and are entitled to the same protection as individuals. The Supreme Court in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, expressly held that it did not make any difference whether such commerce is carried on by individuals or by corporations. Justice Bradley, sitting on the circuit bench in the case of *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411, used the following language: "And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments. This was held and decided in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, and affirmed in the recent case of *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 826, 30 L. ed. 1200, 1 Inters. Com. Rep. 808, and although the decision in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, conformed to the doctrine of *Bank of Augusta v. Earle*, the following striking language was used by the court, to wit: 'At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The lan-

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guage of the grant makes no reference to the instrumentality by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations." We may fairly supplement this language by adding that, when the Constitution was adopted, it could not have been supposed that the regulations of commerce to be made by Congress might be of no avail to commercial corporations, or, at least, might be rendered nugatory with regard to them, in consequence of state restrictions upon their power to act as corporations in any other state than that of their origin." We may therefore proceed with the investigation of the case, relying upon the truth of the proposition that, if the transactions between the plaintiff and the defendant in this case were commerce among the several states, Congress alone could regulate such commerce, under the Constitution of the United States, and the state had no power to regulate that commerce, or impose any obligation or exaction upon the plaintiff which it could not impose or exact upon an individual transacting the same business.

Now, we inquire, what was the nature of the business done, and was it interstate commerce? If we find that it was interstate commerce did the statute obtain requiring the corporation to file the certificate referred to as a condition precedent to its right to purchase the wool of the defendant in the manner that it did, and was it an attempt on the part of the state to regulate commerce among the several states, and therefore null and void? In the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, Chief Justice Marshall, in one of his greatest opinions, discussed § 8, art. 1, of the Constitution of the United States, in which Congress has been granted the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." He said: "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between the nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." In *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, Justice Field used the following language: "Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regula-

tions until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation." Again we find Justice Field defining for the court what commerce among the states consists of, as comprehended by the Constitution of the United States, in the case of *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 288. He there said: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce." In the still later case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, the same justice speaking for the court, said: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters, for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed,—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties and other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transpor-

tation; its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress." In *McCull v. California*, 136 U. S. 104, 34 L. ed. 392, Justice Lamar quotes approvingly the following definition of "commerce" as given by Pomeroy on page 876 of his work on Constitutional Law: "It includes," says Pomeroy, "the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic again embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of intercourse or traffic may be either things, goods, chattels or merchandise, or persons. All these may therefore be regulated." In *Cook v. Rome Brick Co.* 99 Ala. 409, the supreme court of Alabama decided that the sale of bricks in another state, to be delivered in Alabama, or the filling of an order sent from Alabama for bricks in another state, is an act of interstate commerce, not affected by the statutes of Alabama, which required a foreign corporation to have a place of business and an agent in Alabama as a condition precedent to its capacity to do business in Alabama. A like decision was made very recently by the supreme court of Tennessee. *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461. A law of Tennessee required every person, other than photographers of the state, who solicited pictures to be enlarged outside of Tennessee, to pay a certain sum per annum as a privilege tax. But the court held the statute unconstitutional, and used the following language: "Enlargement of pictures by citizens of other states for citizens of this state is the primary matter, though the tax is in terms laid upon other persons engaged as agents, in the promotion thereof. The process of enlarging involves the making of a larger picture after the image or likeness of a smaller one. When this is done by one person, upon the order of another, and the larger picture is delivered for a consideration, the parties have certainly had a commercial transaction; and, if they be citizens of different states, and the picture be made in one state and sent into the other state, as indicated in the statute and averred in the presentment, the transaction as between the principals is as obviously interstate commerce. The latter is a commercial transaction between citizens of different states, and that is what interstate commerce means. Whether the transaction be conducted directly or entirely by the principals themselves, or in part by the agency of another, is of no consequence; it is interstate commerce in both instances. So there is no room for doubt that the enlargement of pictures referred to in the statute is, to all intents and purposes, interstate commerce."

Now, when we apply to the facts of this case the principles of the foregoing definitions, what do we have? The plaintiff corporation sent its agent into Montana to solicit or buy wool to be consigned to its wool houses in other states, wherein it does its principal business. The agent did no other kind of business for the corporation in Montana. Such being the case, it seems clear to us his business directly pertained to interstate commerce. It related to intercourse and traffic between Montana and New York, and the subject-matter of the intercourse and traffic was the wool itself. If the Northern Pacific Railroad in transporting the wool over its road between Montana and Minnesota was engaged in interstate commerce,—as clearly it was,—we cannot perceive how the transaction by which the wool itself was exchanged through consignment or sale by defendant to plaintiff can be excluded from any reasonable definition of "commerce among the states." The sale and exchange of wool is among the great operations of the commercial world. It is, like traffic in cotton or wheat or corn, a subject of frequent intercourse between citizens of the different states and different nations. The railroad transportation is a part of the commerce,—the instrument or vehicle of intercourse; the wool, the essential subject-matter of the intercourse and traffic. It being our opinion from what we have said that the plaintiff corporation was engaged in a business which was strictly interstate commerce, no law of the state could control or restrict such commerce by exacting conditions for permitting the plaintiff to do such business. The argument that a foreign corporation has its domicile in the state from which it derives its existence, and that its right to transact business elsewhere, and to enforce its contracts made in other states, depends purely upon the comity of those states, is not pertinent. The power of a state to make discriminations in privileges granted to foreign corporations may be exercised where a foreign corporation desires to do business within the limits of the state, not strictly interstate or foreign commerce. This may be illustrated by familiar instances of cattle and sheep companies, or mining and smelting corporations, in Montana. No foreign corporation, we take it, organized for any of the purposes for which such associations are usually formed, and desirous of carrying on its business and of acquiring a domicile in Montana, can escape the consequences of omission to comply with the terms and conditions upon which it has a right to do business within the state. Indeed, such corporations, in the exercise of legislative discretion, may be excluded from the state altogether, as was laid down in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 857, and *Horn Silver Min. Co. v. New York*, 148 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57. Such conditions or restrictions, however, are permissible upon the ground that a state may not be willing, upon grounds of a policy of its own, to have a corporation, even if legally created under the laws of the state of its creation, establish a business in Montana, or the state may demand of it a license tax, or the performance of any other reasonable condi-

tion, before it can claim the same protection in the conduct of its business that is accorded to like corporations within the jurisdiction of the state. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 81 L. ed. 650, 2 Inters. Com. Rep. 24. But a most vital limitation in this respect upon the power of the state springs up where the business of the foreign corporation is commerce between the corporation, the creature of the legislature of one state, and a citizen of another state. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 81 L. ed. 650, 2 Inters. Com. Rep. 24. As against all such foreign corporations engaged in interstate commerce, the state can pass no prohibitory law, constitutional or statutory, without impinging upon the commercial clause of the Constitution of the United States. The decisions of the United States Supreme Court justify these views. In *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 784, 28 L. ed. 1139, the court had before it statutes quite similar to those upon which respondent in this case relies; and while the decision was based upon the ground that the statute could not affect a corporation under the laws of one state which did a single act of business in another, still there is language in the opinion recognizing the doctrine that the statute could not be construed "to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states." The implication from this language is that if a foreign corporation has sent an agent into Montana, and made a contract within the latter state for the consignment of wool between Montana and New York, no construction can be put upon the statute of Montana which would render such a contract void without invading the exclusive right of Congress. If, therefore, this contract sued upon was lawfully made, notwithstanding a statute which declares or attempts to declare it void, it follows that any legislation of the state which seeks to prevent the enforcement of the contract is equally an invasion of the exclusive right of Congress. It must be true that if the state cannot declare the contract void, it cannot prevent the enforcement of the contract. In the case of *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 786, 28 L. ed. 1139, there is a brief concurring opinion by Justices Matthews and Blatchford, in which they planted themselves firmly upon the broader ground that the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado, was commerce, and that for the state of Colorado to prohibit it, except upon conditions, was to regulate commerce between Colorado and Ohio, which lay exclusively within the province of Congress. "It is quite competent, no doubt," said Justice Matthews, "for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery

manufactured elsewhere, for that would be to regulate commerce among the states." The facts in that case, as also in the case of *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461, heretofore cited, and that of *Bateman v. Western Star Mill. Co.* 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260, present the converse of the case at bar. The foreign corporations in all those instances were domiciled in other states, and through their commercial agents solicited business and sold and shipped goods to points in the other states in which laws existed imposing upon foreign corporations compliance with certain conditions precedent to their right to do business within such states. But the opinions were all based upon the reasoning that the goods sold were commodities subject to barter and sale, and that the sale, transportation, and delivery of goods and the transaction of business between a foreign corporation of one state and a citizen of another state constituted interstate commercial transactions, which corporations, as well as individuals, could carry on free from any restraints by any state. But, as we have heretofore seen, the transaction pertaining to the wool shipped by the defendant to the plaintiff in this case is obviously brought within the same rule. It is just as much an interstate commerce transaction to export wool from Montana to New York as it is to import clothes made of the wool from New York to Montana. Either transaction is interstate commerce, and neither can be interfered with by local law.

Of course, this exclusive power of the regulation of interstate commerce by Congress does not interfere with the police power of the state. Police regulations often incidentally affect commerce, but they still remain police regulations. The line of distinction between an attempt to put a burden or restriction upon interstate commerce, and the police power of the state, has been very recently discussed by Judge Grosscup, in *Re Lebott*, 77 Fed. Rep. 587, who thus expressed himself: "The Supreme Court of the United States, in an unbroken line of decisions, has held that any attempt to put any burden or restriction upon interstate commerce, either by the way of taxing it, or requiring a license from its agents or drummers, or a discriminating license or tax upon any of its goods or products, is outside the power of a state, and an infringement upon the powers of the national government. . . . The government of the United States has control and exclusive power to regulate interstate commerce. The government of the state has the power to look after police regulations, such as affect the life, health, or morals of the citizens." The decision of Judge Grosscup in the case quoted from was to the effect that an ordinance of the city of Chicago which prohibited the sale or the offering for sale of vinous liquors in Illinois by the representative of a California association, without a license, was not an exercise of the police power of the state, but was an attempt to regulate interstate commerce, and consequently invalid. It has also been held in the case of *McCall v. California*, 186 U. S. 104, 34 L. ed. 892, that where a statute affects commercial transactions among states only in such an indirect, incidental, and remote manner as not to bur-

den or impede interstate commerce, it is not in conflict with the Constitution of the United States. But there again a different rule applies from that which must be applied in this case.

We do not think it necessary to proceed any further in this discussion. It has been so repeatedly held by the Supreme Court of the United States that every tax on interstate commerce is a burden on that commerce, and, if imposed by the legislature of a state, is illegal, that it is scarcely necessary to cite more decisions to that effect. They are referred to in *Leloup v. Port of Mobile*, 127 U. S. 640, 33 L. ed. 811, 2 Inters. Com. Rep. 184, and are reviewed by the supreme court of Tennessee in *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461. The trend of the later decisions of the supreme court has been, we think, to extend the protection afforded to the carrying on of interstate commerce, by including within the definition of the words any form of interstate commerce, "whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on." *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 160, 8 Inters. Com. Rep. 148; *Crutcher v. Kentucky*, 141 U. S. 58, 35 L. ed. 652; *Brennan v. Titusville*, 153 U. S. 302, 38 L. ed. 728, 4 Inters. Com. Rep. 658.

As the country has developed, and commercial intercourse between the citizens of the several states has expanded, and facilities for the conduct of such commerce have so vastly multiplied, the wisdom and perspicuity of the framers of the Constitution in preserving in Congress the exclusive right to regulate and control such commerce, and to preserve it wholly free from any local interference or impediment on the part of the state, is too apparent to need comment. It may be safely said that one of the causes for the development of the states is the business relations between citizens of different states,—relations which, in turn, exist because of the guaranty by the Federal Constitution that interstate commerce shall remain free from any impositions or discriminations of state legislation.

The sequel of these views is that the contract alleged to have been made between the plaintiff corporation and the defendant was, if made as a fact, valid and enforceable; and, the transaction being one of lawful interstate commerce, it could in no manner be affected by any statute of the state imposing conditions (not in the exercise of the police power) upon plaintiff precedent to its capacity to enter into the contract. Perhaps the legislature did not mean to extend the statute under consideration to foreign corporations engaged in interstate commerce. The presumption would be that they did not, but whatever the purpose may have been in this respect is immaterial to this discussion; for, if it was intended to include such foreign corporations, we hold the statute unconstitutional in that respect. The judgment is therefore reversed, and the cause is remanded for a new trial.

Reversed and remanded.

Pemberton, Ch. J., and Buck, J., concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Jacob S. JOHNSON, *Plff. in Err.*,

v.

STATE of New Jersey.

(59 N. J. L. 535.)

1. A statute which attempts to deprive the governor of his constitutional power to appoint judges of an inferior court by changing the name of the court and requiring the judge to be elected without changing its jurisdiction or functions is void.
2. A statute attempting to abolish several inferior courts and to substitute one court in their place cannot be separated so as to uphold the substituted court in place of some of them if one is protected from destruction by the Constitution and its judge is a member of the others.
3. Exclusion of negroes from jury duty upon the trial of a negro is not ground for reversal if the exclusion was not designed.
4. The requirement of Rev. p. 526, that the sheriff shall file the jury list summoned for service with the county clerk, is directory merely, and failure to do so will not invalidate a trial unless it affirmatively appears that injury was done.
5. Testimony of nonexperts as to the appearance of footprints in the sand near the scene of a crime, and prints made in sand by boots worn by the prisoner, is admissible upon the question of his connection with the crime.

(Dixon, J., *dissentia*.)

(July 16, 1897.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Court of Oyer and Terminer for Somerset County convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Mears, Steele & Meehan, for plaintiff in error:

The trial of this indictment was before the court of oyer and terminer.

This court by an act of the legislature was then abolished, and had no jurisdiction of the cause after the 1st Monday of December, 1895.

Pub. Laws 1895, p. 807.

The court of oyer and terminer is one of the inferior courts of the state, and § 1, art. 6, of the Constitution vests in the legislature the power to alter or abolish its inferior courts, as the public good may require.

If one part of an act, or even of a section, be good, and the remainder bad, so much of it as is good will be permitted to stand, while the unconstitutional part will be declared and held void.

Keokuk N. L. Packet Co. v. Keokuk, 95 U. S. 80, 24 L. ed. 377; *Penniman's Case*, 103 U. S. 717, 26 L. ed. 604; 3 Am. & Eng. Enc. Law,

p. 676; *State, Morgan, v. Monmouth Pl. Road Co.* 26 N. J. L. 109.

When a part of an act is declared unconstitutional but the rest is independent and can stand alone, the portion so declared to be unconstitutional is as if it had never been passed, and the constitutional portion must remain in full force.

State, Brown, v. Copeland, 3 R. I. 83; *State, Cornish, v. Tuttle*, 53 Wis. 45; *Com., v. Hitchings*, 5 Gray, 485.

Every presumption and intendment is in favor of the constitutionality of an act, and a court is not justified in pronouncing it invalid unless satisfied beyond a reasonable doubt of its repugnance to the Constitution. It must be presumed that the legislature did not intend to violate the Constitution.

Cooper v. Telfair, 4 U. S. 4 Dall. 18, 1 L. ed. 722; *Colwell v. May's Landing WaterPower Co.* 19 N. J. Eq. 249; *Foster v. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 185.

A construction which raises a conflict between parts of the Constitution is not permissible when by any reasonable constructions the parts can be made to harmonize.

People, Livesey, v. Wright, 6 Colo. 92.

When the power to alter or abolish the court to which the appointment is to be made is vested in the legislature, such power is not limited to its jurisdiction, but must be construed to extend to the Constitution and powers of the court as a whole, and if, in the judgment of the legislature, the public good requires, it should extend to an alteration in the method of appointing its judges.

Engeman v. State, 54 N. J. L. 247.

If a judge makes a mistake in principle, in determining whether a challenge shall prevail, his decision is reviewable.

Patterson v. State, 48 N. J. L. 889.

The court will take judicial notice of the census and that there is a large negro population in the county of Somerset subject to jury duty.

12 Am. & Eng. Enc. Law, p. 175, note; 5 Crim. L. Mag. p. 449.

In the selection of the general panel of jurors, for the term of the court at which plaintiff in error was tried, there was a practical exclusion of his race from jury duty, and a discrimination against them, as a matter of course, because of their color; and by such exclusion and discrimination he was deprived of a right to which he was entitled.

Thompson & M. Juries, §§ 29, 30; *Ex parte Virginia*, 100 U. S. 313, 323, 25 L. ed. 667, 671.

The court erred in admitting in evidence sand impressions not made from the original footprints.

It was incompetent because it was not proved that the model or impressions were reproductions.

People's Pass. R. Co. v. Green, 56 Md. 84.

NOTE.—As to the constitutional power of appointment to office, see also *Evanville v. State*, Blend (Ind.) 4 L. R. A. 93; *State, Jameson, v. Denny* (Ind.) 4 L. R. A. 79; *State, Holt, v. Denny* (Ind.) 4 L. R. A. 66; *French v. State*, Harley (Ind.) 29 L. R. A. 38 L. R. A.

113, *State, Sherman, v. George* (Or.) 16 L. R. A. 787; *Fox v. McDonald* (Ala.) 21 L. R. A. 529; *State, Standish, v. Boucher* (N. D.) 21 L. R. A. 539; and *People, Richardson, v. Henderson* (Wyo.) 22 L. R. A. 751.

It was not proved that the boots with which the impressions were made were the boots that made the footprints at the scene of murder.

Smith v. Carrington, 8 U. S. 4 Cranch, 62, 2 L. ed. 550; 3 Rice, Ev. p. 56; *Stokes v. State*, 5 Baxt. 619, 80 Am. Rep. 72.

These impressions in effect were sought to be proved as copies of the original footprints, and no proper foundation was laid for their introduction as secondary evidence; and upon this ground they were not properly admitted.

Eborn v. Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

Messrs. Nelson Y. Dungan and James J. Bergen for defendant in error.

Depue, J., delivered the opinion of the court:

The plaintiff in error was indicted for murder, for causing the death of Sarah Ann Rogers. The indictment was found in the court of oyer and terminer of the county of Somerset at the term of September, 1895. On the traverse of this indictment the prosecutor was tried before said court, and convicted of murder in the first degree, and sentenced to death. The writ of error places under review the following assignments of error:

First, that the court before which the defendant below was tried and convicted had no legal existence, having been abolished by the act of 1895, commonly called the "County Court Act." By an act of the legislature passed June 13, 1895, the inferior courts of common pleas, the courts of oyer and terminer, and courts of quarter sessions of the several counties of the state were abolished, and a county court established in each of the counties of the state, to be known and designated as the "[name of county] county court," with the same jurisdiction, civil and criminal, as the courts which were abolished previously possessed. The act provided for one judge for each county, to be elected by the qualified voters of the county. It further provided that any county court might be held by any justice of the supreme court, or by any judge of a county court, or by such justice and judge sitting together, with a proviso that a justice of the supreme court should preside in the trial of indictments for crimes punishable by death. Pamph. Laws 1895, p. 807. Under the judicial system in existence prior to the act of 1895, a judge of the court of common pleas, as such a judge, sat as an associate in the oyer and terminer, and as a judge of the court of common pleas he sat in the quarter sessions. These judges were appointed and commissioned as judges of the court of common pleas. The appointment of a judge as judge of the court of oyer and terminer or court of quarter sessions was a thing unknown. The judges of the court of common pleas sat in the oyer as judges of the court of common pleas, just as the justice of the supreme court presided in that court,—not as a judge of the oyer and terminer, but in virtue of his commission as a justice of the supreme court. By the Constitution as amended in 1875 the prerogative of appointing the judges of the court of common pleas was conferred upon the governor, with the advice and consent of the senate. The act

of 1895 did not create a new court with a new jurisdiction. It simply created a court by a new name, and invested it with all the jurisdiction and functions exercised by the old court, and took from the executive the power to appoint its judges, and delegated it to a popular election. The power of the legislature to alter or abolish the court of common pleas as the public good may require is indisputable. *State, Kenny, v. Hudapeth*, 59 N. J. L. 320; same case (in this court) 59 N. J. L. 504. This power has been vindicated to the extent of permitting the legislature to vacate the commissions of those judges who were in office when the legislature intervened. But the capacity of the legislature to alter or abolish is not involved at this time. A court consists in its jurisdiction and functions, and not its title or name. The legislature in the act of 1895 (carefully preserved the jurisdiction and functions of the old court in everything which is the essential quality of a court, gave the tribunal a new name and transferred the selection of the incumbents of the judicial office from the executive to a popular election. The court of common pleas, as a court, and all its concomitants, such as the right of its judges to sit in the oyer and sessions, were retained by the act of 1895 precisely as they existed before. All that was done was a change of name and the mode of selecting the judges who were to officiate in the court. The Constitution having conferred upon the governor the prerogative of appointing, with the advice and consent of the senate, these judicial officers, it was not competent for the legislature by a subterfuge to divert this prerogative right to another source. When the Constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the legislature to provide any other mode of obtaining or holding the office. *State, Morris, v. Wrightson*, 56 N. J. L. 127, 141, 22 L. R. A. 548. That is precisely what the act of 1895 purported to accomplish,—to leave these courts with a change of name, and the executive shorn of his prerogative of appointment. It was on this ground that the supreme court in *State, Schaik, v. Wrightson*, 58 N. J. L. 50, decided that the act of 1895 was unconstitutional and void. That decision is approved by this court. It is contended by counsel that, although the act of 1895 is unconstitutional with respect to the judges of the court of common pleas, it may be sustained with respect to the judges of the oyer and terminer and court of quarter sessions; these courts being without any constitutional protection or regulation, and the selection of the judges being wholly a matter of legislative discretion. The theory on which the argument proceeded was that the statute consisted of two parts, one of which, being unconstitutional, might be rejected, and the other retained. It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and, if the parts are wholly independent of each other, that which is constitutional may stand, and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the legis-

statute intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail. As was said by Mr. Justice Matthews in *Poindexter v. Greenhow*, 114 U. S. 270, 304, 29 L. ed. 185, 197: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one which they may never have been willing by itself to enact." *Sprague v. Thompson*, 118 U. S. 91, 30 L. ed. 116; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 635, 39 L. ed. 1108, 1125. In *Warren v. Charlestown*, 2 Gray, 84, it was held that "when the parts of a statute are so mutually connected and dependent, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional, or connected, must fall with them." This rule with regard to an unconstitutional feature in a statute is elementary, and it applies in an eminent degree to the legislation in question. The judges who, under our judicial system prior to the act of 1895, sat as associates in the oyer and terminer, and as judges in the court of quarter sessions, were appointed and commissioned as judges of the court of common pleas; and it is inconceivable that it was the legislative scheme by the act of 1895 to leave the court of common pleas in existence, and its judges in commission, and create a new judicial officer, known as a "county court judge," to hold the courts of quarter sessions, and to sit as an associate to the supreme court justice in the court of oyer and terminer. That such was not the purpose of the legislature is demonstrated by the title of the act, which is as follows: "An Act To Abolish the Inferior Courts of Common Pleas, Courts of Oyer and Terminer and General Jail Delivery, and Courts of General Quarter Sessions of the Peace, To Establish in their Places a County Court in Each of the Counties of This State, and To Provide for and Define the Jurisdiction, Powers, and Duties of Such County Courts." It is obvious from the title of the act, as well as its body, that it was the legislative purpose to abolish the old courts, and substitute the new court in their place. The legislative scheme, in its main feature,—that is, the extinguishment of the old courts,—having failed, the other part, which is not separable, must fail also.

The second ground assigned for reversal is the exclusion of negroes from jury duty, the prisoner being a colored man. There is no proof in the case to show that this exclusion

was done designedly or that such persons were omitted from the panel of jurors except in the same way that white citizens not selected were omitted. The conduct of the sheriff in the selection of the jurors was approved by the court below, and its decision is not subject to review. *Patterson v. State*, 48 N. J. L. 382.

Third, that the sheriff did not deliver a list of the jurors actually summoned to the clerk, pursuant to § 9 of the act concerning juries. Rev. p. 526. By that section it is made the duty of the sheriff to deliver a list of the jurors by him summoned for service at such term, certified by him to be a true list, to the clerk of such court, who shall thereupon file the said list, and forthwith lay the same before the said court, and no person shall serve as a juror whose name is not contained in said list, if objection be made before such person is sworn or affirmed. The jury for the general panel was drawn in the presence of the court and the list of names so drawn, with the proper certificate attached, was filed with the county clerk, and a copy thereof retained by the sheriff. The persons so selected were by the sheriff duly summoned, and all were in attendance on the day fixed for the trial; objection having been made to the panel because the sheriff had not filed with the county clerk a list containing the names of the jurors summoned. The challenge was overruled, and the sheriff advised by the court to file the list, as he did on that day, as appears by the certificate of the clerk. From the jurors thus summoned were selected forty-eight persons, as required by law, a list of whom was served on the defendant, and from this list was drawn in the usual way the jury by whom the case was tried and determined. The claim by the prisoner is that, although the jury were properly chosen and duly summoned, they could not try the defendant, because of the fact that the jury that had been summoned was not certified to and filed by the sheriff with the county clerk. In disposing of this assignment of error, it is sufficient to say that the general panel of jurors in this case was drawn by the sheriff before the court of common pleas, pursuant to the 5th section of the act of April 21, 1876 (2 Gen. Stat. p. 1854, ¶ 50), and that the list of the general panel was certified to by the judges of the said court, pursuant to the statute, as jurors selected in all respects according to the provisions of the statute, a copy of which list was filed by the clerk in his office, and another copy delivered to the sheriff. The statute just referred to contains the only prescription of the mode in which the general panel shall be drawn. The other provisions of the statute are directory merely, and will not invalidate the selection and return of jurors unless it affirmatively appears that injury was done. *Gardner v. State*, 55 N. J. L. 17; *Poulson v. Union Nat. Bank*, 40 N. J. L. 563. The prisoner's counsel was informed by the list on file in the clerk's office of the names of the persons upon the general panel, and at the opening of court every juror whose name appeared on the general panel was present, and answered to his name. It may also be said that the sheriff was under no duty to deliver this list of jurors before the commencement of the term, the language of the section being, "as soon as may be after the commence-

ment of the term," and no application was made to postpone the trial of the case until such a certificate might be made. The sheriff's failure to comply with this statutory requirement was a mere irregularity, which could in no wise have prejudiced the defendant in maintaining his defense upon the merits; and the statute forbids the reversal of a judgment upon an indictment for any imperfection, omission, defect in, or lack of form, or for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits. 1 Gen. Stat. p. 1138, § 89.

The fourth assignment of error relates to the judicial action of the trial court with respect to the introduction of certain evidence. The case was one depending wholly on circumstantial evidence. Certain witnesses testified to having seen certain footprints of a peculiar character in the dirt and soil near the body of the woman who had been murdered, and, for the purpose of showing that such footprints had been made by this defendant, the state produced the boots that were worn by the prisoner on the night in question. Certain impressions in sand, made in the presence of the jury by the boots just mentioned, were exhibited to the jury, against objections taken by counsel of the defendant. This constitutes this assignment of error. The testimony of the witnesses with regard to the appearance of these footprints was undoubtedly competent. Such testimony involved in no sense the knowledge of an expert, and the exhibition of the boots worn by the defendant on the night in question, and the impress in the sand by way of illustration with them, were also competent. We agree with the opinion of the supreme court on this subject.

The counsel of the prosecutor also contends that on a review of the whole record, pursuant to the act of May 9, 1894 (1 Gen. Stat. p. 1154), the conviction should be set aside and a new trial ordered. We have examined this case carefully and have reached the conclusion that the plaintiff in error has not suffered manifest

injury, either in the rejection of testimony, or in the charge to the jury, or in the denial of any discretionary matter by the court, or upon the evidence adduced at the trial. We think that this case was fairly tried, and that the evidence justified the jury in their verdict.

Finding no error in the record or proceedings, the judgment should be affirmed.

Dixon, J., dissenting:

In January, 1896, the plaintiff in error was tried and convicted of murder in the first degree, before a tribunal styled in the record the court of oyer and terminer of the county of Somerset, held by a justice of the supreme court and two others styled judges of the court of common pleas of said county. At that time the act of June 18, 1895 (Pamph. Laws, p. 807), which purports to abolish the courts of oyer and terminer and of common pleas after the 1st Monday in December, 1895, stood upon the statute book unrepealed.

For the reasons set forth by Mr. Justice Magie in his dissenting opinion in *State, Schalk, v. Wrighton*, 58 N. J. L. 50, I think that act was a valid exercise of the constitutional power of the legislature to abolish the inferior courts of the state, and therefore that the tribunal which tried and convicted the plaintiff had no lawful existence, and consequently no jurisdiction.

That the act of April 9, 1896 (Pamph. Laws, p. 236), could not validate such proceeding is sufficiently maintained by the opinion of Chief Justice Beasley in *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 342.

The judgment should be reversed.

For affirmance—The Chancellor, Deque, Gummere, Van Syckel, Barkalow, Bogert, Dayton, Hendrickson, Krueger, Nixon. 10.

For reversal—Dixon. 1.

PENNSYLVANIA SUPREME COURT

Kate McNULTY

v.

PENNSYLVANIA RAILROAD COMPANY, Appt.

(182 Pa. 479.)

A railroad employee engaged in working upon a bridge is a passenger while riding on a railroad train to his home after his day's work is done, where his contract entitled him to free transportation and he was not under any obligation to ride or engaged in any service for the company while so riding.

(October 11, 1897.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 3, for Philadelphia County in favor of plaintiff in

NOTE.—For employee of a railroad as a passenger, see *Doyle v. Fitchburg R. Co. (Mass.)* 25 L. R. A. 167, and 33 L. R. A. 344.
38 L. R. A.

an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. David W. Sellers, for appellant:

Decedent rode in the car only as an employee.

Tunney v. Midland R. Co. L. R. 1 C. P. 291.

To impose upon the defendant the obligation of a carrier as to a passenger is to make a contract never agreed to.

Bricker v. Philadelphia & R. R. Co. 182 Pa. 8.

If McNulty was not in the car as an employee, then he was a trespasser.

Pennsylvania R. Co. v. Mooney, 126 Pa. 250.

He was on the car only by reason of his contract of service. He was therefore on the road "while lawfully engaged."

Ricard v. North Pennsylvania R. Co. 89 Pa. 195; *Baltimore & O. R. Co. v. Colvin*, 118 Pa. 230.

Mr. P. F. Rothermel, Jr., for appellee:
The case at bar falls directly within the decision of *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 386.

Sterrett, Ch. J., delivered the opinion of the court:

The first and third specifications of error are intended to present what may be regarded as the controlling question in this case: Whether upon the undisputed facts, the relation of plaintiff's husband to the defendant company, at the time he was killed, in the collision that occurred on October 28, 1894, was that of a passenger being transported in one of its cars, or that of an employee then in the service of the company. The specifications are as follows: (1) In refusing to charge, as requested in defendant's first point, "that McNulty was carried by defendant in the performance of a contract of employment and service, and was in law not a passenger, but an employee, and, as he was injured by a collision due to the negligence of the engineer, the verdict must be for the defendant." (3) "In charging the jury that the decedent was a passenger." This specification was doubtless intended to embrace that part of the charge in which the learned trial judge refers to the relation of the deceased to the defendant company at the time of the collision. If so, it offends against rule 23, which provides that "the part of the charge . . . referred to must be quoted *totidem verbis* in the specification."

Turning to the charge sent up with the record, we find that as to the contractual relation existing between the deceased and the defendant and the circumstances attending the collision in which he lost his life, etc., the learned judge said: "It appears that the husband was an employee of the railroad company. He was employed to work on a bridge at Tacony, in this county, under a contract of employment, by which he was to receive \$1.20 a day; and the company also contracted to transport him from his home to the place where his work was to be performed, and from that place back to his home at night, when his work was over. The dead man lived at Bristol, in the adjoining county; and, upon the Sunday when he met his death, he had finished his work about 15 or 20 minutes after 6 o'clock, and he, with other workmen employed upon the bridge at Tacony, entered a passenger car of the Pennsylvania Railroad Company, and the car then proceeded towards Bristol. It stopped at a station called 'Croyden,' situated between Tacony and Bristol; and while there at rest, or when about to come to rest, a freight train of the Pennsylvania Railroad Company, upon the same track, crashed into the rear end of the car and plaintiff's husband was killed. It was argued to the court that under a statute of our state, and under the general law, a railroad company was not liable in damages in such a case as this, because McNulty was an employee of the company at the time of the accident, and that the company is not liable to the employee who is injured through the negligence of another employee. In passing upon the motion for a nonsuit, I stated, and I now charge you, that, under the contract of hiring in this case, the services, the work, the em-

ployment of McNulty, ceased when he quit work at Tacony, and that, while he was being transported to his home over the tracks of the railroad company, he was not an employee then in its service; and therefore the injury which he suffered, and which resulted in his death, did not come to him while he was in the employ of the company. . . . He was not in the employ of the company, but was being transported over the road for a valuable consideration, under a contract, it is true, which involved his employment, but a contract in which the transportation and the wages were a return for services rendered; and therefore it became the duty of the company to transport him with care, and with due regard for his safety."

It is unnecessary to refer in detail to the testimony. A careful examination of the record clearly shows that the foregoing instructions were in strict accord with the undisputed evidence in the case. The conclusively established facts as to the contractual relation of the parties are not susceptible of any other conclusion than that the transportation of plaintiff's husband from and to his home in Bristol was part of the consideration moving from the company to him, and given him, with the \$1.20, in payment of a day's wages. That being so, he had virtually paid for his passage home in the car in which he was riding at the time of the collision, and was therefore a passenger, and not an employee, as soon as his day's work was done, and he entered the car for the sole purpose of being carried home. In its controlling features, this case is on all fours with *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 386, in which Mr. Justice Agnew, after referring to the contract of hiring in that case, says: "The work of the plaintiff was wholly at the bridge. . . . At the time of the accident the plaintiff had finished his day's work, and was 10 or 12 miles distant from the bridge on his way home. Under these circumstances, the court below instructed the jury that the plaintiff was traveling as a passenger and not in the capacity of a servant. . . . He was not bired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed, he was no longer in the service of the company, but was free to go or stay, and, when he traveled, in effect paid his fare out of his wages." As was clearly shown in *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 386, the cases of *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384, and *Tunney v. Midland R. Co.* L. R. 1 C. P. 291, are clearly distinguishable from the one now under consideration. The plaintiff in the former was a laborer on a gravel train. In the exercise of his employment he was required to be on the train. The loading and unloading of gravel necessarily required the hands employed in that work to travel with the train from place to place. He traveled, not as a passenger to any particular destination, but went with the train whenever it became necessary to obtain or deposit gravel. His traveling on the cars, like that of a brakeman or a fireman, was in pursuance to his employment, and not under a contract with the com-

pany for transportation to his home or elsewhere. In the other case it was part of Tunney's employment, as a laborer, for specific wages, to travel from Birmingham to Derby on a train called the "pick-up train," for the purpose of gathering up materials left along the line of the road; and he was required to be ready for the train at Birmingham, and start thence on his trip, and return there. The case was put distinctly on the ground that it was part of Tunney's contract of service that he was to return each day to Birmingham by the pick-up train, to be ready to start upon his work the next morning."

In the case at bar, the transportation from and to his home to which the deceased McNulty was entitled was not in any sense a service or connected with any service that he was rendering to the defendant company, but it was a service which the latter, by the terms of the contract, was required to render to him. He was under no obligation to ride on the cars, but there was an obligation on the part of the company to afford him an opportunity of doing so, if he saw fit to avail himself of it; and when he exercised the right to which he was thus entitled, and entered the car for the sole purpose of being transported to Bristol, he was a passenger, in the full sense of the word, and not an employee of the defendant. Before he did so, his day's service to the company was fully completed, and he had earned the \$1.20, together with the right of transportation to Bristol.

The point for charge, recited in the second specification, was rightly refused, for the reason that there was no evidence in the case to bring it within the provisions of the act of April 4, 1868. As we have seen, plaintiff's husband, according to the undisputed evidence, was a passenger and not an employee, at the time of the collision; and hence, by express terms of the act itself, it has no application to the case.

The question of defendant's negligence as the sole cause of McNulty's death has been definitely determined by the verdict rendered under adequate and proper instructions. The question of contributory negligence of the deceased was not even suggested.

Further elaboration of the questions involved in the assignments of error is unnecessary. We find nothing in either of them that would justify a reversal or modification of the judgment.

Judgment affirmed.

Re Estate of Williamina LENNIG, Deceased.

(182 Pa. 485.)

1. A written agreement to transfer a share of a mere expectancy cannot be sustained as a gift, and is not valid when it is entirely one-sided without any consideration, and is not made in settlement of any controversy or dispute.

NOTE.—As to the validity of the transfer of an expectancy, see note to *McCall v. Hampton* (Ky.) 8; *L. R. A.* 226; also *Hale v. Hollon* (Tex.) 36 *L. R. A.* 75.

38 *L. R. A.*

2. An abandonment of effort to obtain a codicil to a will cannot constitute a valuable consideration for the assignment of an expected interest in the estate, as it is against public policy to recognize such opportunity as the legitimate basis of a contract right.

(October 11, 1897.)

A PPEAL by John B. Lennig, trustee, etc., from a decree of the Orphans' Court for Philadelphia County disallowing his claim to a share in the estate of Williamina Lennig, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. John G. Johnson, for appellant:

The agreement of February 28, 1891, considered by itself, was binding upon all the parties thereto, and vested in the trustee of the children of John B. Lennig the right, at the decease of Mrs. Williamina Lennig, to receive one third of that portion of her estate which she had derived from her husband.

1. The agreement was made, not for the benefit of the covenantors, but for that of the children of John B. Lennig, who were entitled through their trustee to recover thereon.

Mississippi C. R. Co. v. Southern R. Assn. 8 Phila. 107.

2. The agreement operated as an equitable assignment to the trustee of the children of John B. Lennig of one third of the husband's portion of Mrs. Williamina Lennig's estate.

Kennedy v. Ware, 1 Pa. 450, 44 Am. Dec. 145; *East Lewisburg Lumber & Mfg. Co. v. Marsh*, 91 Pa. 99; *Kuhn's Estate*, 163 Pa. 440; *Power's Appeal*, 63 Pa. 443; *Patterson v. Caldwell*, 124 Pa. 455; *Bayler v. Com.* 40 Pa. 37, 80 Am. Dec. 551; *Merriman v. Moore*, 90 Pa. 78.

3. The agreement was upon such consideration, and was of such a character, as made it enforceable in equity.

Leake, Contr. 289; *Hare, Contr.* p. 205; *Bispham, Eq.* p. 243; *Dennison v. Goehring*, 7 Pa. 178, 47 Am. Dec. 505; *Bayler v. Com.* 40 Pa. 37, 80 Am. Dec. 551; *Wistner's Appeal*, 80 Pa. 495; *Power's Appeal*, 63 Pa. 444.

The findings of the adjudicating judge were in accordance with the evidence, and must stand unless shown to be clearly wrong, the burden of proof in this respect being upon the appellees.

Luce's Appeal, 3 Pa. Super. Ct. 289; *Straw's Estate*, 168 Pa. 567; *Kittel's Estate*, 156 Pa. 445.

Messrs. Melick & Potter, for appellees:

A transfer of an expectancy, invalid at law, requires in equity a valuable consideration.

Kuhn's Estate, 163 Pa. 438; *Bayler v. Com.* 40 Pa. 37, 80 Am. Dec. 551.

A seal imports only a constructive consideration, and is not sufficient to enable a court of equity to compel specific performance of any agreement, and much less an agreement to transfer an expectancy.

Adams, Eq. 6th ed. p. 73; *Bispham, Eq.* 5th ed. p. 489; *Kennedy v. Ware*, 1 Pa. 451, 44 Am. Dec. 145; *Dennison v. Goehring*, 7 Pa. 178, 47 Am. Dec. 505.

A consideration must be something stipulated for.

Hare, Contr. pp. 135, 216; *Kirkpatrick v. Muirhead*, 16 Pa. 126; *Philpot v. Gruninger*, 81 U. S. 14 Wall. 570, 20 L. ed. 743.

It is conceded that the compromise of the family disputes is favorably regarded, but it does not follow that every agreement, merely because the parties thereto are related, will be enforced.

Wistar's Appeal, 80 Pa. 495; *Grove v. Hodges*, 55 Pa. 519.

A contract enforced in equity must be mutual. Equity will not decree the specific performance of a unilateral contract.

5 Bispham, Eq. 5th ed. § 877; *Dornan's Estate*, 2 W. N. C. 522.

A transaction cannot be considered as a family arrangement, where the doubts existing as to the rights alleged to be compromised are not presented to the mind of the party interested.

Harvey v. Cooke, 6 L. J. Ch. N. S. 84.

Ignorantia juris non excusat relates only to crime, and does not extend to civil cases.

Lansdown v. Lansdown, *Mosely*, 364, cited in *Bellas v. Hays*, 5 Serg. & R. 441, 9 Am. Dec. 392.

Where there is no delivery a seal does not import consideration.

Trough's Estate, 75 Pa. 118.

A gift is not executed unless the thing be delivered or what is the equivalent thereto.

Schieff's Appeal, 179 Pa. 319.

Green, J., delivered the opinion of the court:

The subject of contention in this cause is the distribution of a fund constituting the estate of Williamina Lennig, amounting to about \$180,000. The decedent left a will, wherein she bequeathed the whole of the fund to Williamina Thudicum, a daughter, and two granddaughters, Joyeuse and Williamina Fullerton. These three legatees have the prima facie title to the fund because it is given to them by the will of the last owner, the present testatrix. But the appellant, as trustee for his three children, claims one third of the fund by virtue of a paper duly executed by the three legatees in the lifetime of the testatrix. The paper is dated February 28, 1891, and the testatrix died September 15, 1893. The contents of the will were known to all the parties at the time of the execution of the paper mentioned. The appellant, John B. Lennig, trustee, was a son of the testatrix and her deceased husband, Charles Lennig, and the three children of the trustee were her grandchildren. The paper in question was an agreement on the part of Williamina Thudicum, Williamina Fullerton, and Joyeuse Fullerton that the share of Charles Lennig's estate which the testatrix received as his widow, claiming under the law and against his will, should be equally divided in the following manner, to wit: "One full third part thereof shall be paid to Williamina Thudicum absolutely. One other equal third part thereof shall be equally divided, share and share alike, between Williamina Fullerton and Joyeuse Fullerton. And one other equal third part thereof shall be equally divided, share and share alike, amongst the present and future children of John B. Lennig, and for this purpose shall be paid to the said John B. Lennig, as their trustee."

After having read all the testimony in the 38 L. R. A.

case with most careful attention, we are clearly of opinion that this paper was voluntarily executed by the parties to it, with a full knowledge of its contents, and with the intent that the instrument should do precisely what it purported to do, to wit, transfer to the children of John B. Lennig, through him as trustee, one equal third part of that part of the estate of the testatrix which she derived from her husband's estate. It is perfectly manifest to us that there was no fraud, imposition, mistake, misrepresentation, or undue influence exerted or existing in the minds of the parties to the instrument at the time of its execution, or at any time afterwards. Upon this branch of the case we concur entirely with the findings and views of the learned auditing judge, and, if the decision of the case depended alone upon these considerations, we would reverse the decree, and award the one third of the fund to the appellant, as trustee. But there is a fundamental question lying back of the instrument and the evidence affecting it, which, as it seems to us, is fatal to the appellant's claim. It is this, and it arises in this manner: The fund in controversy belonged to the testatrix absolutely, and she could dispose of it as she pleased. She has given it to her daughter and her granddaughters, and she refused to give any part of it to the appellant's children, when she had the opportunity to do so by means of a codicil to that effect, which she was asked to sign, but refused. We mention this incidentally, and not because we think it is vital to the decision. We see no reason to discredit the positive testimony of Dr. Fricke in relation to the codicil which he presented to the testatrix for her signature. The claim of the appellant therefore rests exclusively upon the effect, in any legal or equitable sense, of the paper signed by the daughter and granddaughters of the testatrix. While it must be conceded that, although they were mere expectant legatees at the time they signed the paper, they subsequently became absolute owners of the fund, by reason of the testatrix dying without having made any change in her will, yet they now claim that they have changed their minds; that they desire the whole of the estate themselves; that they formally revoked the grant made, by another instrument duly executed; but, over and above all, that the instrument they did execute was never obligatory upon them and conveyed no estate or interest to the appellant or his children. The blunt question therefore arises, Can that instrument be enforced against them, contrary to their will? If it was a good conveyance, operative from its date, or if it became effectually operative from the death of the testatrix, it could not now be recalled or rescinded by any act of theirs; and hence the formal rescission by the paper of June 12, 1893, is not of very material consequence, except as notice that the parties to it were determined to resist all claim under the former paper, and were no longer agreed that the appellant or his children should have or take any part of the fund under the original instrument.

The question now recurs, Does that instrument confer a good title, which can be enforced either at law or in equity? The difficulty about it grows out of the peculiar character

of the subject-matter of the instrument. It was an estate in expectancy only. The grantors had no present estate or interest in the property at the date of the grant. It was the property of the testatrix, and she might at any time, up to the moment of her death, revoke her will, and give the estate to other persons. The instrument was therefore an attempted conveyance of something that did not then belong, and might never belong, to the persons assuming to convey it.

There are plenty of authorities in relation to this species of assignment or grant, but the sum of the whole of them is that at law they convey nothing, and in equity they must be founded upon a valuable, not merely a good, consideration. In *Bayler v. Com.* 40 Pa. 37, a married woman, her husband joining, executed a mortgage, to secure a debt of the husband, upon all her estate, right, title, and interest which she would be entitled to receive from her father's estate. When, after the father's death, the creditor attempted to enforce it, we held it could not be done, because the estate mortgaged was only an expectancy, and it was invalid at law, and in equity there was no sufficient consideration to sustain it. Strong, J., delivering the opinion, said: "The mortgage given by Mrs. Jay and her husband to Henry Bayler was not a pledge or conveyance of any estate which she owned at the time of its execution. . . .

Her father was then living. In his estate she had no property—no interest. The subject of the mortgage was therefore nothing that she then had. It was a mere expectancy, and the instrument of mortgage was made, not for any consideration then received by her, or parted with by the mortgagee, but solely for the purpose of securing a prior debt of her husband. . . . It is an old and well-settled rule of the common law, that a mere possibility cannot be conveyed or released; and the reason given for it is that a release or conveyance supposes a right in being. . . . At law, therefore, nothing passes by a deed of land of which the grantor is only heir apparent. Certainly nothing by its direct operation. . . . But though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration." In *Power's Appeal*, 68 Pa. 443, we said (Read, J.): "An heir, or an expectant devisee or legatee, may, in the lifetime of the intestate or testate, in equity sell or assign his expectant or contingent interest, whatever it might turn out to be, upon the death of the person from whom it may come, which contract, if made upon a valuable consideration, a court of equity will enforce." Citing from Snell, Eq. p. 72, the opinion proceeds: "A mere expectancy, therefore, as that of an heir at law to the estate of an ancestor, or the interest which a person may take under the will of another then living, nonexistent property, to be acquired at the future time, as the future cargo of a ship, is assignable in equity for valuable consideration. . . . The interest which a child has in his orphanage part is a mere contingency, and no present right, and therefore a release of it is not valid, in point of law; but, if founded on a valuable

consideration, it shall operate as an agreement, and be binding in equity." In *Kuhn's Estate*, 163 Pa. 488, our Brother Williams, delivering the opinion, said: "At law a valid transfer can be made of anything in actual existence. What the assignor has he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to because he has no title himself. But such sales and assignments have been sustained in courts of equity whenever good conscience seemed to require it, and not otherwise. . . .

If the consideration for such an assignment is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignee's title accrues, and it will be held to take effect as an assignment when the expectant interest vests in the assignor. . . . Was the assignment to Julia Ann Kuhns good in equity? This must depend on the bona fides of the transfer and the adequacy of the consideration." There is a great abundance of authorities to the same effect, and it is not necessary to cite more of them. They are not really disputed. Recognizing their force, the appellant contends that in this case there was sufficient consideration for the agreement in question on two grounds: (1) Because of its being a family settlement; and (2) it led to a discontinuance of efforts to procure the execution of a codicil to the will, in favor of the appellant's children.

We do not see how the paper can be regarded as a family settlement. There was nothing in dispute. There was no title or claim of title of any kind residing in the appellant's children. There was no doubt existing about any question at issue between the parties as to the title to any interest in the estate of the testatrix on the part of the children of the appellant. So far as there could be any title or pretense of title before the death of the testatrix, the persons signing the paper were the only persons having any interest whatever. Their interest was but an expectancy, at the best. While such as interest would have been sufficient to bind them, it could only do so by virtue of an actual and valuable consideration passing to them from the grantees. But there was no controversy or dispute between the parties about any claim of interest or title which the grantees had or might have in the estate of the testatrix, and hence we cannot see how the paper can be regarded as a settlement of a dispute or controversy. If they had even a doubtful claim, although it were found afterwards that it could never have been realized, still it would probably be regarded as sufficient to sustain an actual settlement. But here there is nothing which can be regarded as having even the semblance of a claim upon which to raise any kind of a consideration. In *Wistar's Appeal*, 80 Pa. 495, which was a bill in equity founded upon an agreement which was claimed to be a family settlement, and where actions of ejectment had been brought and were pending for trial when the agreement was made, and in which the master found that the plaintiffs were entitled to the relief sought on the ground that the agreement was of the character claimed, this court reversed the master and court below, and dismissed the bill.

Mr. Justice Sharswood, delivering the opinion, said: "It is certainly true that all agreements for the compromise and settlement of family disputes are favorably regarded, both in courts of law and equity, and are supported, not only as beneficial in themselves, but as conducing to peace and harmony, where it ought most especially to exist. . . . But the principle is not to be carried so far as to work practical injustice. Especially it ought not to override every other rule upon which courts of equity proceed in the enforcement of the specific performance of contracts. A bill for that purpose is always an appeal to the conscience of the chancellor, in which he exercises a sound discretion under all the circumstances, and he will not interfere if the bargain is hard or unconscionable, or the terms unequal, or the complainant is taking an undue advantage from the strict legal construction of the words.

. . . In the compromise of family disputes particularly, the agreement of compromise should be complete in itself, not a mere plan looking to a future adjustment of details; more especially when, so far from settling the family difficulties, it will be itself merely the germ of future litigation. Otherwise, instead of promoting peace and harmony, it may be the source of prolonged discord and dissension." In the present case it will be observed that the agreement is entirely one-sided. The parties who signed the paper merely gave away their expected rights to the whole estate of the testator, and got nothing in return. The children of the appellant had nothing to give, and did not agree to give anything. If the paper could be sustained as a gift, it would answer the purpose; but that cannot be, because the thing given had no existence, and as a gift, under all the authorities, it cannot be sustained. In *Groves v. Hodges*, 55 Pa. 519, Strong, J., said: "Mutuality of obligation is considered, perhaps, more frequently in courts of equity than in those of law. In bills to enforce the specific performance of contracts, which, of course, have to do with executory agreements, it is a constant inquiry what equities the defendant has against the complainant, and a chancellor will not enforce specifically a contract that is one-sided." In *Bispham*, Eq. 5th ed. p. 489, it is said: "It is essential to specific performance that the consideration should be valuable. A merely good consideration, such as natural love and affection or the performance of a moral duty, will not be sufficient. Moreover, it is necessary that the consideration shall be actual. A constructive consideration, such as that imported by a seal to a bond, will not do." In *Kennedy v. Ware*, 1 Pa. 445, 44 Am. Dec. 145; Gibson, Ch. J., said: "An equitable assignment of a chose in action is said by Mr. Butler (Co. Litt. 232b, note 1) to be a declaration of trust, with an agreement to permit the assignee to sue in the assignor's name. The contract, being consequently executory, must have a consideration to support it, without which equity would no more execute it than the law would make the breach of it a subject of compensation. . . . Consanguinity is sufficient to raise a use; but that it is not a consideration for an assignment like the present is shown by *Brett v. J. S. Cro. Eliz.* pt. 2, p. 756, where it was held that nat-

ural affection is not a sufficient consideration for an assumpsit to ground an action.

What, then, was the consideration of the assignment before us? Kennedy, whose executors are sued on a parol agreement to convey land to his son-in-law, Ware, assigned by the instrumentality of his son, to whom he had conveyed his estate in special trust, a judgment against Avery in advancement of his daughter, Ware's wife. The trust being subsequently revoked and the estate reconveyed, Kennedy promised to convey to Ware a particular lot of land in lieu of part of the judgment which was reassigned to him. The judge charged that the promise would sustain the action, but, according to the cases brought into view, the first assignment of the judgment, being in consideration of natural love and affection, was void; and as Ware had nothing in it to give back, Kennedy's promise to convey on the foot of it was also void. The partial rescission of the first assignment was not the compromise of a contested right; and there was therefore no consideration for the agreement on that or any other ground."

For the reasons stated, we are unable to regard the instrument in question as a family settlement, or as being founded upon any consideration. The only other point suggested in this connection is the proposition that, in consequence of the agreement, further efforts to obtain a codicil to the will of Mrs. Lennig were abandoned, and this may be regarded as a sufficient consideration to support the agreement as an equitable assignment. We find ourselves quite unable to assent to this contention. There is no evidence that we can discover of any agreement on the part of Mrs. John B. Lennig or her children to desist from further efforts to obtain from Mrs. Lennig the execution of a codicil in favor of the children; and, while it may be that no such further effort was actually made because of the agreement, that circumstances could not operate as proof of a restrictive agreement against further efforts. But, even if there had been a positive agreement to make no further efforts to obtain a codicil, we cannot regard such a stipulation as a valid condition, possessing the force of a valuable consideration. An agreement not to importune an aged and infirm invalid to make a testamentary disposition in favor of a party may be a very proper stipulation for the party to make, because such conduct would be reprehensible upon considerations of policy and sound morality; but that it can be held to be a valuable consideration for the conveyance of an expectancy in the estate of such a person is a very different proposition. While children may reasonably solicit their parents to make a testamentary disposition in their favor, they certainly should not do so at the risk of annoying and distracting such parents or other persons when in conditions of sickness and suffering. It would certainly be an evil policy for the courts to give countenance to such proceedings by recognizing them as the legitimate basis of a contract right. We cannot regard the argument or the inference of such a result in this case as the foundation of a lawful right to recover the estate of such a person when deceased, upon the theory that it constituted the basis of a valuable con-

sideration for the assignment of an expectant interest in such estate. Entertaining these views, we are obliged to sustain the decree of the court below, while we would have been very glad to reach a different result if that were possible.

The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.

Margaret O'NEIL, *Appt.*,

v.

Noah BEHANNA *et al.*

(182 Pa. 236.)

1. **Strikers who induce newly employed men to break their contracts** by meeting them and following them in considerable numbers as the new men enter the town, and calling them "scabs" and "blacklegs," sometimes surrounding them and endeavoring to pull them away, are liable to the employer for any damages he may suffer in consequence.
2. **The display of force by strikers**, though none is actually used, is intimidation and as much unlawful as violence itself.
3. **All who participate personally in the unlawful conduct of strikers**, or in such combinations as make them liable for the acts of the others done in pursuance of the common purpose, are liable for the damages done in the execution of such purpose.

(July 15, 1897.)

A PPEAL by plaintiff from a decree of the Court of Common Pleas for Fayette County dismissing a bill filed to enjoin defendants from interfering with plaintiff's business and to recover damages for such interference. *Reversed.*

The facts sufficiently appear from the following report of the master, W. J. Johnson:

The testimony in this case is rather lengthy, and the controversy grows out of what is commonly called, or known, as a "strike," resulting from a difference of disagreement in the price of wages between the complainant as operator and the respondents as employees.

Before going on to find the facts in the case, a brief review of the pleadings will be made. Upon the 28th day of February, A. D. 1893, Margaret O'Neill, the plaintiff, filed her bill in equity, setting forth that she is the owner of certain coal works in Washington township, Fayette county, Pennsylvania, situate on the Monongahela river where she is engaged in the business of mining and selling bituminous coal; that in conducting said business she has for a long time past been giving constant employment to a large number of men; that on or about the 10th of September, 1892, the workmen employed by her with one consent and in a body without reasonable or just excuse and greatly to the injury and damage of her said business did cease and refuse and do still refuse to continue working in their said employment for her in conducting her said business;

that these defendants were on and before the 10th of September aforesaid in her employ at said works, or employed in other occupations in the immediate neighborhood of said works; that since the 10th day of September aforesaid, solely because of the refusal of the men to work, the said works and business have been altogether interrupted and suspended, to her great inconvenience, injury, loss, and damage; that since that time she has made great efforts to replace the said strikers with other workmen who were willing and desirous to work for her in said business, and had procured a large number of men who attempted to go to work in said mines; that the strikers did on the 28th day of February, 1893, intimidate, overawe, and prevent eleven workmen from accepting and undertaking said work for her, besides large numbers of other workmen who were at other times so prevented and deterred; that the above-named defendants have unlawfully combined and conspired together to prevent any other persons from accepting employment from and working for her in said business; that in pursuance of said unlawful combination and conspiracy, they have prevented large numbers of workmen from assisting her in her said business, and for the purpose of preventing and deterring all persons from assisting her in her said business are engaged in collecting large, tumultuous, and disorderly crowds which maintain a threatening appearance and conduct, and address threats, menaces, and abusive language to the workmen who are willing to work, thereby putting them in fear of personal or bodily violence or injury to such an extent as to intimidate and prevent them from assisting her in said business; that the defendants are without means to enable them to respond adequately in damages, and that they are active participators in the violent and unlawful acts above mentioned.

She prays for a preliminary injunction, hereafter to be made perpetual, restraining and enjoining the said defendants from assembling and procuring other persons to assemble in large, disorderly, and threatening crowds at or in the neighborhood of the railway stations, steamboat landings, or other places of public travel, and from doing and saying anything whatsoever calculated or intended to overawe, intimidate, hinder, or prevent any person from accepting work and assisting her in her said business, and from in any manner interfering with her business or workmen; and also that an account be stated of the damages sustained by her by reason of said unlawful acts of defendants.

A preliminary injunction was granted as prayed for, and upon March 6, 1893, defendants filed their answer admitting that they are workmen in part, and that some of them were formerly employed as miners at said Fayette City coal works, and that others of them follow divers other occupations, but denying that they or any of them have been unlawfully combining and conspiring together as set forth in plaintiff's bill, or been engaged in collecting and encouraging the assemblage of large crowds of

NOTE.—As to lawfulness of conspiracies and boycotts by or against employees in general, see the considerable number of cases collected in note to *Casey v. Cincinnati Typographical Union*, No. 8 38 L. R. A.

(C. C. S. D. Ohio) 12 L. R. A. 193; also *Worthington v. Waring* (Mass.) 30 L. R. A. 342; *Vegetahn v. Guntner* (Mass.) 35 L. R. A. 722.

disorderly and turbulent persons at and near the coal works of said plaintiff, or elsewhere, or in encouraging crowds, or any body of men in any boisterous, menacing, or threatening conduct, or in addressing violent, threatening, and abusive language to persons desirous to work for her, and also denying that they did on the 28th day of February, 1893, or on any other day, join with or lead any crowd or persons in making threats, menaces, and assaults upon the workmen of said plaintiff, or that they at any time used or attempted to use any violence or threats or menaces to plaintiff or her workmen for the purpose of intimidating, deterring, and preventing them or any persons from accepting employment from and assisting her in her said business, and denying all allegations in her bill charging them with any unlawful conduct or acts in any manner.

It will be seen that the claims or allegations of plaintiff may properly be divided as follows: She claims that the workmen had not the right, without any reasonable or just excuse and greatly to her inconvenience, injury, loss, and damage, to quit and refuse to work for and assist her in her said business: Second. That these defendants together with other persons unlawfully combined and conspired together to prevent and altogether deter all other persons from accepting work from her and assisting her in her said business, and in pursuance of said unlawful combination and conspiracy did engage in abusing, annoying, threatening, menacing, intimidating, deterring, and preventing workmen who were willing to assist her from accepting work. Third. That said defendants are liable to her in damages for losses sustained by reason of the stoppage of said works and business, and for expenses incurred by said strike.

From the testimony taken in the case the master reports the following findings of facts:

1. That the plaintiff, Margaret O'Neil, is one of the owners of certain coal works at Fayette City, Fayette county, Pennsylvania, situate on the Monongahela river, where she is engaged in the business of mining and selling bituminous coal, and in conducting the said business gives employment to a large number of men, about 250 or 300 at a time, the number employed when said works are running in full.

2. That on and before the 10th day of September, 1892, the said works were and had been for some time past running in full, giving employment to part of the defendants herein named and a number of other persons. On or about the 1st of September aforesaid plaintiff gave notice to her employees by posters and otherwise, that on and after the 10th of said month a reduction of one half of a cent on the bushel would be made for mining said coal, that is, instead of paying 8 cents per bushel only 2½ cents would thereafter be paid. This reduction was accordingly made but the miners refused to accept it and on the 10th of September all the employees at said works with one consent and in a body ceased and refused to continue working in their said employment for said plaintiff and continued so to refuse to work until the "strike", as it is called, was declared off on the 24th of March, 1893.

3. That only five of these defendants, Michael O'Neil, J. N. Furlong, Frank Lowers,

Link Lowers, and Hugh McDonald, were in the employ of the said plaintiff on the 10th of September when the men quit work; that John H. Wilson, Charles Wilson, Jr., Robert I. Johnson, William Johnson, John Biles, Jacob Carr, James McPherson, and Frank Bruce had formerly been in her employ but were at that time employed elsewhere, and the other defendants, Noah Behanna, George Hupp, William T. Spalter, Thomas Haywood, James A. Jacobs, Charles Jacobs, Frank Jacobs, and Paul Lamak, had never been in her employ but were and had been engaged in various occupations in the immediate neighborhood of said works.

4. That said works and business were altogether interrupted and stopped on the 10th of September aforesaid by the men quitting and refusing to continue to work in their said employment for said plaintiff. After having been thus stopped no effort or attempt was made by plaintiff to start up said works and resume business until about the 1st of February, 1893, when she began to procure new men in and about Pittsburg, Pennsylvania, and to bring them in to said works to take the places of the strikers. While the stoppage of said works and business was caused solely by the men quitting and refusing to work, yet the suspension until February 1 was not, as the plaintiff made no effort to resume operations. The new men were brought to said works in charge of plaintiff's agents, some on the cars, and others on the steamboats. The first squad of these men, about eleven in number, was brought in on the 1st or 2d day of February aforesaid, and after that various other different squads were brought in two and three times a week until the strike ended six or seven weeks afterwards on the 24th of March.

5. When new men arrived they were always met at the station and landings by some of the strikers, usually by one or more members of their committee which had been appointed by them to look out for new men, and prevailed upon not to go to work in their, the striker's places. Several of the above-named defendants, namely: Robert I. Johnson, William Johnson, Michael O'Neil, Charles Wilson, George Hupp, and Jacob Carr, were on this committee to solicit new men not to work. Some of the men in nearly every squad that was brought in refused to go to work and joined the strikers who furnished them meals and gave them money or tickets to go back home. On several occasions members of the committee went down the river on the lookout for new men and came up with them on the train and boats and talked to them and persuaded them not to stop at said works but to go on past. Crowds of considerable size frequently, in fact almost invariably, collected at the station and on the wharf and street corners when the trains and boats came in. This seems to be the custom of the place. These crowds were composed of strikers and citizens of the town in general, but were, perhaps, somewhat larger on account of the men being idle. Defendants were sometimes in these crowds and talked to the men and tried to persuade them not to go to work; not all of them at one and the same time, but some at one time, others at another. On two or three oc-

casions there was hallooing and cheering of victory by some of these defendants and other strikers when new men were brought in and part of them went back, especially on one occasion after the entresquad of ten men joined the strikers a cheer of victory was given. In a few instances there were some pushing and shoving by plaintiff's agents to keep the strikers from talking to the men, and while some profanity was indulged in, yet there was no violence used by either party. In their efforts to get to talk to the men some of the strikers, and sometimes some of these defendants, would follow the men up from the river to their boarding houses. Printed notices were distributed by the strikers requesting that no men should work in the river mines and especially at Fayette City. Plaintiff had some special police officers or watchmen hired, and also, fearing that trouble or a riot might occur, applied to the sheriff for assistance, who responded by sending two deputies on the 12th or 13th of February and two more on the 20th, all of whom stayed there until the strike was declared off. The sheriff himself was there twice in the meantime but saw nothing indicating trouble. Some trouble or street rows and personal altercations occurred between the town policeman and the deputies and a few arrests were made. Plaintiff's manager admits that they were not troubled or interfered with in any way whatever by defendants and other strikers until they attempted to start up on February 1. Another fact which in the master's opinion is important in passing on this matter, is, that none of the men who were deterred and prevented from accepting work were called at the hearings to testify that it was the alleged unlawful acts of these defendants or other strikers that prevented them from working for plaintiff.

The master finds also that the weight and preponderance of evidence in this contention lie upon the side of the defendants, and from all the testimony is of the opinion and states here as facts that the defendants did not on the 28th day of February, 1893, intimidate and prevent eleven workmen from accepting work from plaintiff; nor did they deter and unlawfully prevent other workmen at any other time from working for her; nor did they unlawfully combine and conspire together to deter and prevent all persons from accepting employment from and working for her in her said business; nor did they annoy, disturb, intimidate, frighten away, deter, and prevent workmen from accepting employment from her, or attempt so to do, by collecting in or in aiding and assisting in collecting, large, tumultuous, and disorderly crowds of threatening appearance and conduct, and by addressing threats, menaces, and abusive language to said workmen, thereby putting them in fear of personal or bodily violence and injury as charged in the fifth and sixth paragraphs of her bill, but that they appealed to them and informed them of the situation, leaving them free to act upon their own judgment, and by peaceful solicitations persuaded them or some of them not to go to work.

6. Plaintiff claims to have sustained loss and damages by reason of the interruption of said work and business in loss of trade, damages to

works and mines, and expenses incurred in procuring new men to the amount of at least \$5,000, and offered testimony and itemized statements marked Exhibits "A," "B" and "C" attached to the testimony in the case, in support of said claim. The master is of the opinion, however, that having already found as a fact that defendants limited themselves to legitimate and peaceful means, and did not act in an unlawful manner, a finding of fact from the evidence on this matter is immaterial and unnecessary.

7. It is not clearly established whether defendants have sufficient means to enable them to respond adequately in damages or not, and is too uncertain to become the subject of a finding of fact, but it is believed by the master that they are without such means.

From the facts found from the testimony and from the pleadings, the master reports the following findings of law:

1. That these defendants had a right to quit and refuse to work for plaintiff, on the 10th of September, 1892, either as individuals or collectively, if in their opinion the wages paid were insufficient, or their treatment unjust. Act June 16, 1891.

Not being bound by contract or agreement to work for plaintiff a certain time, they were free to work for whom they pleased, or not to work at all if they so preferred.

In *Com. v. Hunt*, 4 Met. 183, 38 Am. Dec. 346, Chief Justice Shaw, in referring to a similar case, uses these words: "It acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract."

In the opinion of the master, these defendants, when they quit and refused to work for plaintiff, merely asserted and used a right and privilege to which they are lawfully entitled as workmen, and which the courts fully recognize in all proceedings, whether in civil actions or criminal prosecutions. *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 185; *Newman v. Com. (Pa.)* 5 Cent. Rep. 497; *State v. Glidden*, 55 Conn. 46; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346.

2. That defendants had a right to approach new men and advise them of the strike at said works and of its cause and by peaceful solicitations persuade and induce them not to work for plaintiff in their places as it would be thus working against all their interests. The act of assembly of April 20, 1876, authorizes workmen, having a lawful purpose, to hinder and delay others from working by any means other than the use of force, threats, or menaces of harm to persons or property.

In *People v. Wilsig*, 4 N. Y. Crim. Rep. 418, it is held that "they [the workmen] have a right to go to all their friends, make known their wrongs, and say to them, 'If you are a friend of labor, withdraw your patronage from the man who injures us or refuses us justice.'" To resist the proposed reduction of their wages was, in the master's opinion, a lawful purpose.

It is contended by counsel for plaintiff, however, that any united or concerted action on

the part of defendants to quit and refuse to work for plaintiff and in any manner hinder and keep others who are willing to work for her from working, is an unlawful combining and associating together, and that any talking to, advising, solicitations, or inducements whereby workmen are dissuaded and kept from working for and assisting her in her said business is an unlawful annoyance, hindrance, and interfering with her workmen and business to her injury and loss, and contended further that said defendants did not limit themselves to quiet, peaceful means at all times. The case chiefly relied upon to support plaintiff's claims is the case of *Brace Bros. v. Evans*, 35 Pittsb. L. J. 899. The facts in that case differ very materially from those found by the master in the present case. As to the question raised by part of plaintiff's contention that case does not decide, for the court, Slagle, J., in delivering the opinion, says: "It is not necessary to say whether or not the defendants in this case might, individually or collectively, refuse to employ Brace Bros. and advise their friends and neighbors and such of their patrons as they could reach not to do so, or that they might not distribute circulars, giving a truthful account of plaintiffs' trouble with their employees. It is not necessary to a decision of this case." In *State v. Glidden*, 55 Conn. 46, it is said: "The law encourages combinations for good, and combinations by workmen to better their condition by legitimate and fair means are commendable and should be encouraged. It is certainly true that they had a right to have such a purpose [better their own condition, to fix and advance their rate of wages, and to further their own material interest] and to use all lawful means to carry it into effect. They had a right to request . . . [plaintiff] to discharge its workmen and employ themselves, and to use all proper arguments in support of their request." In *Cole v. Murphy*, 159 Pa. 420, 23 L. R. A. 185: "It is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his service as he sees proper, and, under the Constitution, there is no power lodged anywhere to compel him to work for less than he chooses to accept. But, in this case, the workmen went further; they agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do so is also clear." They "agree upon what in their judgment is a fair price, and then combine in a demand for payment of that price; when refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded; further, they agree by lawful means to prevent all others not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used or menaces to person or property, they had a lawful right to do." These defendants quit and refused to work to resist a reduction of their wages, and to enforce their demand for the old price endeavored to prevent by lawful means others from working in their places. No force or menaces were used as the master finds from the

testimony, but the strike was conducted in an orderly and a lawful manner.

8. That defendants are not liable to plaintiff for any loss or damages which she may have incurred or sustained. While there may have been losses and damages to plaintiff as claimed and offered at hearings, in this matter, they are not the result of illegal and unlawful acts of defendants and she is not entitled to recover, and no account of the damages need therefore be stated.

Messrs. R. P. Kennedy and Edward Campbell, for appellant:

The question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right, either admitted or proved, that since the institution of the suit the invasion has ceased.

United States v. Workmen's Amalgamated Council, 54 Fed. Rep. 995, 26 L. R. A. 158, 4 Inters. Com. Rep. 881; *Murdock v. Walker*, 152 Pa. 595; *Brace Bros. v. Evans*, 35 Pittsb. L. J. 899; *Sweeney v. Torrence*, 1 Pa. Dist. R. 622; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101.

The costs follow the suit usually, as they do at law.

Brewster, Pr. § 6111; *Shedwick v. Prospect M. E. Church*, 160 Pa. 57.

Messrs. Howell & Reppert and Boyd & Umbel, for appellees:

The appellees not only had the right to quit work either individually or collectively without in any way making themselves liable in damages to the appellant, but had the right by all lawful means, such as reasoning and persuasion, to prevent other workmen from working for less.

Cole v. Murphy, 159 Pa. 425, 23 L. R. A. 185.

Mitchell, J., delivered the opinion of the court:

We are obliged to differ wholly from the view of the facts reported by the learned master. It is totally irreconcilable with the testimony, read in the light of experience and a knowledge of human nature. Nor can we agree entirely with the view of the court below, though it is more in accordance with the evidence and the law. The learned judge, in his opinion, says: "The testimony establishes the fact that certain of the defendants overstepped these bounds, and used annoyance, intimidation, ridicule, and coercion to prevent new men from engaging in work for the plaintiff. When the new men were followed, and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, and followed to their lodging places, all the time being pressed and entreated to return, and called 'scabs' and 'blacklegs,' and sometimes surrounded, and the effort made to pull them away, and unfriendly (at least) atmosphere about everywhere, it must be admitted that there was something more than mere argument and persuasion and the orderly

and legitimate conduct of a strike. This was certainly serious annoyance, and well calculated to intimidate and coerce; and that effect was apparently produced on more than one occasion. Nor did such acts entirely end when the men imported actually began work, but such men were, on occasions, and in a less public manner, approached in a like manner in their intervals of labor and advised that there would be trouble there, and they had better leave. No actual violence, however, was employed." This is a mild and judiciously restrained statement of what the evidence clearly showed. The strikers and their counsel seem to think that the former could do anything to attain their ends, short of actual physical violence. This is a most serious misconception. The "arguments" and "persuasion" and "appeals" of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. The display of force, though none is actually used, is intimidation, and as much unlawful as violence itself.

An attempt is made to argue that the strikers only congregated at the place of arrival of the new men, in accordance with the custom at boat and train arrivals in small towns. But this disguise is too flimsy to hide the real purpose. If they desired in good faith to meet peaceably and lawfully for their own business, they should have selected another place, sufficiently remote to be free from the excitement and crowds which their own testimony admits attended the arrival of the new men, and also far enough away to avoid the intimidating effect of a hostile crowd on the newcomers. But, in truth, they did not desire to avoid that effect. On the contrary, that was what they were there for, and their presence indicates their real intentions too plainly for any verbal denials on their part to offset.

It is further urged that the strikers, through their committees, only exercised ("insisted on" is the phrase their counsel used in this court) their right to talk to the new men to persuade them not to go to work. There was no such right. These men were there presumably under contract with the plaintiff, and certainly in search of work, if not yet actually under pay. They were not at leisure, and their time, whether their own or their employer's, could not lawfully be taken up, and their progress interfered with, by these or any other outsiders, on any pretense or under any claim of rights to argue or persuade them to break their contracts. Even, therefore, if the arguments and persuasion had been confined to lawful means, they were exerted at an improper time, and were an interference with the plaintiff's rights which made the perpetrators liable for any damages the plaintiff suffered in consequence. But, in fact, their efforts were not confined to lawful means. The result of the evidence, as stated by the learned judge, is that the new men were "followed and importuned not to work, from their point of embarkation to their destination, and there met by the strikers in considerable numbers, . . . called 'scabs' and 'blacklegs,' and sometimes surrounded, and the effort made to pull them away." This view is quite sufficiently favorable to the defendants, and, as already said, a hostile and

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threatening crowd does not need to resort to actual violence to be guilty of unlawful intimidation. The acts of those defendants were an unlawful interference with the rights of the new men, and with those of the plaintiff. In *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, it is said by our brother Dean that "it is one of the indefeasible rights of a mechanic or laborer in this commonwealth to fix such value on his services as he sees proper, and under the Constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept," nor, as the same right may be stated with reference to this case, to prevent his working for such pay as he can get and is willing to accept. We regard the testimony as demonstrating that the defendants were guilty of an unlawful combination, which, while professing the intention and trying to maintain an outward appearance of lawfulness, was carried out by violent and threatening conduct, which was equally a violation of the rights of the new men who came to work for plaintiff, and of the plaintiff herself, and that they are liable in this suit for all the damages which plaintiff suffered thereby.

We have nothing at present to do with the acts of assembly from 1869 to 1891, which have modified the common law as to conspiracy. The question of their constitutionality was left open in *Cote v. Murphy*, 159 Pa. 420, 23 L. R. A. 135, and does not need to be considered here, as the evidence takes the case entirely out of their provisions.

The learned judge below found no damages against any of the defendants, but made a distinction between them as to liability for costs. We do not think the evidence sustains this distinction. The master reports that "all of the defendants are included in the term 'strikers,' as used by him in his report;" and the testimony is ample to show that all participated personally in the unlawful conduct, or in such combination as made them liable for the acts of the others done in pursuance of the common purpose.

The view taken by the master prevented him from considering the subject of damages, nor did the learned judge make any specific findings on them. In the absence of such findings, we do not enter on the discussion of the subject further than to say that the plaintiff has established her claim to some substantial damages, though her claim may be larger, and may start at an earlier date, than the proof will sustain. So far as yet appears, the defendants did nothing to make them liable prior to the attempt of plaintiff to resume operations, in February, 1893. But after that date the violation of her rights is clear. The case must go back for examination and ascertainment of the facts on this branch of it.

Not the least notable feature is the expression of surprise by the counsel, and even by the court, that the case was pushed after the strike was over. It appears to be a fact that the strike was less violent and disorderly than others which had preceded it, and a sentiment seems to have pervaded the community—even the court not being entirely exempt—that, the strike being over, the subject had better be dropped. This is not law nor justice. A plaintiff who might have been hurt worse than

he was may be inclined not to push his claim for compensation for the injury actually received; but it is for him, and not for others, and especially not for courts, to make the choice, and there should be no judicial surprise

if he insists on his rights, though other men may think discretion the better part of valor.

Decree reversed, bill reinstated, and damages directed to be ascertained in accordance with this opinion; costs to be paid by the appellees.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Edward EVEY, *Plff. in Err.*,
v.

MEXICAN CENTRAL RAILROAD COMPANY, Limited.

(51 Fed. Rep. 294, 53 U. S. App. 118.)

1. A transitory action for a personal tort accruing in Mexico is within the jurisdiction of a circuit court of the United States where one party is a citizen and resident of Texas and the other a citizen of Massachusetts.
2. The laws of Mexico defining negligence and the civil rights resulting therefrom are not too vague and indefinite to be administered by courts in this country.
3. Dissimilarity between the law of Mexico, where the cause of action for negligence arose, and the law of Texas, in which an action is brought therefor, will not preclude the maintenance of the action where the dissimilarity relates chiefly to matters of procedure, and does not involve any conflict with the settled public policy of Texas.
4. The fact that an action might be brought in Mexico for injuries received there by a railroad employee who lives in Texas, since the defendant owns and operates a railroad in Mexico, does not constitute a reason why he should not sue in Texas,—at least when the defendant railway company is incorporated in the United States and its road extends into Texas.
5. The right, under the law of Mexico, to recover additional damages in a new suit when they accrue after the first judgment for injuries caused by negligence is a matter of remedy only, and does not prevent a court in the United States from enforcing a liability for negligence occurring in Mexico.
6. The requirement of an endeavor to procure an agreement and a compromise, which is found in the Mexican Code, art. 318, relates merely to procedure, and the failure to comply therewith does not prevent an action in this country for negligence occurring in Mexico.
7. The fact that negligence may constitute a crime in Mexico does not make a civil action in this country for the negligence amount to the enforcement of a penal law of Mexico when the civil liability does not depend, under Mexican law, upon the criminal prosecution.
8. The provision of the law of Mexico giving extraordinary indemnity for negligence considering the social position of the party injured does not constitute any reason why a court in this country should not entertain an

action for negligence occurring in Mexico, when it is not asked to give such extraordinary indemnity.

9. The question of international comity is controlled and decided by international law and custom, and the decisions of local courts thereon are not controlling in the courts of the United States.

(April 12, 1897.)

ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed*.

Before *Pardee* and *McCormick*, Circuit Judges.

Statement by *Pardee*, Circuit Judge:

To make an intelligent statement of this case it is necessary to give plaintiff's first amended original petition and the defendant's special exceptions thereto in full, as follows:

"Now comes the plaintiff, Edward Evey, and, by leave of court first obtained, files this, his first amended original petition, in lieu of his original petition heretofore filed, and alleges that the plaintiff, Edward Evey, is a citizen of, and resides in, El Paso county, Texas, and that the defendant is a railway corporation duly incorporated under the laws of, and a citizen of, the state of Massachusetts, doing business in El Paso county, Texas, and has, and at all times hereinafter mentioned has had and maintained, an office and agent in El Paso county, Texas; and that the said defendant, the Mexican Central Railway Company, Limited, owns and operates, and at all times hereinafter mentioned has owned and operated, a line of railway from the city of Mexico, in the Republic of Mexico, to and into El Paso county, Texas, carrying on and conducting the ordinary business of a railway company, as a common carrier of goods and passengers for hire; that on the 12th day of July, 1895, and for a long time next prior thereto, plaintiff was an employee of said defendant, engaged in the employment of said defendant company as a locomotive engineer, and was engaged in the running of an engine to and fro over its railway for defendant upon the division known and commonly called the 'Mexico Division,' and which comprises that portion or section of defendant's railroad from the city of Mexico north of Danue station, in the Republic of Mexico. And plaintiff says that on said 12th day of July, 1895, and while so engaged in the service of said defendant, and in the discharge of his duties incident to said employment, and while running said engine under the direction of said defendant company, he was, by and

NOTE.—As to right of action for death caused by wrong or negligence in another jurisdiction, see note to *Nelson v. Chesapeake & O. R. Co.* (Va.) 15 L. R. A. 583; also *Mexican Nat. R. Co. v. Jackson* (Tex.) 31 L. R. A. 276.

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through the negligence of said defendant company, its section boss, agents, and servants, seriously and permanently injured, without any fault or contributory negligence on his part. And he says that on the said 12th day of July, 1895, he was engaged, as an engineer, in running for defendant, and under its orders and directions, an engine known in railroad parlance as a 'helper engine,' which said engine was then and there under the direction and in the charge of one Phil J. Martin, as conductor thereof; that on said 12th day of July, 1895, plaintiff, under the direction of said defendant and its said conductor aforesaid, had assisted a freight train, with said helper engine from Tula station to Danue station, on said defendant's railroad; that plaintiff arrived at said last-named station, on the said helper engine, at about 7 o'clock P. M. on said 12th day of July, 1895; that, upon his arrival at said Danue station, plaintiff was ordered to return to said Tula station by defendant and its agents and its said conductor Phil J. Martin; that in obedience to the orders of defendant and its agents and said conductor, who was then and there present, and in charge of, and controlling the operation of, said engine, plaintiff started to return from said Danue station to said station of Tula, and that while he was so returning the engine upon which plaintiff was as aforesaid was derailed and wrecked by and through the negligence of said defendant company, its section master, agents, and servants, in this: that said railway track was obstructed by a push car, said push car being then and there on said railway track, and being then and there in such a position as to obstruct said railway track, by and through the negligence of defendant, its section master, agents, servants, and employees; that plaintiff did not know, and had no means of knowing, that the railroad of defendant was unsafe or so obstructed, and was not informed thereof by defendant, or defendant's said section master, agents, or employees, and said push car was not seen by the plaintiff in time for him to stop said engine and protect himself against injury, for the reason that said defendant, its officers, section boss, and agents, negligently failed to provide the said push car with a light, and negligently failed to have a man or some person in front of said push car with a signal light to give warning to the plaintiff and others who might be upon said helper engine. And the said defendant, its officers, section boss, agents, and employees, negligently allowed said push car to be out upon said railroad track after dark (it being already dark when the accident aforesaid happened), and the said defendant, its section boss, agents, and employees, negligently failed to inform plaintiff that said track was so obstructed, or that said push car was upon that section of said railroad where plaintiff was operating said engine as aforesaid, although said defendant then and there owed plaintiff the duty to keep said railroad track clear and free of all obstructions. And through such negligence upon the part of said defendant, its section boss, agents, and employees, plaintiff was injured as hereinbefore and hereinafter stated. Plaintiff alleges that, when said push car was struck by said engine, said engine was derailed and wrecked, and

plaintiff was thrown from said engine and sustained serious and permanent injuries, to wit, his left foot was badly crushed and broken, three of plaintiff's ribs were crushed and broken and his left leg was also badly crushed and broken, and plaintiff was greatly bruised, wounded, and permanently injured in his back, shoulders, heart, and spine, and by reason of such injuries plaintiff became insensible, and remained insensible for a long space of time, to wit, for the space of two hours, and after he regained consciousness he suffered intense pain and agony for the space of twenty-four hours; that after so receiving said injuries he was, by reason of the negligence of said defendant and its agents, forced to lie in the rain, upon the ground, and without shelter, for the space of nearly five hours, without any effort or attempt upon the part of defendant, its agents, or servants, or any or either of them, to administer to him, or to in any way or manner alleviate plaintiff's great suffering. Plaintiff states that the injuries so received by him were occasioned solely by the negligence of the defendant, its section boss, agents, and employees, in not maintaining its roadway in a safe and secure condition for the passage of said engine over the same, and in negligently allowing said push car to be on said track at the time of said accident, and negligently allowing the same to be on said track without supplying the same with a proper and sufficient light, and in negligently allowing said push car to be operated upon the same without having a man with a signal light at a safe distance in advance of the same, or on plaintiff's side of the same, to warn plaintiff of danger, and to notify plaintiff that there was danger, and that the push car was upon that section of track and in front of him. And plaintiff says that had not defendant, its section boss, agents, and employees, been so negligent in those respects he would not have been injured. Plaintiff states that said injuries so received by him through the negligence of defendant as aforesaid are serious and permanent as aforesaid, and have rendered plaintiff a cripple and invalid for life, and by reason of said injuries plaintiff has ever since said 12th day of July, 1895, suffered great mental and physical pain, and now suffers, and will throughout the remainder of his life continue to suffer, such pain, and that by reason of said injuries plaintiff was forced to lie in a hospital in the Republic of Mexico for the space of two months, and for seven months afterwards plaintiff was unable to do any work or follow any employment. Plaintiff says that before said injury he was a sound, able-bodied, and vigorous man, but by reason of said injuries plaintiff's heart is permanently and dangerously affected, his nervous system shattered and permanently injured, and plaintiff's capacity to earn a living as a locomotive engineer has been destroyed, and his capacity to earn a living by any sort of means or employment has been seriously and permanently impaired; that at the time of and before said injuries the plaintiff was earning the sum of \$120 per month in money of the United States of American, or its equivalent in money of the Republic of Mexico, and that, by reason of his experience as a railroad engineer, he would have been able to earn at least that amount aft-

erwards; that in consequence of said injuries it will be impossible for said plaintiff in the future to secure any kind of permanent employment, and that, even if he succeeds in securing any kind of employment, he will not be able to make and earn more than \$30 per month; that at the time of said accident plaintiff was thirty-four years of age.

"Plaintiff further alleges that by the laws of Mexico, which now exist, and which existed and were in force at the time and place of the happening of said injuries, through defendant's negligence as aforesaid he (plaintiff) has and had a right of action against defendant for his damages, and he says that the following were the laws of Mexico, and are now the laws of Mexico, applicable in this case, out of which his said right of action grew, and by virtue of which the same now exists in said Republic of Mexico, *viz.*:

"From the Federal Constitution of the Mexican United States:

"Art. 72. Congress has power: . . . (22) To enact laws governing the general lines of communication, and governing postoffices and mails."

"Art. 97. The Federal courts have jurisdiction: (1) Of all questions growing out of the execution and application of the Federal laws, except when the application of the law only affects interests of individuals, in which case the local judges and tribunals of the state shall entertain jurisdiction."

"From the Federal Penal Code of Mexico:

"Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits, or neglecting to do that which it commands."

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government."

"Art. 6. There are intentional crimes, and crimes resulting from neglect."

"Art. 11. Negligent crimes exist: (1) Where an act is done, or a duty omitted, which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences, through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions, or through unskillfulness in any art or science, the knowledge of which is necessary in order that the act done may not result in injury. Unskillfulness is not punishable when he who does the act does not profess the art or science necessary to be known, and acts when impelled by the gravity and urgency of the case. . . . (3) Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved: If the accused is ignorant of such circumstances, through not having previously made the investigation which the duty of his profession or the importance of his case demands."

"Penal Code, bk. 2, 'Civil Liability in Criminal Matters:'

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnification, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, for the violation of a right which is formal, existing, and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence."

"Art. 305. Indemnification imports: The payment of damages, that is, of that which the injured party fails to enjoy as a direct and immediate consequence of an act of omission by which a formal, existing, and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right."

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnification of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding and to avail himself of his rights in such proceeding or in the civil suit."

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover."

"Art. 309. The judges who adjudicated upon the civil responsibility shall be controlled by the provision of this title, in so far as its provisions extend; on other questions, they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility."

"Art. 310. The right to civil responsibility forms part of the estate of a decedent and descends to his heirs and successors; provided, it be not the case of the following article, or that it arise from injury or defamation, and that, the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted."

"Art. 311. The action to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 815 as directly damaged. Consequently such action forms no part of the estate of the deceased, nor is it extinguished, although the latter pardon the offense in life."

"Art. 318. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed: . . ."

"Art. 321. In case of blows or wounds, from which the injured party does not remain crippled, lame, or deformed, he shall

have the right that the responsible party pay all his expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which, in the opinion of competent persons, he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or be a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which may be lucrative and appropriate to his education, habits, social position, and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed, or deformed, by that circumstance, he shall have the right, not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed, or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in the violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law unless it be proved: That the party sought to be charged usurped the property of another; that without right he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the acts or omissions of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the condition of the preceding article, those liable are: . . . railroad companies."

"Art. 363. Limitation: The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been in-

curred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the Civil Code or the Commercial Code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution, but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew."

"Transitory Law, Pen. Code:

"Art. 26. Until it is determined in the new Code of Procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed. . . . (5) Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending the proceedings in the former shall be stayed."

"From the Federal Civil Code:

"Art. 9. Against the observance of the law, disuse, custom, or practice to the contrary cannot be alleged."

"Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all the circumstances of the case.

"Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages, and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights or rights of the same species, it shall be decided, observing the greatest equality possible between the parties."

"Art. 1095. Limitation bars in three years: . . . (8) Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

"Act of Congress of December 15, 1881:

"Article 1. The executive shall regulate the service of railroads, telegraphs, and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following bases: (1) Railroads, telegraphs, and telephones which in the Federal district and territory of Lower California unite together two or more municipalities, or the Federal district and territory of Lower Cali-

California with one or more states; those which communicate two or more states with each other; those which touch at any point in the territorial boundary line of the Republic and foreign countries, or run parallel therewith within a region of 20 leagues, are known as general lines of communication within the meaning of fraction 23 of article 72 of the Constitution. (2) These general lines of communication and their branches shall be subject exclusively to the Federal legislature, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: . . . (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operations of the lines. (h) Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service, and for accidents or mishaps in the operation.

"From the regulations for the construction, maintenance, and operation of railroads."

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

"Art. 53. The conductor of a train *en route* is the person in command of all the train crew, including the engineer and fireman."

"Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: . . . Three blasts or sounds of the whistle shall be the signal that the entire train is going to move backward."

"Art. 124. Companies [railroad] are liable for accidents which occur through the failure to observe the provisions of this chapter [chapter 7] respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals."

"Art. 194. Companies [railway] are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees."

"Art. 298. All violations of this law, which companies [railway] commit shall be subject to punishment by the administration by fine up to \$500 which the department of public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them."

"Plaintiff further alleges that by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth, he had at the time of the occurrence of the accident hereinbefore mentioned, and now has, a right of action for his damages against the defendant in the Republic of Mexico, and the same now exists in said country as well as in the United States of America. And he says that the acts of negligence upon the part of the defendant, its section master, agents, and employees, complained of, were wrongful and actionable, as has been hereinbefore shown

by the plaintiff, in the Republic of Mexico, at the time of the accident complained of, and are now so, and he says the same were then and are now wrongful and actionable in the United States of America and in the state of Texas. And plaintiff says that by reason of said injuries received by him he has suffered and sustained damages in the sum of \$15,000 for which he sues. And, the defendant being in court, plaintiff prays that he have judgment for his damages aforesaid, costs of suit, and he prays for general relief."

The special exceptions are:

"(1) And, for further special exception to said petition, defendant, by its attorneys, comes and says: That it excepts to said petition because the laws of the Republic of Mexico, as pleaded by the plaintiff, are so vague, uncertain, and dissimilar to the laws of this country that this court should not entertain jurisdiction herein and attempt to enforce said laws. That said laws have been passed up on by a decision of the supreme court of the state of Texas, to wit, in the case of *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 81 L. R. A. 276; it being therein held that the courts of this state would not sit to adjudicate controversies like the one at bar, under the laws of the said Republic of Mexico, on account of their dissimilarity to our laws, and that the policy of this state and courts of this country would be not to interfere with the traffic of railroads having their lines in Mexico by adjudicating causes arising in Mexico. (2) That said petition shows that the injury sustained by plaintiff occurred in the Republic of Mexico, and any right of action he may have would be controlled by the laws of said Republic, and it appears that said defendant has ever since said injury maintained its line of railroad in said Republic, and continued to possess its property in said Republic, and there is no reason shown in said petition why plaintiff did not sue for damages for said injuries in said Republic, where the injury occurred, instead of bringing his suit in this court. (3) That it appears from the laws of Mexico, as set out in plaintiff's petition, that, if plaintiff has any cause of action, it would be controlled by the laws of the Republic of Mexico. That according to said laws, as set out in plaintiff's petition, that suit and adjudication of the rights of plaintiff and the awarding of damages to the plaintiff for the injuries sustained would not be a final determination of the rights between the parties, but that plaintiff, according to said law, would have the right to bring suits from time to time, and recover in said suits, if said injury is continuing or permanent. That said law is contrary to public policy. (4) That, according to article 813 of the laws of said Republic, the judge who takes cognizance of suits based upon civil responsibility shall endeavor to effect compromise, so that the amounts and terms of payment be fixed by agreement of the parties, that, according to said law, no right of action will accrue to the plaintiff until after the judge who took cognizance of the case shall endeavor to have the amount and terms of payment fixed by agreement of the parties; that said petition fails to show that the judge of this court, or any judge having cognizance

of said matter, had endeavored to have the amount and terms of the payment for such injuries agreed upon between the parties. (5) That according to the laws of said Republic, as set out in said petition, said plaintiff would have no right in a civil suit to recover damages for his said injuries unless he shows that the acts of defendant which caused the injury constituted a crime under said laws of Mexico. That the recovery in such civil suit is penal in its nature. That this court cannot enforce the penal laws of the Republic of Mexico. That said laws so pleaded do not sufficiently define what acts are made penal under said laws to enable this court to judge whether or not said acts by which such injury was caused are penal within the meaning of said law, to entitle plaintiff to any recovery in a civil action therefor. (6) That, according to article 823 of the laws of said Republic of Mexico, a recovery may be had, not only for the damages sustained by the injury complained of, but the judge trying the case may award, as extraordinary indemnity, any sum that he may determine, considering the social position, etc., of the party injured. That said law is against natural justice and the policy of our law to discriminate in favor of or against a litigant according to his social position. (7) That the laws of the Republic of Mexico, by which plaintiff's cause of action will have to be tried, are so vague and indefinite that this court cannot properly and intelligently determine and administer the same. Wherefore defendant prays judgment of the court, etc."

The circuit court, on argument, sustained the said special exceptions, and, the plaintiff declining to amend, dismissed the action, to which the plaintiff excepted, and now prosecutes this writ of error.

Messrs. W. B. Brack and Millard Patterson, for plaintiff in error:

It is not necessary that a right of action should exist both by the *lex fori* and the *lex loci*, and objections for dissimilarity do not so readily arise in Federal courts.

Huntington v. Attrill, 146 U. S. 657, 38 L. ed. 1123, and cases there cited; *Northern P. R. Co. v. Babcock*, 154 U. S. 198, 38 L. ed. 961; *Greaves v. Neal*, 57 Fed. Rep. 817; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771.

The cause of action was transitory, and while the right of action is governed by the *lex loci*, the remedy, and all that pertains to procedure, are governed by the *lex fori*.

Nonce v. Richmond & D. R. Co. 33 Fed. Rep. 438; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Scott v. Lord Seymour* (1862) 1 Hurlst. & C. 219; *Webb's Pollock*, Torts, p. 239; *Mexican C. R. Co. v. Gehr*, 66 Ill. App. 173.

Mere dissimilarity is no ground for refusing jurisdiction, by Federal courts at least. Our right is founded upon general and international law, and mere local policy of state courts in refusing jurisdiction is not binding, no state law being involved.

Greaves v. Neal, 57 Fed. Rep. 816.

The fact that a tort was committed in a foreign country where the defendant does business

has never for the last one hundred years been thought to constitute any objection to the court entertaining jurisdiction, especially where both parties are its own citizens, and personal service can be had. Nor is it necessary in such cases to show reason why suit was not brought in the foreign country.

Smith v. Condry, 42 U. S. 1 How. 80, 11 L. ed. 35; *McKenna v. Fisk*, 42 U. S. 1 How. 242, 11 L. ed. 117; *Mitchell v. Harmony*, 54 U. S. 13 How. 116, 14 L. ed. 76.

The purpose of the act was to give the injured party full damages, and whether these are to be recovered in one or two suits is a matter pertaining to the procedure or remedy.

Mexican Nat. R. Co. v. Jackson (Tex. Civ. App.) 32 S. W. 230.

The duty of the judge who takes cognizance of suits based upon civil responsibility in Mexico to effect a compromise does not relate to the substantial right of the party cognizable everywhere in any court, but to the remedy.

Mexican Nat. R. Co. v. Jackson (Tex. Civ. App.) 32 S. W. 235.

The fact that by a law of Mexico, as contained in article 26, such negligence is also a crime, does not justify the proposition that defendant has no right to recover damages unless he shows that the acts of defendant constitute a crime.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Mexican Nat. R. Co. v. Jackson* (Tex. Civ. App.) 32 S. W. 233.

Messrs. T. A. Falvey and Waters Davis for defendant in error.

Pardee, Circuit Judge, delivered the opinion of the court:

As the plaintiff is a citizen of the state of Texas, residing in the western district of said state, and the defendant a citizen of the state of Massachusetts, the circuit court has jurisdiction *ratione personae*. As the cause of action shown by the petition is one for a personal tort (i. e., for injury to the person through negligence), it is transitory, and the circuit court has jurisdiction *ratione materiae*.

While the negligence complained of was committed in the Republic of Mexico, neither of the parties is a citizen of Mexico, but both are citizens of the United States; and therefore there ought to be no question of international comity in the case, further than to inquire whether the laws of Mexico give a right to the plaintiff to recover damages for such negligence, and the extent of such right. The laws of the Republic of Mexico create a civil liability in favor of a person injured by negligence, and give a distinct civil remedy therefor, in the nature of pecuniary damages. To the same effect is the law of the state of Texas. This action is not barred by any statute of the United States, of the state of Texas, or of the Republic of Mexico. "A right arising under, or a liability imposed by, either the common law or the statute of a state may, where the action is transitory, be asserted and enforced in any circuit court of the United States having jurisdiction of the subject-matter and the parties." *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439. Whether a law is a penal law, in the international sense, so that it cannot be enforced in

the courts of another state, depends upon whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. "The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person. In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 608, 36 L. ed. 829, 833. *Huntington v. Attrill*, 146 U. S. 657, 673, 683, 36 L. ed. 1123, 1129, 1133. "The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*." *Herrick v. Minneapolis & St. J. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, approved by the Supreme Court of the United States in *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958. The foregoing propositions are not exactly disputed by the learned counsel for the defendant in error, but we have thought best to state them, in order to relieve this case of some of the judicial fog which has settled on it.

The first special exception to the plaintiff's right of action is, in substance, that the laws of the Republic of Mexico, as pleaded by the plaintiff, are so vague, uncertain, and dissimilar to the laws of this country, that this court should not entertain jurisdiction thereon and attempt to enforce said laws. To pass upon this exception, it is pertinent to inquire to what extent the proper understanding and construction of the laws of the Republic of Mexico are material to the case made in the petition. According to the rule declared in *Herrick v. Minneapolis & St. J. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, which rule, as we have seen, was approved by the Supreme Court of the United States in *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, the law of Mexico is to be looked to to determine whether thereunder an employee of a railroad company, injured by and through the negligence of the company, has a right to recover in a civil action damages for such injury, and, if he has, what is the extent of such right. On this inquiry, we are of opinion that the law of Mexico, instead of being vague and uncertain, is clear and specific. Article 11 of the Mexican Federal Penal Code, and articles 301, 304, 305, 306, 307, 308, and 326 of book 2 of the same Code, as pleaded,

confer on any person injured by and through the negligence of another a right to recover in a civil proceeding all the actual damages sustained. Article 330 of the same Code provides that masters may be held civilly liable, through their clerks and servants, according to the provisions of articles 326 and 327, for the negligence of said clerks and servants within the scope of their employment. Article 184 of the act of Congress of December 15, 1881, declares that railway companies are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees. Certainly these laws, so clearly defining negligence and the civil rights resulting therefrom, ought not to be rejected as too vague and indefinite to be administered by intelligent courts and judges.

But it is excepted that these laws are dissimilar to the laws of this country (i. e., of Texas), and too dissimilar to be administered by the court. The alleged dissimilarity having such grave results is not pointed out in the exception. The brief of the learned counsel for the defendant in error is but little more specific, and that little by way of argument that the law of Mexico, as pleaded, requires a judicial determination of the infraction of the penal law of Mexico as a condition precedent to a suit for civil damages, and that such criminal proceedings have not been commenced, whereby all pending civil proceedings would be stayed, under article 26 of the transitory law of the Penal Code of Mexico; and, further, that the petition should show, but does not, that the judge who took cognizance of this suit endeavored to procure an agreement of the parties to a compromise of the controversy as required by article 313 of the Mexican Code before proceeding to adjudication hereof. Article 26 of the transitory law (Penal Code) and article 313 of the Penal Code, as pleaded, relate wholly to matters of procedure, and do not affect the right, nor even the remedy. Article 327 of the Penal Code provides that the civil liability shall exist without regard to whether the defendant be absolved or condemned to criminal liability; and article 298 of the act of Congress of December 15, 1881, expressly reserves the right of individuals through indemnity and the liability which the companies may have incurred through criminal acts or omissions committed by them. If, however, it should be conceded that there is dissimilarity between the law of Mexico giving the rights of action and the law of Texas, in which state it is sought to enforce the right, it does not appear that such dissimilarity extends so far as to conflict with the settled public policy of the state of Texas.

"But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against

the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens." *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 711. See also *Higgins v. Central New England & W. R. Co.* 155 Mass. 176.

In *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1128, the supreme court says: "In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, *The Halley*, L. R. 2 P. C. 193, 204; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Morham*, L. R. 1 Prob. Div. 107, 111; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458; *Ash v. Baltimore & O. R. Co.* 72 Md. 144. But such is not the law of this court. By our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought. *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. ed. 85; *The China v. Walsh*, 74 U. S. 7 Wall. 53, 64, 19 L. ed. 67, 71; *The Scotland*, 105 U. S. 24, 29, 26 L. ed. 1001, 1003; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 489; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829."

The second special exception is that the petition does not show any reason why plaintiff did not sue for damages for said injuries in the Republic of Mexico, and this on the ground that the injury sustained by the plaintiff occurred in the Republic of Mexico, and any right of action which he may have is controlled by the laws of said Republic; and it appears that the defendant has, ever since the injury, maintained its line of railroad in said Republic, and continued to possess its property in said Republic. We are familiar with the exception of the pendency of another suit between the same parties on the same cause of action in another court of the same jurisdiction, but this is our first introduction to an exception that the plaintiff cannot maintain a cause of action in a court having jurisdiction *ratione personæ* and *ratione materiæ*, because the plaintiff could have instituted his action in some other court that would have had like jurisdiction. It has been conclusively shown that although the injury for which plaintiff sues occurred in the Republic of Mexico, and that his right to recover damages is controlled by the laws of said Republic, yet the plaintiff has a right to sue in the circuit court. That the petition shows that the defendant owns and operates a railroad in the Republic of Mexico does not appear to be a very good reason for the courts of Texas to decline jurisdiction, particularly where the same peti-

tion shows that the defendant owns and operates part of the same line of railroad in the state of Texas.

The third special exception is, in substance and effect, that a judgment in favor of plaintiff, awarding him damages for the injuries sustained, would not be a final determination of the rights between the parties, but that thereafter the plaintiff, under the law of Mexico, would have the right to bring suits from time to time, and recover in said suits, if his said injury is continuing or permanent. This exception appears to be based upon article 906 of the Penal Code of Mexico, which is as follows: "Art. 906. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnification of subsequent damages and injuries be exacted by a new suit, when they shall have accrued: If they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries."

The purport of this article is that if damages accrue after the first suit, which damages proceeded directly from, and as a necessary consequence of, same negligence, such damages may be made the subject of a second suit; and the article clearly has reference only to damages which accrue after the first suit, and which were not known to exist at the time such suit was brought and determined. It was evidently intended to give a party injured through negligence full actual damages, although not known or contemplated at the time of the first suit. The adjudication under the Mexican law in the first suit is as final as to all injuries known to exist or existing at the time of the suit as is an adjudication in our courts. In this connection the following from the opinion of Chief Justice James in *Mexican Nat. R. Co. v. Jackson* (Tex. Civ. App.) 82 S. W. 234, 235, is directly in point, and we agree with the reasoning and conclusion: "The well-established rule of law is that we are to look to the laws of Mexico for what pertains to the rights of the parties and to our laws and practice for what applies to the remedy. *Northern P. R. Co. v. Bobcock*, 154 U. S. 190, 38 L. ed. 953; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771; *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200. There is no fundamental difference as to the measure of damages. The actual damage the injured party has sustained and will afterwards sustain is sought to be arrived at and redressed in both jurisdictions. The end sought in both countries is compensation. The allowance of a new suit for injuries that develop later demonstrates the purpose of the Mexican law to secure to the injured party his right to complete and actual damages. The case is not like those in which it appears that the foreign law limits the amount of damages recoverable to a certain sum, where it is held that the domestic court will not render judgment in excess of such sum. The limit and standard in both countries is compensation, and the power to reduce the allowance in favor of defendant, and the right to a new suit in favor of plaintiff, for unconsidered damages, are all merely the means of attaining and enforcing actual damages. It is observed that ex-

emplary damages were not asked or allowed in this case. Our opinion on this branch of the case is that the difference in the mode of arriving at and administering the damages is a matter that affects the remedy only, and therefore offers no obstacle to the exercise of jurisdiction by our courts. Story, Conf. L. § 807*d*. It was proper to proceed according to our law practice, as the court did in this instance, in ascertaining the entire damages and awarding execution."

The fourth special exception sustained by the court below is that the petition fails to show that the judge of the circuit court, or any judge having cognizance of the matter, had endeavored to have the amount and terms of the payments for plaintiff's injuries agreed upon between the parties as required of the judges in Mexico under article 318 of the laws of said Republic. We have already held that this article relates merely to procedure, and does not affect the right, nor even the remedy. The procedure provided for in said article 318 is, as we are informed, a practice enjoined in suits on contracts as well as torts, and is derived from the civil law.

The fifth special exception is that according to the laws of Mexico, as pleaded, the plaintiff has no right to recover damages in a civil suit unless he shows that the acts of the defendant which caused the injury constituted a crime under said laws of Mexico; that the recovery in said civil suit is penal in its nature; that the circuit court cannot enforce the penal laws of the Republic of Mexico, and that the laws of said Republic do not sufficiently define what acts are made penal under said laws to enable the court to judge whether or not said acts by which said injury was caused are penal within the meaning of the law, to entitle the plaintiff to any recovery in a civil action therefor. It appears from the laws pleaded that a civil action lies in the courts of Mexico for the negligent wrongs complained of, and although by the laws of Mexico the wrongful acts of the defendant, as alleged in the petition, may constitute a negligent crime, it does not appear that the liability of defendant to the plaintiff for the injuries complained of depends in any way upon the criminal prosecution or conviction of the defendant. Article 327, Mexican Code; articles 194, 298, Act. Cong. December 15, 1891. And see *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1128.

The recovery sought in this case is not penal, but is for the individual benefit of the plaintiff, and inures in no way to the benefit of the public. The court is not asked in this action to enforce any penal law of the Republic of Mexico, but merely to enforce the civil right of the defendant granted by the laws of Mexico, occasioned by an act of negligence such as gives a right of action under the law in any civilized country.

The sixth special exception is that, according to article 328 of the laws of the Republic of Mexico, a recovery may be had, not only for the damages sustained by reason of the injuries complained of, but the judge trying the case may award an extraordinary indemnity any sum that he may determine, considering the social position, etc., of the party injured; and the argument is that the said law is against natural

justice, and that to discriminate in favor of or against a litigant according to his social position is against the policy of our law. Counsel for the plaintiff answers this exception as follows:

"There is no law requiring us to sue for extraordinary indemnity, and we have not done so; and the fact that we might have done so in the Republic of Mexico is no reason why we should not sue for, in this country, such damages as are otherwise permissible. . . . The fact that the defendant is sued in a forum where extraordinary damages cannot be recovered is a matter for which he ought to thank heaven, take courage, and say no more about it. He certainly cannot complain. Suppose the law of one country should give exemplary damages under circumstances such as that the laws of our country would not give? Could it be supposed that that was a reason for this court refusing to give such damages as are permissible under our laws? If the law of Mexico giving extraordinary indemnity considering the social position is against natural justice and the policy of our laws, that would be a good reason why the courts of this country should not give extraordinary indemnity. But certainly it is no reason why they should not give ordinary indemnity such as is consistent with natural justice and our policy."

This answer seems to dispose of the sixth exception conclusively.

The seventh special exception reiterates the charge of vagueness and indefiniteness of the Mexican law involved, and is disposed of by what has been said with regard to the first special exception.

To support the ruling of the circuit court sustaining the foregoing special exceptions, the learned counsel for the defendant in error relies solely upon a decision of the supreme court of the state of Texas in *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276. That was a case in most respects similar to the one under present consideration; differing, however, in one or two important points, which will be hereafter noticed. The first propositions in *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, affecting the ruling here, are as follows:

"This is a transitory action and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should not entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law, by which the right claimed must be determined, is such that we can properly and intelligently administer it, with due regard to the rights of the parties. *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564. The decisions of this court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of this state in relation to the same subject. *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 860, 1 L. R. A. 804; *Texas & P. R. Co. v. Richards*,

68 Tex. 375. Many difficulties would present themselves in an attempt to determine the meaning of the Mexican law and apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts from which we could ascertain their interpretation of these laws."

It is to be noticed that the action was one in a court of the state of Texas brought by a citizen of that state against a foreign corporation, and that the suit before us is one brought in a court of the United States by a citizen of the United States against another citizen of the United States. In the Texas case the right to sue may be affected by comity. In our case the right to sue is specifically granted by the statute, and appears to be absolute. *Gardner v. Thomas*, and *Johnson v. Dalton*, cited above, were cases in which one British subject sued another British subject (both sailors) in the state of New York to recover damages for assault and battery committed on board a British ship on the high seas. In *Gardner v. Thomas* the court admitted jurisdiction, but refused to hear the case on motives of policy. In *Johnson v. Dalton* the court approved *Gardner v. Thomas*, but concluded that, as the plaintiff left or abandoned the vessel in the port of New York, the court ought to entertain jurisdiction. These two cases are not very persuasive in determining as to the right of a citizen of Texas to sue in his own court and before his own judge. The Texas cases cited were actions for damages caused by the death of the injured party, where it was held that the courts of Texas will not entertain such actions if founded upon a law which is materially different from the law of that state. The rule declared may be correct and binding on the courts of the state of Texas, but the rule in this regard binding on the courts of the United States is to the contrary, and is found peremptorily declared in *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439. The difficulties which present themselves in determining the meaning of the Mexican law and in applying it to give redress to the parties claiming rights under it, we have already sufficiently considered. As to the Mexican courts not being governed by precedent, and having no reports of adjudicated cases, we concur with what Chief Justice Fly so well says in *Mexican C. R. Co. v. Mitten* (Tex. Civ. App.) 86 S. W. 232: "Dissimilarity of the laws, however, was not the sole ground upon which the aid of our courts was denied to Jackson, but other, and, to us, novel, reasons were given why the right should be denied; among the number being the difficulties that would beset Texas courts in determining the meaning of Mexican laws. On this point it is said: 'We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts from which we could ascertain their interpretation of these laws.' If it be true that the Mexicans have no precedents, and keep no record of adjudicated cases, it would seem that a Mexican court would be in no better position to follow in the track of the decisions than would an American court, and

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while 'it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law, as fixed by the courts of the other state, is to be followed,' still it does not follow that where the other state has not interpreted its laws, or has failed to record its interpretations, this state should therefore refuse to extend a remedy for a wrong inflicted on a citizen within the borders of such foreign state. In many of the cases in which jurisdiction has been assumed or held to attach in the courts of one state when the wrong was perpetrated in another, the offending party had removed from the latter state; but we have found no case where the fact of removal was made the ground for assuming jurisdiction. Our courts either have jurisdiction of the class of cases we are discussing, or they have not; and the question of whether a man has voluntarily resorted to our courts, or been forced into them, or whether commerce between Mexico and Texas will be injured or protected by compelling the payment by a corporation of damages for the wrongs it has inflicted, or the condition of our dockets, can have no weight or force in determining jurisdiction. These are considerations that might possibly address themselves to the notice of legislatures, but not to the determination of courts. Courts are not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy. *Percival v. Hickey*, 18 Johns. 257, 9 Am. Dec. 210. We are not willing to subscribe to the doctrine that a citizen of Texas who has suffered wrongs, transitory in their nature, in a foreign country, at the hands of one who has his legal domicile in this state, before he can obtain redress at the hands of our courts must show that he has been refused aid in the foreign courts, and make it appear that he comes to the courts of his own country unwillingly and as a last resort. Jurisdiction of a cause should not be made to depend upon any such state of circumstances. If the construction placed upon the decision in the *Jackson Case* be the true one,—and some of its expressions would seem to justify the construction,—it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, by relegating him to a trial in the courts of a country where the laws are said to be enforced without precedent or authority, and which laws are claimed to be so uncertain and obscure that our courts cannot undertake to construe them. We are not willing to subscribe to such doctrine, and will not extend the scope of the decision referred to beyond the purview of the fact of that case. We hold that the petition showed a cause of action, and that the district court of El Paso county had jurisdiction of the case."

Following the above quoted propositions, the supreme court in the case cited elaborates in regard to the dissimilarity between Mexican law and the law of Texas, and holds that this dissimilarity is sufficient to warrant the courts of Texas in refusing to entertain jurisdiction. The court next finds that another reason for refusing to entertain jurisdiction exists in the fact that the Mexican National Railroad Company owns and operates a railroad in Mexico; and as a matter of comity to the people of Mexico,

and as a matter of policy towards the growing commerce between Texas and Mexico, and out of consideration for the overburdened condition of the dockets of the Texas courts, the court holds the Texas courts ought not to entertain suits for negligence brought against railroad companies operating lines in Mexico, where the plaintiff chooses the Texas jurisdiction from convenience, and not from necessity. The petition in the case at bar shows a fact not appearing in the *Jackson Case*, i. e., that the Mexican National Railroad extends into and is operated in the state of Texas; and that being the case and as the plaintiff has a right to sue in the circuit court, we doubt if the locality of the defendant's railroad, given as sufficient for nonsuiting Jackson in the courts of the state of Texas, is sufficient to nonsuit the present plaintiff in the circuit courts of the United States sitting in Texas. The question of international comity is controlled and decided by international law and custom, and the decisions of local courts are not controlling in the

courts of the United States. *Huntington v. Attrill*, 146 U. S. 670, 36 L. ed. 1128; *Greaves v. Neal*, 57 Fed. Rep. 816. Clearly the opinion and decision of the supreme court of the state of Texas ought not to, and do not, control in the proper decision of the questions here involved. Our lengthy discussion of the case comes from our high appreciation of the acknowledged ability of the judges of that court, and in deference to our learned brother of the circuit court, who appears to have followed the same.

Having considered the important questions presented in this case in the light of the numerous authorities cited by counsel, and many others within our reach, we conclude that neither in reason nor on authority are the special exceptions to the amended original petition well founded.

The judgment of the Circuit Court is reversed, and the case remanded, with instructions to overrule the special exceptions, and thereafter proceed in the trial and determination of the case according to law.

WASHINGTON SUPREME COURT.

PIONEER SAVINGS & LOAN COMPANY, *Appt.*,

v.

PROVIDENCE WASHINGTON INSURANCE COMPANY, *Rept.*

(..... Wash.)

1. An application for a policy of insurance in Minnesota on property located in Washington which is delivered by the company on a certain day in the latter state will be held to have been before a transfer of the property which took place two days before the policy was delivered, for the purpose of determining the truthfulness of a statement as to the title to the property.
2. A violation of the ordinary stipulation in a mortgage clause on an insurance policy that the mortgagee will notify the insurer of a change of title to the property is not a ground for forfeiture of the policy, but is merely a breach of contract for which an action for damages will lie if the insurer is injured.
3. Change of title by deed from mortgagor to mortgagee in the interval between the application by the mortgagee for insurance on the property and delivery of the policy will not render the insurance void for false description of the property as belonging to the mortgagor if the facts of the existence of the mortgage and the pendency of foreclosure proceedings are stated in the application.
4. A conveyance from the mortgagor to mortgagee prior to the date of the fire, which is not accepted until after that date, will not avoid a policy of insurance on the property for change of title, since the mortgagee may

keep his mortgage alive and prevent its merging in the title if it is to his interest to do so.

(June 18, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Mr. Mark F. Mendenhall, for appellant:

The application for insurance being true as to title when made, and defendant's agents rewriting the insurance some time later, with full knowledge of the foreclosure suit, and without making any further inquiries as to the title at the time of rewriting the insurance, the agents' acts bound the defendant; they had full power to approve risks and write and deliver policies, and the burden was on defendant to inquire as to any mutation in the title in the interim between August 14 and August 30, 1893; and defendant is now estopped to deny its liability and take refuge behind the oversight of its agents.

Henschel v. Oregon F. & M. Ins. Co. 4 Wash. 476, 488; *Meisterman v. Home Mut. Ins. Co.* 5 Wash. 524; *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86; *Kahn v. Traders' Ins. Co.* (Wyo.) 84 Pac. Rep. 1068; *Hoose v. Prescott Ins. Co.* 84 Mich. 809, 11 L. R. A. 340; *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 178, and 21 Iowa, 186 and 193; *National Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161; *Forward v. Continental Ins. Co.* 142 N. Y. 382, 25 L. R. A. 637; *Watertown F. Ins. Co. v. Grover & B.*

NOTE.—As to the right of a mortgagee to the benefit of insurance taken in the mortgagor's name, see note to *Chipman v. Carroll* (Kan.) 25 L. R. A. 306; also *Palmer Sav. Bank v. Insurance Co. of N. A.* (Mass.) 82 L. R. A. 615.
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As to the effect of a mortgage slip in such case, see note to *Phenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 25 L. R. A. 673; also *Hardy v. Lancashire Ins. Co.* (Mass.) 83 L. R. A. 241.

Sewing Mach. Co. 41 Mich. 181, 82 Am. Rep. 146; *Fire Assn. of Philadelphia v. Laning* (Tex. Civ. App.) 81 S. W. 682; 1 May, Ins. p. 15; *Thomason v. Capital Ins. Co.* 92 Iowa, 72; *Day v. Hawkeye Ins. Co.* 72 Iowa, 598; *Hartford F. Ins. Co. v. King*, 106 Ala. 519.

The truth or falsity of the representation as to ownership and title in the land and buildings cannot affect plaintiff's right to recover; the mortgage plaintiff had an insurable interest in the property, wholly independent of the owner, and the courts have been always liberal to protect an insurable interest, although misstated.

1 May, Ins. §§ 80-83; 1 Wood, *Fire Ins.* §§ 119, 266, 281, 282; *Excelsior F. Ins. Co. v. Royal Ins. Co.* 55 N. Y. 843, 14 Am. Rep. 274; *Dooty v. Hanover F. Ins. Co.* 16 Wash. 155; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409; *Williams v. Roger Williams Ins. Co.* 107 Mass. 377, 9 Am. Rep. 44. See note to *Strong v. Manufacturers' Ins. Co.* (Mass.) 20 Am. Dec. 507; *King v. State Mut. F. Ins. Co.* 7 Cush. 1, 54 Am. Dec. 683, note; *Eddy v. London Assur. Corp.* 143 N. Y. 311, 25 L. R. A. 686; *Carpenter v. German American Ins. Co.* 135 N. Y. 298; *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 834, 25 L. R. A. 679; *Springfield F. & M. Ins. Co. v. Allen*, 48 N. Y. 393, 8 Am. Rep. 711; *Ames v. Richardson*, 29 Minn. 330; *Bell v. Western Marine & F. Ins. Co.* 5 Rob. (La.) 428, 89 Am. Dec. 546.

The mortgage clause when attached to the policy forms a distinct and separate contract with the mortgagee, whose interests cannot be jeopardized or invalidated by any acts of the mortgagor. The insurance as to the owner may be absolutely void from the beginning on account of false representations material to the risk, or may become void by subsequent acts of the owner; but the mortgagee cannot be prejudiced as to his security.

Hastings v. Westchester F. Ins. Co. 78 N. Y. 141; *Foster v. Equitable Mut. F. Ins. Co.* 2 Gray, 216; *Syndicate Ins. Co. v. Bohn*, 27 U. S. App. 564, 65 Fed. Rep. 165, 37 L. R. A. 614; *Carpenter v. German American Ins. Co.* 135 N. Y. 298; *Phenix Ins. Co. v. Omaha Loan & T. Co.* 41 Neb. 838, 25 L. R. A. 679; *Eddy v. London Assur. Corp.* 143 N. Y. 311, 25 L. R. A. 686.

All representations are not material to the risk, and if immaterial they do not avoid the policy. The test is,—the title being represented in an uncertain, shifting condition, or momentarily liable to change, and the insurance company being willing to write its policy on that information, but in fact the title was in plaintiff, the mortgagee, thus increasing its equitable interest to an absolute one,—if this latter state of the title had been disclosed to the insurer, would it have been less willing to write the insurance or have demanded an enhanced premium? Most emphatically, "No," to either question.

Dodge v. Hamburg-Bremen F. Ins. Co. 4 Kan. App. 415; *Continental Ins. Co. v. Ward*, 50 Kan. 346; *Washburn Mill Co. v. Fire Assn. of Philadelphia*, 60 Minn. 68; *Columbia Ins. Co. v. Lawrence*, 35 U. S. 10 Pet. 516, 9 L. ed. 516; 1 May, Ins. §§ 273, 275, 276; *Syndicate Ins. Co. v. Bohn*, 27 U. S. App. 564, 65 Fed. Rep. 165; *National Bank v. Union* 88 L. R. A.

Ins. Co. 88 Cal. 497; *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 184, 85 Am. Dec. 553; *Bailey v. American C. Ins. Co.* 13 Fed. Rep. 250, and note, 256; *New Orleans Ins. Co. v. Gordon*, 63 Tex. 144; *Keeler v. Niagara F. Ins. Co.* 16 Wis. 523, 84 Am. Dec. 714; *Collins v. London Assur. Corp.* 165 Pa. 298.

Parol evidence was admissible to explain the circumstances surrounding the application and the giving of the deed, and the policy was not necessarily void because the estate or interest was not truly stated in the application for insurance.

Clinton v. Hope Ins. Co. 45 N. Y. 464; *Barry v. Hamburg-Bremen F. Ins. Co.* 110 N. Y. 1; *Weed v. Hamburg-Bremen F. Ins. Co.* 183 N. Y. 394; *Gilbert v. North American F. Ins. Co.* 23 Wend. 43, 85 Am. Dec. 544; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541; *Berry v. American C. Ins. Co.* 132 N. Y. 49.

A substantial compliance with representations is all that is needed, and the jury are the only ones to pass upon the materiality thereof.

1 May, Ins. 184, 186, 187, 187b-195; 1 Wood, *Fire Ins.* 236; *Columbia Ins. Co. v. Lawrence*, 35 U. S. 10 Pet. 516, 9 L. ed. 516; *Howard F. Ins. Co. v. Chase*, 72 U. S. 5 Wall. 509, 517, 18 L. ed. 524, 527; *Daniels v. Hudson River F. Ins. Co.* 12 Cush. 416, 59 Am. Dec. 192; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. 385, 80 Am. Dec. 90; *Stetson v. Massachusetts Mut. F. Ins. Co.* 4 Mass. 330, 8 Am. Dec. 220; *Merriam v. Middlesex Mut. F. Ins. Co.* 21 Pick. 162, 32 Am. Dec. 252.

This honorable court must and will take judicial knowledge of the distance between the cities of Spokane and Minneapolis, and the necessary lapse of time for the passage of the United States mails between distant points.

The insurance company cannot keep appellant's premium and then pray for relief from liability under the policy.

Appleton Iron Co. v. British America Assur. Ins. Co. 46 Wis. 23; *Lycoming F. Ins. Co. v. Haven*, 95 U. S. 249, 24 L. ed. 476; *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86.

The "change of ownership" of which notice was to be given, was some transfer of the title other than that contemplated as possible under the mortgage.

Washburn Mill Co. v. Philadelphia Fire Assn. 60 Minn. 68; *Billings v. German Ins. Co.* 34 Neb. 502.

The perfection of title in the mortgage was the mere operation of law upon conditions existing and contemplated by the insurer at the time of issuing the policy, and which it might well have foreseen.

Bragg v. New England Mut. F. Ins. Co. 25 N. H. 298; *Bailey v. American C. Ins. Co.* 13 Fed. Rep. 250, note, 258.

The change of title made the hazard of the defendant less rather than greater.

Continental Ins. Co. v. Ward, 50 Kan. 346; *National Bank v. Union Ins. Co.* 88 Cal. 497; *Ormsby v. Phenix Ins. Co.* 5 S. D. 72; *Getman v. Guardian F. Ins. Co.* 46 Ill. App. 489; *Rhode Island Underwriters' Assn. v. Monarch*, 98 Ky. 305; *German Ins. Co. v. Churchill*, 28 Ill. App. 206; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409.

Messrs. Graves, Wolf, & Graves, for respondent:

Celinda Newsom was insured from the 80th day of August, 1893, against loss or damages by fire, and there was an express provision in the policy that it should not be valid until countersigned by the agents of the company at Spokane, Washington, and such policy was actually signed and delivered on August 30, and therefore nothing can be considered by the court except as to the condition of the title and the representations made thereof on such date.

Wainer v. Milford Mut. F. Ins. Co. 153 Mass. 335, 11 L. R. A. 600.

One who accepts an insurance policy accepts the provisions contained therein, and is presumed to know its contents.

Guinn v. Phoenix Ins. Co. (Tex. Civ. App.) 81 S. W. 566; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353; *Cleaver v. Traders' Ins. Co.* 71 Mich. 414; *Moore v. State Ins. Co.* 72 Iowa, 416.

With such positive conditions in the policy as this one contains no court would make a new contract for the parties, and say that positive words meant nothing.

McWilliams v. Cascade F. & M. Ins. Co. 7 Wash. 50.

The parties to this policy have asserted that the representations as to the ownership of this property were material; it was only on condition of the ownership being as therein stated that they entered into this contract. The court will never hear evidence as to whether such matters are material or not; it is a question that the parties to the contract have settled by their agreement.

McWilliams v. Cascade F. & M. Ins. Co. 7 Wash. 52; *Stensgaard v. St. Paul Real Estate Title Ins. Co.* 50 Minn. 429, 17 L. R. A. 576; *Campbell v. New England Mut. L. Ins. Co.* 98 Mass. 381; *Wilson v. Conway F. Ins. Co.* 4 R. I. 141; *Conover v. Massachusetts Mut. L. Ins. Co.* 8 Dill. 231; *Alma L. Ins. Co. v. France*, 91 U. S. 510, 23 L. ed. 401; *Bruton v. Metropolitan L. Ins. Co.* 48 Hun, 204.

There can be no such thing as a conditional delivery to a grantee. It matters not what parol conditions may be attached to such delivery, when a deed is executed and delivered to a grantee title absolutely passes, and the parol conditions amount to nothing.

Tiedeman, Real Prop. § 815; 3 Washb. Real Prop. 5th ed. p. 817.

Reavis, J., delivered the opinion of the court:

Action at law to recover on a fire insurance policy. The plaintiff procured a policy of insurance from the defendant against loss by fire, in the amount of \$1,500, upon a store building in the town of Post Falls, Idaho. The policy ran directly to Celinda Newsom, and the contract of insurance was for the term of one year from the 80th of August, 1893, at noon, on the 30th of August, 1894, against all direct loss or damage by fire. The application for the insurance was made by the plaintiff as mortgagee of the property owned then by Celinda Newsom and her husband. It contained the stipulation, "Loss, if any, payable to the plaintiff named as mortgagee or trustee, per mortgage clause attached" which mort-

gage clause contained, among other things, the following provisions: "It is hereby agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary in the trust deed only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer, or conveyance of the premises; provided, that the mortgagee or beneficiary shall notify this company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee or beneficiary, and shall have permission for such change of ownership or such increased hazard duly indorsed on this policy." On October 1, 1893, the buildings were totally destroyed by fire. Notice was given and tender of proof of loss made by the plaintiff to the defendant within reasonable time thereafter, and claim for payment of loss. Defendant denied all liability under its contract of insurance, and plaintiff began this action. At the trial of the cause, objection was interposed by defendant to the introduction of testimony because the complaint did not state facts sufficient to constitute a cause of action. The court sustained this objection, and upon motion of defendant, directed the jury to return a verdict in favor of the defendant, and entered judgment thereon. Previous to the trial a general demurrer had been interposed by defendant to the complaint, and overruled by the court.

It will be observed that the question presented here is upon the sufficiency of the pleadings by the plaintiff. The complaint sets out the corporate capacity of the plaintiff and the defendant, and that Newsom and wife were the owners of the property covered by the policy of insurance, and as such owners executed and delivered a mortgage of \$1,800 to the plaintiff, for a valuable consideration, and that the mortgagors agreed to keep the premises insured against loss by fire, and the policy to have a mortgage clause attached, with the loss, if any, payable to plaintiff, and that, in case of failure of the mortgagors to keep up the insurance, then the mortgagee to take out the insurance and pay the premiums, and the mortgage was to be security for the premiums paid; that, for a breach of the conditions of the mortgage, plaintiff commenced a foreclosure suit about the 2d day of August, 1893, in the district court of Kootenai county, Idaho, and immediately served the defendant with summons; that during the pendency of the foreclosure suit, about August 23, 1893, Newsom and wife made, executed, acknowledged, and delivered their deed, thereby intending to convey the mortgaged premises to plaintiff, and at the same time it was expressly understood between defendants Newsom and plaintiff that title should pass to plaintiff only on condition that said title be approved by plaintiff's attorneys, and upon the further condition that the foreclosure suit be dismissed and the mortgage debt satisfied and discharged by plaintiff as against Newsom and wife; that about the 21st of September, 1893, plaintiff's attorneys, on behalf of the plaintiff, filed a

motion in the Idaho court to dismiss the foreclosure suit, and the motion to dismiss the suit was heard and order of dismissal thereon entered by the court on the 6th of November, 1893; that, during the pendency of the foreclosure suit in accordance with the provisions of the mortgage, plaintiff, upon the — day of August, 1893, at Minneapolis, Minnesota, applied for and procured from defendant insurance on the premises, and paid the premium of \$87.50 therefor; and that defendant, by its agents duly authorized thereto, on August 30, 1893, at Spokane, Washington, made the policy of insurance in writing and insured the premises as the property of Celinda Newsom in the sum of \$1,500 against loss by fire. After the demurrer was overruled, defendant answered, in substance, denying information sufficient to form a belief as to the formal matters alleged in the complaint, and affirmatively alleging that at no time prior to the date of the fire did the plaintiff, or Newsom or wife, or any other party, notify defendant of any change of ownership which had come to the knowledge of either of the parties, nor did plaintiff obtain permission for such change of ownership, or obtain permission for the execution of the deed from Newsom and wife to plaintiff, or concerning the approval of the title of the mortgaged premises, or concerning the pendency or dismissal of the foreclosure suit, and that at the time of the fire, and when the policy of insurance was made, plaintiff was the owner in fee simple of the mortgaged premises. The answer further alleges that the policy described in the complaint contained the following covenant: "That said policy should be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of the ownership of the insurance be a building on ground not owned by the insured in fee simple, or if any change other than by the death of the insured should take place in the interest, title, or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise." Plaintiff replied, denying the absolute sale by Newsom and wife to it on August 28, and also alleging that plaintiff's officers could not notify the defendant of the settlement of the foreclosure suit, and that notice was given of the pendency of the foreclosure; alleging that by reason of the necessary lapse of time in procuring the abstract of title and in approving said title, and the time necessarily consumed by the transmission of the United States mails to and from the city of Minneapolis, plaintiff's officers could not and did not have any notice or knowledge of the foreclosure suit at the time of making application for the policy of insurance, or at the time of the fire; and the plaintiff also alleges that it notified defendant of the pendency of the foreclosure suit, and defendant issued the policy of insurance with full notice and knowledge of the suit. Besides the covenant above mentioned in defendant's answer relative to the ownership of the property, which was in the policy, there was also another stipulation as follows: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the

subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such insurance as shall be written upon, attached or appended hereto."

1. Plaintiff, under the terms of its mortgage, when the mortgagors had failed to procure insurance for the buildings on the mortgaged premises, applied to defendant, a Minnesota corporation in Minneapolis, for a fire insurance policy, as a mortgagee, and paid the premium at the time of \$87.50. The policy was forwarded to be countersigned at the agency of defendant at Spokane, Washington. The allegation of the complaint is that this application was made and the premium paid on the — day of August, 1893. We think it may reasonably be inferred that the premium was paid upon the application made at Minneapolis at least three days before the policy was delivered in Spokane. At the time the application was made Newsom and wife, the mortgagors, were the owners of the premises insured. If, as maintained by the defendant, the presumption exists that plaintiff made a representation of the title in its application for insurance to defendant, then such statement of title was at that time true. In contemplation of both parties, the premises were mortgaged, and a mortgage foreclosure might be made and a change of title occur; and, in such change of title, plaintiff, mortgagee, might become the owner. Indeed, the contract of insurance with the plaintiff, the mortgagee, provided that no change of title or possession, etc., should affect the contract. We believe the rule supported by the better authority is that the contract of insurance with a mortgagee by an insurance company is a separate, distinct contract from that of the owner of the property, and that it is in contemplation between the parties to the contract that a change of title may occur, and that a third person or the mortgagee may become the owner, and that the ordinary stipulation in insurance policies in such contracts, that the mortgagee shall notify the insurance company of a change of title, is one not a substantive part of the contract, for violation of which a forfeiture will lie, but is simply a subsequent breach of the contract, for which damages may lie if the insurance company is injured. Such being the rule, we would have no difficulty in adjudging the defendant liable for the loss, if, after the delivery of the policy, such change of title had occurred, although defendant was without notice of the same. But the change of title in the case at bar evidently occurred in the interval between the application and payment of premium at Minneapolis and the delivery of the policy to the plaintiff at Spokane. May on Insurance (vol. 1, 3d ed. § 276c), discussing foreclosure, says: "If, however, the policy expressly provides that the commencement of foreclosure proceedings shall avoid it, the condition will be enforced. But where an application truly stated that no foreclosure proceedings had been begun, and the policy stipulated that the commencement of any foreclosure proceedings shall immediately render this policy void, and no such proceedings were

begun after the policy was issued, but there were such begun between the date of the application and the date of the policy, it was held that the company was bound, and the policy was not forfeited. The insurer must stipulate for the intervening period, if he would cover it." This question has also been directly before the supreme court of Iowa in a case in which the facts are very similar to those in the one now under consideration here. In that case the application for insurance was made February 23, and stated that no proceedings had been commenced to enforce a mortgage on the property, which statement was true at that time. The application also provided that no liability should attach until it should be approved by the company. It was approved and the policy issued March 3. The policy provided that the commencement of foreclosure proceedings against the property should render it void. Foreclosure proceedings were in fact begun between the dates of the application and the issuance of the policy, and the court held that the policy was not void because of such foreclosure proceedings. The court said: "Upon the 3d of March it relied upon what the insured said about the property on the 23d of February. The company knew that the condition of the property was liable to change in the interval, and employed no means to inform itself. We think it took its own risk in regard to such change. When it issued its policy on the 3d day of March, it seems to us that it undertook to insure the property as it then was. We do not think that the policy can be understood as meaning that foreclosure proceedings commenced before that time would render the policy void. No one can read the provision against the commencement of foreclosure proceedings without being impressed that it was designed to provide merely for the future." *Day v. Hawkeye Ins. Co.* 72 Iowa, 597. This court, in the case of *Dooly v. Hanover F. Ins. Co.* 16 Wash. 155, held that a policy of insurance containing a stipulation similar to the one in the case at bar, that if the ownership was not sole, unconditional ownership in fee, it was void, and where at the time the policy was written and delivered the insured was not such owner, and where the insurance company had no knowledge of the title, and no false representations had been made by the insured, was not vitiated. In effect, it was decided that the insurance company must inquire or inform itself about the title, or else it will not be material. In the policy before us, as usual in fire insurance policies, there are numerous printed stipulations in large and small type, and that they are not always closely noticed by either the insurer or the insured is obvious from a reading of this policy. The stipulation that exists in the printed portion of this policy, "or if any change other than by the death of the insured should take place in the interest, title, or possession of the sub-

ject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise," was not eliminated by the defendant or its agents when they delivered the policy, yet it is absolutely inconsistent with the contract which it specially made with the plaintiff as mortgagee, and which was attached to the policy, the latter contract stipulating that such changes should not vitiate the policy. This illustration is mentioned that it may be seen, when the strictness of a forfeiture is claimed by the insurance company because of a stipulation perhaps first noticed by the insured after loss, it will be closely scrutinized before forfeiture is declared. Nothing will be inferred in favor of the forfeiture.

2. But another phase of the contention for a forfeiture of the contract by the defendant may here be examined. It is true that the execution and delivery of a deed by grantor to grantee estops the grantor from afterwards setting up a conditional delivery, or qualifying it in any way. This rule has its reason, which is that in so important a matter as the conveyance of title to real estate the door for the introduction of parol testimony to contradict the delivery of a deed when once made will not be opened. But this estoppel upon the grantor does not always conclude the grantee. The plaintiff here was the mortgagee. It did not agree to, and did not in fact, dismiss the foreclosure proceeding or satisfy the mortgage until after the loss occurred by fire. The rule is that a mortgagee taking a conveyance of the fee by a deed does not always and necessarily merge the mortgage in the title, but, on the contrary, if it is to the interest of the mortgagee to still maintain the mortgage, he may do so. It would be but an ordinary precaution, when a deed was tendered by the mortgagor, to examine the title before acceptance of the deed. There might be intervening encumbrances which would make it necessary to maintain the mortgage intact, and conclude a foreclosure, and derive title through a judicial sale, rather than to retain the ownership by deed from the mortgagor. Evidently here it was to the interest of the plaintiff to maintain its mortgage after the loss by fire occurred, and it did so for some time; and, if it were in any sense a mortgagee when the loss occurred, the liability of the defendant was at that date fixed, because its contract is to pay such loss as the mortgagee sustained and as its interest appeared. The defendant seems to have retained the \$67.50, and refused to pay the loss under its contract of insurance.

In conformity to the views heretofore expressed, the judgment of the Superior Court is reversed, and the cause remanded for a new trial.

Scott, Ch. J., and Dunbar, Gordon, and Anders, JJ., concur.

NEW YORK COURT OF APPEALS.

Wilson E. PALMER, *Respnt.*,

v.

Seymour VAN SANTVOORD *et al.*, Re-
ceivers, etc., of Walter A. Wood Mowing &
Reaping Machine Company, *Appts.*

(158 N. Y. 612.)

A person employed at a salary of \$100 per month by a mowing machine company to go from place to place and fix and set up machines and unpack and repack them when necessary, as well as to sell or solicit sales, is an employee, within the meaning of Laws 1885, chap. 376, giving a preference to claims of wages of "employees, operatives, and laborers" of corporations.

(Bartlett J., dissent.)

(October 5, 1897.)

A PPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Rensselaer County directing defendants to pay a claim of petitioner for wages out of funds in their possession. *Affirmed.*

Statement by **Andrews, Ch. J.:**

The respondent was employed by the Walter A. Wood Mowing & Reaping Machine Company, a domestic corporation, prior to the appointment of the appellants as its receivers. The nature of his employment is stated in the case as follows: Wilson E. Palmer "was employed by the said Walter A. Wood Company to set up machines and to take them down, and to fix the same when out of repair; to go from place to place and fix and set up the machines of said company for farmers to whom the machines had been sold; to unpack the machines, and to repack them and ship same to company when necessary; also to sell or solicit sales of the machines of said corporation,—and did, in the discharge of his duties as the employee, operative, and laborer of said company, sell machines for them, and that as such operative, employee, and laborer he set up and repaired machines for said company while in their employ as aforesaid, going from place to place so to do, took the machines from the railroad, unpacked same, bolted together and screwed together the same, and did all necessary work to make said machines work, bolting them together and fitting them so they would work, and that he performed manual labor as well as the labor of selling machines, and obeyed and carried out the instructions, orders, and directions given to him by said corporation through its officers and servants." His compensation was \$100 per month. The question submitted is whether he was an "employee, operative, or laborer," and his claim for wages against said company entitled to a preference under the provisions of chapter 376, Laws 1885, which enacts that "where a re-

ceiver of a corporation created or organized under the laws of this state and doing business therein, other than insurance and moneyed corporations, shall be appointed, the wages of the employees, operatives, and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands."

Mr. G. B. Wellington, for appellants:

The respondent was not an employee, operative, or laborer within the meaning of that act. *People v. Remington*, 45 Hun, 329, affirmed 109 N. Y. 631.

In cases of statute liability created against stockholders, such statutes are always strictly construed.

Gurney v. Atlantic & G. W. R. Co. 58 N. Y. 367; *Broton v. A. B. C. Fence Co.* 52 Hun, 151; *Re Stryker*, 73 Hun, 327; *People v. Beveridge Brewing Co.* 91 Hun, 313.

Where stockholders were made liable for all debts that may be due and owing to their laborers, servants, and apprentices for services performed for such corporation, it was held that the services referred to are manual or menial services.

Wakefield v. Fargo, 90 N. Y. 217; *Short v. Medberry*, 29 Hun, 89.

A clerk in the mayor's office, and other employees of the city, are not within the terms of chapter 368 of the Laws of 1890.

People v. Buffalo, 57 Hun, 577; *Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 367.

Mr. Amasa J. Parker, for respondent:

There is no reason why any person who comes within the terms of the statute should be excluded from its beneficent protection. The statutes prescribe no distinction between different classes of employees, and the person employed to keep the books labors with his hands, and contributes no more skill or experience than many skilled laborers.

Gurney v. Atlantic & G. W. R. Co. 58 N. Y. 358; *Broton v. A. B. C. Fence Co.* 52 Hun, 151; *People v. Beveridge Brew. Co.* 91 Hun, 313.

Andrews, Ch. J., delivered the opinion of the court:

The work which the claimant was employed to perform was in part the work of a mechanic, and in part that of an agent for the sale of machines manufactured by the corporation. His duties involved both the performance of manual labor, and the exercise of tact and skill as a sales agent of the company. He was while acting in either capacity an employee of the company, within the general and etymological meaning of the word. The word is defined in the Century Dictionary as "one who works for an employer; a person working for salary or wages; applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation, or to domestic serv-

NOTE.—On the question, Who are laborers, employees, or servants within the meaning of statutes relating to preferences? see note to *Tod v.* 88 L. R. A.

Kentucky Union R. Co. (C. C. App. 6th C.) 18 L. R. A. 305; also *Lewis v. Fisher (Md.)* 26 L. R. A. 278.

ants." It is insisted, however, on the part of the receivers, that he was not an "employee, operative, or laborer," within the meaning of the statute of 1885. It must be conceded that the word "employees" was not used in the statute in its broadest sense. This as well by reason of the words "operatives and laborers," with which it is associated, as of the decisions upon this and cognate statutes. If the legislature intended by the act of 1885 to prefer all debts owing by a corporation (other than an insurance or moneyed corporation), of which a receiver should be appointed, to "employees," using the word in its largest sense, the words "operatives and laborers," with which it is associated, are superfluous. The use of these associated words indicates that the word "employees," by which they are preceded, was used in a restricted and limited sense, and was not intended to comprehend all who were employed by the corporation, irrespective of the nature of their service and the relation which they held to the company. This restricted meaning was given to the word in the learned and able opinion of Judge Follett in the case of *People v. Remington*, 45 Hun, 329, which was affirmed by this court upon his opinion. 109 N. Y. 631. The case of *People v. Remington* arose under the statute of 1885, the same statute involved in the present case; and it was there decided that neither the superintendent of a corporation employed at an annual salary, nor an attorney employed to render professional services for the corporation, nor a foreign agent for the sale of the goods of the corporation in China, who was to receive a commission on sales made by him in addition to an annual salary of \$2,000 were "employees," within the statute, and that their earnings were not "wages of employees" entitled to preferential payment. In construing the 18th section of the general manufacturing corporation act, which imposes liability upon stockholders in corporations for debts owing to "laborers, servants, or apprentices," the courts have confined its application to persons occupying subordinate positions, and have excluded from its protection the officers and managers of corporations, on the ground that they were not laborers or servants, within the meaning of the act. *Coffin v. Reynolds*, 87 N. Y. 640; *Dean v. De Wolf*, 82 N. Y. 626; *Hill v. Spencer*, 61 N. Y. 274; *Wakefield v. Fargo*, 90 N. Y. 218.

We must assume (under the case of *People v. Remington*) that the words "employees," in the act of 1885, is not to be accorded its widest lexicographical meaning; and it is difficult, if not impracticable, to define with precision the line of separation. The intention of the lawgiver is to be sought first in the words of a statute, and if they are obscure, in the occasion of the enactment and in the policy which dictated it, when that can be legitimately ascertained. Prior or contemporaneous legislation on the same general subject may be resorted to in aid of the interpretation, but not to control the clear language of subsequent statutes. Words are not to be rejected as superfluous when it is practicable to give to each a distinct and consistent meaning. "The good expositor," says Lord Coke, "makes every sentence have its operation to suppress all the mischiefs. He gives effect to every word of the statute."

38 L. R. A.

He does not construe it so that anything should be vain and superfluous, nor yet make exposition against express words, but so expounds it that one part may stand agreeable with the other, and all may stand together." Coke Rep. pt. 8, 810. There is much difficulty in giving full force to the word of Lord Coke in the construction of many modern statutes, in view of the diffuseness and inaccuracy of the language used, but they furnish a useful guide, and suggest a needed caution. When the words of the statute do not perfectly express the intention, they are to have a rational interpretation, to be collected from the words and the policy which may be reasonably supposed to have dictated the enactment; and the interpretation may be rigorous or liberal, depending upon the interests with which it deals. Ruth. Inst. p. 104. "Except," says Bronson, J., in *Waller v. Harris*, 20 Wend. 561, 32 Am. Dec. 590, "in relation to a few old statutes which were long since overwhelmed by commentaries and decisions, the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation." The word "employees" in the statute of 1885 is a word of larger import than the words "operatives and laborers," which follow it. *Gurney v. Atlantic & G. W. R. Co.* 53 N. Y. 859. And, while it may embrace the latter classes, it is not confined to those who perform manual labor only; and to construe it in the narrowest sense, as embracing those classes only, would violate one of the accepted canons of construction to which we have referred,—that each word used in an enumeration in a statute of several classes or things is presumed to have been used to express a distinct and different idea. It is doubtless true that, from the lack of technical accuracy and precision in the framing of statutes, a word of large import is often followed by words of narrower meaning, expressing what is included in the larger term, but this does not justify a restriction of the scope and meaning of the larger term to what is expressed in the words which follow, unless the context points to such a construction. A larger word interjected between words of limited meaning in an enumeration of persons or things may furnish a reason for confining the broader term to persons or things of the same relative kind and importance as in the preceding and subsequent words, because the larger term would naturally be the first to be used if it was intended to have a broader sense than those with which it is associated. *Wakefield v. Fargo*, 90 N. Y. 218. The principle that particulars are naturally mentioned in the order of their importance, and that larger particulars are not to be deprived of meaning by subsequent enumeration of things which may be included in the primary word, does not apply to general words following particular ones, for there the rule is to construe them as applicable to persons or things *ejusdem generis*. *Sandiman v. Breach*, 7 Barn. & C. 96; *People v. New York & M. B. R. Co.* 84 N. Y. 565. An early example of this construction is found in 2 Coke Rep. 46, where it was held that a statute treating of "deans, prebendaries, parsons,

vicars, and others having spiritual jurisdiction," did not extend to bishops. But this rule is not without exception. The statute of Marlbridge (chap. 19) makes provision "touching essoignes in counties, hundreds, or in courts baron or in other courts of record, and it was held to extend to the King's courts of record at Westminster; for otherwise the general words would be void, for there were no lower courts than those specified. 2 Inst. 18d.

The contention that the word "employees," in the statute of 1885, should be confined in meaning to persons occupying a strictly subordinate position, as day laborers and the like, is urged in part upon the view that the statute was intended to protect that class of laborers only who, as a rule, are dependent upon their daily wages for subsistence, and who enter upon their employment with no view of giving credit to the corporation for their wages, and, expecting prompt payment, had no occasion to rely on its credit or solvency. The courts have given a strict construction to acts imposing liability upon stockholders in corporations for debts owing to "laborers, servants, and apprentices." The rule of strict construction has been applied to those acts upon the ground stated by Chief Justice Shaw in *Gray v. Coffin*, 9 Cush. 199: "To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It [the statute] is therefore to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute." Cited in *Chase v. Lord*, 77 N. Y. 1. See also *Church, Ch. J., Gurney v. Atlantic & G. W. R. Co.* 58 N. Y. 358. It may perhaps be doubted whether the principle of strict construction has not been carried too far in some of the cases exempting stockholders from liability under the manufacturing corporations act of 1848. But the act of 1885 proceeds, we think, upon a broader policy, as to the persons to be protected, than has been attributed to the acts imposing liability upon stockholders. The act deals with the distribution of the assets of insolvent corporations, or corporations in the hands of receivers. The purpose of the act is that the debts of the corporation for the wages of employees, including in the designation all who in common understanding held that relation to the corporation, should be the first charge on the assets, and that business debts should be postponed thereto. The act of 1885, in this respect, was supplementary to, and *in pari materia* with, the act (chapter 828 of the Laws of 1884) which amended the general act of 1877, regulating general assignments by insolvent debtors so as to provide "that in all assignments made in pursuance of this act the wages and salaries actually owing to the employees of the assignees or assignors shall be preferred before any other debts." Formerly incorporated companies in this state were by statute disabled from making a general assignment in contemplation of insolvency. *Sibell v. Remsen*, 38 N. Y. 95. Whether this rule has 88 L. R. A.

not been changed by recent legislation may admit of question. See § 27 of the assignment act of 1877; stock corporation law, as amended by chapter 688, Laws 1892, § 48. But at least the amended act of 1884 covered the case of insolvent assignments by natural persons, and prescribed that debts due to employees of the assignor should be preferred. The act of 1885, now in question, enacted substantially the same rule of preference in case of domestic corporations in the hands of a receiver,—a situation generally due to insolvency. In *People v. Remington* the claims of the superintendent, of the attorney, and of an agent, for the general management of the foreign business of the corporation in China, to a preference under the act of 1885, were disallowed on the ground that they were not "employees," within the common acceptance and meaning of the word. The superintendent was substantially an officer. The attorney was engaged in an independent business, and his debt arose in the prosecution of that business. The case of the foreign agent is the one which might admit of a difference of opinion. The mere fact of the employment being such as might be designated an agency would not alone, we conceive, take the case out of the protection of the act. Bookkeepers or persons employed to make sales of merchandise or of property manufactured by the corporation are, we think, "employees," within the meaning of the act, and their compensation earned is "wages," whether such persons are employed by the day or month or year, and whether the compensation is denominated "salary" or "wages" in the contract of employment.

We think the order below was correct, and it should therefore be affirmed.

O'Brien, Haight, Martin, and Vann, JJ., concur. **Gray, J.,** absent.

Bartlett, J., dissenting:

This case involves the intention and policy of the legislature when it sought to prefer "the wages of the employees, operatives, and laborers" of insolvent corporations (Laws 1885, chap. 376). If the word "employee" is to be treated as the correlative of "employer," absolutely and without restriction, it then follows that the words "operatives and laborers" in the statute are mere surplusage, and every person employed by a corporation on a salary is preferred. In construing a statute, force must be given to all its provisions if possible. In the case at bar the use of the word "wages" is significant and restrictive, and excludes fixed salaries which are not properly described as wages. Furthermore, some effect must be given to the words "operatives and laborers," which follow the word "employees" in the statute. I think they qualify the latter word, and, taken in connection with the word "wages," limit its general meaning. It is not every employee, in the broad, general sense, who is preferred; but the employee, operative, or laborer who receives wages as such, whose services are menial or manual, and who depends upon his daily wage for present support. In the case before us the employee received compensation at the rate of \$100 a month from a mowing-machine company. It

was his duty to go from place to place and sell or solicit sales of machines, to take them down, fix, and set them up for the purchasers. I am of opinion claimant was a traveling salesman on a salary, and only performed such duties as are common in the sale of machines or instruments of complicated design. This monthly

salary is no more wages, as it seems to me, than the salary and commissions of the salesmen sent to China by E. Remington & Sons. *People v. Remington*, 45 Hun, 829, 842. Affirmed on opinion of the general term, 109 N. Y. 681.

The order appealed from should be reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

George F. UNDERHILL, *Plff. in Err.*,
v.

José Manuel HERNANDEZ.

(26 U. S. App. 573, 65 Fed. Rep. 577.)

1. The acts of a commander of revolutionary forces in charge of a captured city of another country, causing injury by assault and false imprisonment to a citizen of the United States, does not render him liable in a civil action in the United States,—at least after the revolutionary government has been established and recognized by the United States government, even if the acts complained of were performed before the revolution became successful.
2. The expression of an erroneous opinion will not require the reversal of a decision which makes a proper disposition of the case.

(January 23, 1896.)

ERROR to the Circuit Court of the United States for the Eastern District of New York to review a judgment in favor of defendant in an action brought to recover damages for assault and false imprisonment alleged to have been committed by defendant on plaintiff. *Affirmed.*

Before Wallace, Lacombe, and Shipman, Circuit Judges.

The facts are restated in the opinion.

Mr. Salter S. Clark, with Messrs. Logan, Demond, & Harley, for plaintiff in error:

Under the civil law of Venezuela there is a civil action against the defendant for damages for imprisonment or violence to the person corresponding to our actions of false imprisonment or assault and battery.

Hernandez could have been sued civilly on this cause of action in Venezuela. Torts follow the person, and can be sued upon wherever the defendant may be found.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 88 Am. Rep. 491; *Mitchell v. Harmony*, 54 U. S. 13 How. 137, 14 L. ed. 85.

International law makes a military commander personally responsible for all acts ordered or done by him which are merely wanton or malicious, or not necessary to the prosecution of the war.

The Constitution of Venezuela provides that

the dispositions of the law of nations shall be especially enforced in cases of civil war. This gives the citizen and foreigner a municipal right.

Mitchell v. Harmony, 54 U. S. 13 How. 115, 14 L. ed. 75; *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581; Forsyth Cases and Opinions on Constitutional Law, p. 214; Stephen, History of the Criminal Law, p. 215; Field, Code of International Law, § 725; 2 Hare, Am. Const. Law, p. 919; Hall, International Law, p. 469; 1 Halleck, International Law, p. 478; 2 Halleck, International Law, p. 449; Walker, Science of International Law, 1893, pp. 281, 282; *Dow v. Johnson*, 100 U. S. 158, 25 L. ed. 632.

Even if looked upon as a military invader, still, under international law, his rights would be limited, and the law would still be above him, not under his feet.

2 Halleck, International Law, p. 449; Hall, International Law, 1890, p. 469; Walker, Science of International Law, 1893, pp. 281, 282.

The result would be the same, if he had been a rightful civil or military official of Venezuela, exercising martial law in the place.

Luther v. Borden, 48 U. S. 7 How. 1, 12 L. ed. 581; 1 Halleck International Law, p. 478; Forsyth, Cases and Opinions on Constitutional Law, p. 214; Field, Code of International Law, § 725; Stephen, History of the Criminal Law, p. 215; Walker, Science of International Law, 1893, p. 266; *Coleman v. Tennessee*, 97 U. S. 519, 24 L. ed. 1123.

The theory that the occupant of an office is, in that office, the government, the supreme power, the sovereignty of the nation, and hence cannot be questioned by the judiciary, has been denounced as entirely hostile to the theory of government of a free people.

Poindexter v. Greenhow, 114 U. S. 291, 29 L. ed. 193; *Reegan v. Farmers' Loan & T. Co.* 154 U. S. 891, 38 L. ed. 1021.

A general is no more the government than a collector of customs is.

Mitchell v. Harmony, 54 U. S. 13 How. 115, 14 L. ed. 75; *Dow v. Johnson*, 100 U. S. 158, 25 L. ed. 632; *Raymond v. Thomas*, 91 U. S. 712, 23 L. ed. 434; *Planters' Bank v. Union Bank*, 83 U. S. 16 Wall. 483, 21 L. ed. 478; *Ex parte Milligan* 71 U. S. 4 Wall. 2, 18 L. ed. 281.

Civil courts have jurisdiction to hold military officers responsible in suits for damages. It is for the jury to say whether the acts are within military right or not.

NOTE.—This decision has now been affirmed by the Supreme Court of the United States in 168 U. S. 280, 43 L. ed. —, on the ground that the inability of courts to inquire into the acts of foreign gov-
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ernments extends to the acts of an insurgent commander when the revolutionary party ultimately succeeds and is recognized as the government by the United States.

Mitchell v. Harmony, 54 U. S. 18 How. 115, 14 L. ed. 75; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 198; *Beckwith v. Bean*, 98 U. S. 266, 25 L. ed. 124; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Milligan v. Hovey*, 8 Biss. 13; Stephen, History of the Criminal Law, p. 215; *Wilson v. MacKenzie*, 7 Hill, 95, 42 Am. Dec. 51; *Smith v. Shaw*, 12 Johns. 257; *McConnell v. Hampton*, 12 Johns. 234; *Dow v. Johnson*, 100 U. S. 158, 25 L. ed. 632; 15 Am. & Eng. Enc. Law, p. 437; 7 Am. & Eng. Enc. Law, p. 685.

Hernandez's treatment of Underhill was malicious and unnecessary, and so not within any military right.

The existence of civil war in Venezuela in 1892 was never recognized by our government. Therefore our courts must consider the ancient state of things as continuing, and Hernandez a private party, without any right of war.

The recognition or nonrecognition of a state of civil war in a foreign country is for the executive department, and until the executive has acted the courts must decide on the basis of the old state of things.

Rose v. Himely, 8 U. S. 4 Cranch, 241, 2 L. ed. 608; *United States v. Palmer*, 16 U. S. 3 Wheat. 610, 4 L. ed. 471; *Gelston v. Hoyt*, 16 U. S. 3 Wheat. 246, 4 L. ed. 381; *Gelston v. Hoyt*, 13 Johns. 581; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 198; *Kennett v. Chambers*, 55 U. S. 14 How. 88, 14 L. ed. 816; *The Ambrose Light*, 25 Fed. Rep. 408; *The Itata*, 15 U. S. App. 1, 56 Fed. Rep. 505; *United States v. Trumbull*, 48 Fed. Rep. 99; *The Conserva*, 38 Fed. Rep. 431.

The act is to be judged of by the existence or nonexistence of recognition at the time it occurs, and recognition cannot act retroactively to legitimize an act unlawful at the time.

Kennett v. Chambers, 55 U. S. 14 How. 88, 14 L. ed. 816; *The Itata*, 15 U. S. App. 1, 56 Fed. Rep. 505; *United States v. Trumbull*, 48 Fed. Rep. 99; *The Ambrose Light*, 25 Fed. Rep. 408.

It was for a jury to say whether Hernandez was a part of an organized revolutionary party, or was acting independently.

Whart. Am. Law, §§ 454, 221, 210; Walker, Science of International Law, p. 260; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 198.

Messrs. F. R. Coudert and Joseph Kling, for defendant in error:

The acts which the plaintiff claims constituted his false imprisonment by the defendant. Having been done by him in his capacity of a military commander, their validity cannot be questioned in the courts of another country.

The Exchange v. McFaddon, 11 U. S. 7 Cranch, 112, 116, 3 L. ed. 287; *L'Invincible*, 14 U. S. 1 Wheat. 239, 4 L. ed. 80; *Hatch v. Baer*, 7 Hun, 596; *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas., 1; *Nabob of Arcot v. East India Co.* 4 Bro. Ch. 180; *Mighell v. Sultan of Johore*, 68 L. J. Q. B. N. S. 593.

Immunity is not confined to the sovereign, but extends to all those in the service of the sovereign or the state where the acts complained of were done by them in the exercise of their public employment, or as an official of such sovereign or state.

L'Invincible, 14 U. S. 1 Wheat. 238, 4 L. 38 L. R. A.

ed. 80; *Suits against Foreigners*, 1 Ops. Atty. Gen. 45, 46; *Actions against Foreigners*, 1 Ops. Atty. Gen. 81; 5 Webster's Works, 129.

Where a military force, in the prosecution of a war, gains and holds possession of a part of the territory of a state, such territory is necessarily governed by the person in command of the force having possession, and his government is recognized by public law as a government *de facto*, to which all the inhabitants of the district owe obedience.

United States v. Rice, 17 U. S. 4 Wheat. 246, 4 L. ed. 562; *United States v. Baycard*, 2 Gall. 485; *Fleming v. Page*, 50 U. S. 9 How. 603, 13 L. ed. 276; *Cross v. Harrison*, 57 U. S. 16 How. 190, 14 L. ed. 899; *New Orleans v. New York Mail S. S. Co.* 87 U. S. 20 Wall. 887, 22 L. ed. 354; *Martial Law*, 8 Ops. Atty. Gen. 865; Halleck, International Law, ed. 1861, p. 378.

This principle has been fully recognized by the United States in respect to the acts of Confederate authorities during our civil war.

Texas v. White, 74 U. S. 7 Wall. 700, 19 L. ed. 227; *Horn v. Lockhart*, 84 U. S. 17 Wall. 570, 21 L. ed. 657; *Sprott v. United States*, 87 U. S. 20 Wall. 459, 22 L. ed. 371.

There is no evidence that the Crespo government was not the legally constituted government of Venezuela. But even if it were a revolutionary government its acts cannot be questioned in the courts of a foreign jurisdiction.

Williams v. Bruffy, 96 U. S. 185, 24 L. ed. 717; *Ford v. Surget*, 97 U. S. 594, 24 L. ed. 1018.

An officer of an army, while serving in the enemy's country during war, is not liable to an action for injuries resulting from his military orders or acts.

Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632; *Freeland v. Williams*, 131 U. S. 416, 33 L. ed. 197; *Lamar v. Browne*, 92 U. S. 197, 23 L. ed. 654; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118.

The only question to be determined is simply whether there was a war, and not whether it was successful.

Ford v. Surget, 97 U. S. 594, 24 L. ed. 1018.

Wallace, Circuit Judge, delivered the opinion of the court:

This is a writ of error by George F. Underhill, the plaintiff in the court below, to review a judgment for José Manuel Hernandez, the defendant, entered upon the verdict of a jury pursuant to the direction of the trial judge. The suit was for false imprisonment and assault and battery of the plaintiff, committed by the defendant at the city of Bolivar, Venezuela. The acts complained of consisted in the detention of the plaintiff at his own residence in the city of Bolivar under a guard of soldiers stationed near the house, from August 13, to October 18, 1892, by the authority of the defendant, during which time the plaintiff was not permitted to leave the house without an escort of soldiers, and was several times refused a passport to leave the city, for which he made application to the defendant. During this period the defendant was in command of the city as a military officer. A revolution had been organized against the government of Venezuela, and an army had been mustered

against the adherents of the recent president, whose term of office had expired, and who, it was claimed by the revolutionists, no longer represented the legitimate government. The principal parties to this conflict were those who recognized Palacio as their chief and those who followed the leadership of Crespo. The defendant belonged to the revolutionary party, and commanded its forces in the vicinity of Bolivar. Early in August an engagement took place between the forces of the two parties near Bolivar; the revolutionists prevailed, and on August 18 the defendant entered Bolivar at the head of his forces and assumed command of the city. From that time until the plaintiff was permitted to leave Bolivar the defendant was the civil and military chief. Early in October the revolutionary party prevailed generally, and took possession of the capital of Venezuela; and on the 26th day of October, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the government of the United States, pursuant to instructions from the state department to our minister to recognize the new government provided it was "accepted by the people, in the possession of the power of the nation, and fully established." *Foreign Relations of U. S. 1892, p. 635.*

The plaintiff was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water. He also carried on a machinery repair business. The evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces; it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive. The trial judge ruled at the request of the defendant that upon these facts the plaintiff was not entitled to recover, and directed a verdict for the defendant against the exceptions of the plaintiff.

The important question presented by the assignment of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor.

Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own governments. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments and vex the peace of nations to permit the sovereign acts or

political transactions of states to be subjected to the examination of the legal tribunals of other states. Influenced by these reasons, and because the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof. In *Moodalay v. Morton* (1 Bro. Ch. 469) the master of the rolls, while retaining jurisdiction of a suit which involved the private transactions of the East India Company, said: "They have rights as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. . . . I admit that no suit will lie in this court against a sovereign power for anything done in that capacity."

In *Nabob Arcot v. East India Co.* (4 Bro. Ch. 180) the answer to a bill in equity alleged that all the transactions mentioned in the bill were of a political nature and matters of state, and the court dismissed the suit on that ground. In *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, the master of the rolls concluded an elaborate discussion of the liability of the defendant to a suit in chancery with the opinion that the King of Hanover, although a subject of Great Britain, was exempt from all liability to be sued in the courts of that country for any acts done by him as King of Hanover. Upon an appeal from his judgment dismissing the cause to the House of Lords (2 H. L. Cas. 1), that tribunal decided that the defendant, notwithstanding he was a British subject and was in England exercising his rights as such when sued, could not be made to account to the court of chancery for acts of state, whether right or wrong, done by him abroad in virtue of his authority as sovereign. The decision was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign effected by virtue of his sovereign authority abroad. The Lord Chancellor said that "a foreign sovereign coming into this country cannot be made responsible here for an act done in his sovereign character in his own country;" and that "the courts of this country cannot sit in judgment upon an act of a sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as sovereign." In *Hatch v. Baez*, 7 Hun, 596, the New York supreme court decided that an action could not be maintained in the courts of the state against the former president of the Dominican Republic for acts done by him in his official capacity, although he had ceased to be president when the suit was brought. The court said: "We think that by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory. . . . To make him amenable to a foreign jurisdiction for such acts would be a direct assault upon the sovereignty and independence of his country. . . . The fact that the

defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

The law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country in behalf of their government by virtue of their official authority.

In 1794 one Collet, lately the French governor of Guadeloupe, was arrested in this country in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of our government, it was referred to the Attorney General, and he advised that, the defendant being subject to process, the government could not then intervene, but added his opinion that if the seizure of the vessel were admitted to have been an official act, done by the defendant by virtue or under color of the powers vested in him as governor, it would of itself be a sufficient answer to the plaintiffs' action; and that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers, and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation. *Suits against Foreigners*, 1 Ops. Atty. Gen. 45, 46. In 1797, in the *Case of Sinclair*, the Attorney General expressed the opinion "that a person acting under a commission from the sovereign of a foreign state is not amenable for what he does, in pursuance of his commission, to any tribunal of the United States." *Actions against Foreigners*, 1 Ops. Atty. Gen. 81. In 1871, in the *Case of the Pacific Steamship Company*, the Attorney General advised the Secretary of State as follows: "It has often been laid down that before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule plainly is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoiding all occasion for international discussion." *New Granadian Passenger-Tax*, 13 Ops. Atty. Gen. 547, 550. In 1872, in the case of *The Tipitapa*, the Attorney General advised the Secretary of State in a case where an officer with a party of armed men, acting under an order of the judicial officer of the port of Granada, had seized an American vessel at that port, the seizure having been made for the purpose of enforcing a supposed legal right, "that this government ought not to make reclamation in behalf of the owner, as it is presumable that, if the proceedings were illegal, the judicial tribunals of Nicaragua would afford redress." 18 Ops. Atty. Gen. 554.

Conspicuous among the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the state. According to one of the most recent commentators upon interna-

tional law (Hall, *International Law*, § 102), officers in command of armed forces of the state, and their subordinates and soldiers, are not, in any case, amenable to the civil or criminal laws of a foreign state in respect to acts done in their capacity as agents for which they would be punishable or civilly responsible if done in their private capacity. This doctrine was sanctioned by our own government, in 1841, in the case of McLeod, who was under indictment for murder in a state court of New York. He had been engaged as a member of the colonial forces in repelling an attack made upon Canada by an armed force of the United States, and had assisted in the destruction of a vessel moored on the American shore of the Niagara river, during which an American citizen was killed. The British government, through its minister at Washington, demanded his release upon the ground that the destruction of the vessel was a public act of persons in her Majesty's service obeying order of the superior authorities, and, therefore, according to the usages of nations, could only be the subject of discussion between the two governments. Mr. Webster, then Secretary of State, acceded to this view, stating that "the government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction, authorized by the British authorities, the individuals concerned in it ought not, by the principles of public law and the general usage of civilized states, to be held personally responsible in the ordinary tribunals of law for their participation in it." [Webster's Works, vol. 5, p. 126 (Little, Brown, & Co. ed. 1890).] The courts of New York refused to release McLeod at the intervention of the general government, and he was tried, but acquitted on proof of an alibi. The episode led to the enactment by Congress, on August 29, 1843 (5 Stat. at L. 539, chap. 257, § 1) of the provision, now § 753, United States Revised Statutes, by which the courts of the United States are authorized to issue a writ of habeas corpus where a person "being a subject or citizen of a foreign state, and domiciled therein . . . or in custody . . . for . . . any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, . . . claimed under the commission, or order, or sanction, of any foreign state. . . . or under color thereof . . . the validity and effect whereof depend upon the law of nations."

Upon principle it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or titular or of a *de facto* government. In either case if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the Supreme Court of the United States in cases in which the civil liability of confederate soldiers for acts done as members of the insurgent forces during the Rebellion was under consideration. *Ford v. Surpet*, 97 U. S. 594, 24 L. ed. 1018; *Freeland v. Williams*, 131 U. S. 465, 33 L. ed. 198.

As was decided in *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716, the government of the confederate states was a *de facto* government of

an inferior class. "It never represented the nation; it never expelled the public authorities from the country, it never entered into any treaties, nor was it ever recognized as that of an independent power."

Ford v. Surget was an action brought by the plaintiff to recover the value of certain cotton destroyed during the war of the Rebellion in the state of Mississippi; and the court held that the defense that it was destroyed by the defendant acting under the orders of the military authorities of the confederate states was a good justification. *Freeland v. Williams* was a bill in equity to invalidate a judgment of the court of the state of West Virginia obtained against the defendant for a tort committed by him as a soldier of the confederate army. One of the questions discussed was whether the judgment was void inasmuch as it proceeded upon the ground that the defendant was civilly responsible as a trespasser for an act done by him as a confederate soldier in accordance with the usages of civilized war. In the prevailing opinion the court said: "The case as it is now presented to us shows that the trespass for which the original judgment was rendered was of that character, and it is argued with much force that the court which rendered that judgment had no jurisdiction of the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void. It follows from this view on the subject that the court in which it was originally rendered had jurisdiction to set it aside or annul it without the aid of the constitutional provision of the state of West Virginia, and that, on that ground alone, the decree we are called upon to review must be affirmed. In this view of the subject some of the judges of this court concur. Again the court says: 'If it be true that, when the original action was presented to the circuit court of Preston county, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment as presented by the record is absolutely void, it may be conceded that a court of equity in a proper case can prevent the enforcement of it.' In a dissenting opinion Mr. Justice Harlan insisted that the judgment was not void but conceded that the complainant was not civilly responsible if his act was one of legitimate warfare as a soldier in the confederate army.

The acts of the defendant as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround

them if they had been performed subsequently. The organization of which he was a part represented that kind of a *de facto* government, which is described in *Williams v. Bruffy*, p. 186, "such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. The validity of acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation." By its success the revolutionary party vindicated its claim to recognition as the legitimate government of Venezuela, and achieved a justification in the estimation of foreign governments and their legal tribunals for the acts of its military forces as complete and ample as though those forces had been employed by any sovereign power. After the recognition of the new government by the United States, the courts of this country must accord to those who throughout the progress of the civil war acted as the agents of the people of Venezuela, the position of official representatives of the state. The act of recognition by our government neither added to nor detracted from the responsibility of the people of Venezuela for any prior injuries which citizens of the United States may have suffered on her soil from the hands of her *de facto* authorities, but these responsibilities, in our judgment, are to be adjudicated by the two governments by international action, according to the principles of international law applicable to such cases.

For these reasons we conclude that the acts of the defendant were the acts of the government of Venezuela and as such are not properly the subject of adjudication in the courts of another government.

The various requests made to the court on behalf of the plaintiff for instructions to the jury either involve propositions of law, which, according to views we have expressed, were properly refused, or propositions for the submission of questions of fact, as to which there was no conflict of evidence, and which, therefore, the trial judge was not required to submit to the jury. If the trial judge, in directing a verdict for the defendant, enunciated a rule which to its full extent may not obtain, because it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was nevertheless proper, and the result is not affected by his expression of an erroneous opinion.

The judgment is affirmed.

All concur.

Affirmed 168 U. S. 250, 42 L. ed. 456.

NEW YORK COURT OF APPEALS.

Peter CAMPBELL *et al.*, *Appts.*,

v.

Amalie COON, *Resp't.*

(149 N. Y. 554.)

1. That a contract for materials to be delivered "at and for" a building in New York was made and payable in another state does not prevent the materialman from obtaining a lien therefor, under N. Y. Laws 1885, chap. 342, providing that "any person" may have a lien who has furnished any materials which

have been used in the erection of any building within the state.

2. A lien for materials furnished to the principal contractor who abandons the contract, filed before the owner assumes to complete the work in accordance with a provision of the contract, attaches after the completion to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed.

3. An architect's certificate that a building has been actually completed, provided for in the building contract, need not be obtained by

NOTE.—Mechanic's lien under contract made or performed in another state.

CAMPBELL v. COON is in line with the great weight of authority upon this question. In fact, the cases are practically unanimous that the mere fact that the contract was made in another state does not prevent the lien from attaching. The only conflict is in cases where the title had passed in the other state and the material was brought into the state where the lien is claimed by the owner of the building or his representative.

Although in the lower court it was held that the right to the lien did not exist, upon the ground that the contract was to be performed in the foreign state so that the title to the materials would there pass out of the vendor. *Campbell v. Coon*, 8 Misc. 284.

Immaterial where contract is made.

The fact that the contract is made out of the state does not defeat the lien.

In case of a contract between nonresidents that one of them shall come into the state and do work on property located here, a mechanic's lien may be enforced against the property upon which the work is done. *Dahlonega Gold Min. Co. v. Purdy*, 65 Ga. 496. The court says this was not a suit to enforce a contract made in New York, but was for damages upon breach of a contract. The plaintiff resided in Georgia, did the work in Georgia, by his skill repaired and improved the property of the company, and was entitled to have this statutory remedy employed in his behalf.

A citizen of Alabama doing work or furnishing materials in Georgia has the same remedies as a citizen of Georgia for like work done or materials furnished, and may enforce his lien therefor. Although the contract as to the price of materials may have been made in the foreign state if the material was to be delivered in the state where the building was to be erected, the law of the latter state controls with respect to the remedies for the enforcement of the contract. *Thurman v. Kyle*, 71 Ga. 323.

In *Footman v. Pusey*, 45 Ga. 561, which was an attempt to enforce a mechanic's lien on a steamboat, one of the grounds of defense was that the claimant was not a citizen or resident of the state, and that the materials were sent in from another state; but the court did not notice this defense, there being another reason for defeating the lien.

A lien for materials furnished for the erection of improvements on lands in Kansas may be maintained where the contract is entered into in Missouri as well as if it were made in Kansas. *United States Invest. Co. v. Phelps & B. Windmill Co.* 54 Kan. 144.

In *Gaty v. Casey*, 15 Ill. 189, where the action was to enforce a lien for material furnished out of the state, the objection was made that as the contract was made out of the state no lien could arise under

the statute which could not operate extraterritorially. But the court said it is not the contract which creates the lien under the statute, but it is the use of the material furnished upon the premises, the putting of them into the building and attaching them to the freehold, which entitles the party furnishing the materials to a lien; and the court held that the objection was not well taken.

In *Atkins v. Little*, 17 Minn. 342, it is said there is nothing in the objection that the plaintiffs are non-residents and that the contract was made out of the state. A mechanic's lien is a statutory security to which the term "remedy" would be misapplied as it would be in respect to a mortgage.

There is nothing in the Missouri act restricting the right to a lien to those who perform work or furnish materials within the limits of the state. If a part of a railroad lies without the state a lien may be enforced for work upon it on that part which lies within the state. *St. Louis Bridge & Constr. Co. v. Memphis, C. & N. W. R. Co.* 72 Mo. 604.

And that ruling was recognized in *Ireland v. Atchison, T. & S. F. R. Co.* 79 Mo. 572.

In *Baeder v. Carnie*, 44 N. J. L. 208, it was held that under the statute giving a lien on a vessel for materials or articles furnished in the state for the repair of the vessel, it did not matter where the contract was made.

In *Stedman v. Patchin*, 34 Barb. 218, which was the case of a seizure of a steamboat for materials furnished in repairing it, the court held that if the statutes under which the vessel was seized were valid as to the citizens of the state, they were equally valid as to all persons litigating in the courts of that state in proceedings founded upon them, no matter where the parties resided.

In *Wethered v. Garrett*, 140 Pa. 224, the lower court charged the jury that there is nothing to be drawn in this case against the plaintiffs from the fact that they are New Yorkers, and this is made the subject of an assumption of error; but the court on appeal does not notice that point, so that the reporter states that it seems that one who is a citizen of another state may file a mechanic's lien against a building within this state for materials furnished by him.

Statutes giving a mechanic's lien upon a building for the value of their labor or materials apply as well to nonresidents as to those who reside within the state. The court says that a refusal of a lien in favor of nonresidents would be against that comity and liberality that does and should exist between us and our sister states. *Greenwood v. Tennessee Mfg. Co. & Agri. School*, 2 Swan, 130.

In *Patten v. Northwestern Lumber Co.* 73 Wis. 223, which was a claim for lien for supplies furnished in getting out logs, it appeared that the claimant had his residence and place of business in a county different from that where the lien was filed; but the court says that the residence of the person furnishing the supplies, or the place where

one who furnished materials to the contractor, where the latter abandons the work and the owner finishes the same in accordance with a provision of the contract.

(June 16, 1896.)

APPEAL by plaintiffs from a judgment of the General Term of the Court of Common Pleas for the City and County of New York reversing a judgment entered upon the report of a referee in favor of plaintiffs in a suit brought to enforce a mechanic's lien. *Reversed.*

The facts are stated in the opinion.

Mr. James J. Allen, for appellants:

The plaintiffs are entitled to a lien for the

amount of their claim against the interest of the defendant Coon in the premises described in the complaint.

Van Clief v. Van Vechten, 130 N. Y. 571; *Foshay v. Robinson*, 127 N. Y. 134.

The plaintiffs furnished materials for a building within this state within the meaning of the statute.

Stevens v. Ogden, 130 N. Y. 182; *Tipton v. Fietner*, 20 N. Y. 425; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271.

Messrs. Robert L. Harrison and Herbert H. Gibbs, for respondents:

The plaintiffs cannot recover because at the time their lien was filed there was nothing due under the contract from the owner to the con-

they are delivered to the person using them, is wholly immaterial; language broad enough to include residence in another state and cases of non-residence are cited to sustain the ruling.

In *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.* 66 Fed. Rep. 683, the question was as to the proper county within which to file the lien, whether that where the plans were prepared or that where the building was erected, and a decision was rendered in favor of the latter place.

In *Wood v. St. Paul City R. Co.* 42 Minn. 412, 7 L. R. A. 149, it was held that the affidavit to the claim might be sworn to before an officer in another state.

And that case was recognized in *Hickey v. Colom*, 47 Minn. 565.

But in one case it was held that the Georgia acts giving the owners of steam saw mills liens for lumber furnished for structures on lands of other persons provides a lien only in case the mill is located in that state; and as the act is to be strictly construed a person seeking to enforce the lien should allege that his mill is so located. *Porter v. Lively*, 45 Ga. 159.

Where title passes in other state.

There is a strong tendency on the part of the courts to hold that if the title has passed before the property is brought into the state no lien can be claimed.

In *Tyler v. Currier*, 13 Gray, 184, which was an attempt to enforce a lien for materials furnished for building a ship, it appeared that the materials were sold and delivered in another state and were brought into the state by the shipowner, and it was held that no lien could be claimed for the reason that the contract was completely executed in the other state.

In *McDonald v. The Nimbus*, 187 Mass. 360, which was a claim for a lien on a vessel, it was held that no lien could be maintained in one state for materials furnished for use in a vessel in another state.

If the materials are delivered to the owner of the property in the foreign state so that they become his property there and are brought into the state by him, there can be no lien for them under a statute giving a lien to one furnishing materials within the state. *Birmingham Iron Foundry v. Glen Cove Starch Mfg. Co.* 73 N. Y. 81.

In *Stout v. Sawyer*, 37 Mich. 315, where a mill wheel was sold and delivered in another state, the court held that a lien could not be enforced for it in Michigan. The ruling was placed upon the ground that the wheel might be used anywhere, and that since it was not attached to the building by the vendor, and was not in fact bought with reference to the building in which it was placed, it was a mere chattel for which a lien would not lie.

But several courts with the above decisions before them have refused to apply the exception which

they contain, and adhere to the general rule even when the title has passed in the other state. Of course the wording of the statutes may have some influence on the decisions, but the exceptional cases have not been followed as a rule because they construed the provisions of the statutes too strictly.

In Texas the lien exists although the materials were sold and delivered beyond the borders of the state. *Fagan v. Boyle Ice Machine Co.* 65 Tex. 324. The court says that the question of the passing of title is immaterial since the law and not the contract of the parties gives the lien. That the fact that one or all of the facts from which the law evolves the lien transpired beyond the limits of the state cannot affect the validity of the law. And the case of *Birmingham Iron Foundry v. Glen Cove Starch Mfg. Co.* 73 N. Y. 20, is disapproved.

The fact that an agreement for the furnishing of materials is made out of the state, and the agreement is complied with and the materials are delivered there, does not defeat the right to the lien if the materials were delivered for a specified object and purpose, and were designed for the structure in which they are incorporated. *Thompson v. St. Paul City R. Co.* 45 Minn. 13.

The fact that the materials to be used in a building were sold and delivered in another state does not impair the right to a lien. *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170.

Compliance with an agreement to manufacture at plaintiff's factory in Kansas and deliver to defendant at the depot in Atchinson certain machinery for defendant's elevator in Nebraska, is a furnishing of the same in Nebraska within the meaning of the Nebraska lien law. The judge says: I do not think that either the letter or spirit of the statute requires that the machinery should be actually laid down at the site of the building by the lienor, but if his labor, skill, or capital produced it and set it in motion for that destination, and it finally reached it and was attached to the building for the purpose intended, then it was furnished there by him without regard to the name in which it was shipped or other matters connected with its transportation. *Great Western Mfg. Co. v. Hunter Bros.* 15 Neb. 83.

A person furnishing materials for the construction of a railroad under a contract made in another state where the materials are actually delivered to the contractor may have a mechanic's lien upon the road within the state when the materials are used there. *Carnegie v. Lancaster & H. R. Co.* 1 Ohio N. P. 300. And the court disapproved of the case of *Bender v. Stettinius*, 19 Ohio L. J. 163, in which it was held that to entitle any person to a lien under the statutes the materials must be furnished for the labor performed within the state, and that goods consigned from another state to the head contractor do not entitle the consignor to a lien as a materialman. H. P. F.

tractor, and nothing became due prior to the commencement of this action.

Ringle v. Wallis Iron Works, 85 Hun, 279; *Leigne v. Schwarzer*, 10 Daly, 547; *Bailey v. Johnson*, 1 Daly, 67.

The plaintiffs as subcontractors are subrogated to the rights of the contractor, nothing more and nothing less, and these rights are to be determined by its contract.

Herbert v. Herbert, 57 How. Pr. 338; *Schneider v. Hobbin*, 41 How. Pr. 232; *Hoffgang v. Meyer*, 2 Abb. N. C. 111; *Cheney v. Troy Hospital Asso.* 65 N. Y. 282; *McMillan v. Seneca Lake Grape & Wine Co.* 5 Hun, 12; *Crane v. Genin*, 60 N. Y. 127; *Gibson v. Lenane*, 94 N. Y. 183; *Sullivan v. Brewster*, 1 E. D. Smith, 684.

The contractor and these appellants, plaintiffs, claiming under it by subrogation were not entitled to recover without the production of the architect's certificate or proof that it was unreasonably withheld.

Beecher v. Schuback, 4 Misc. 54; *Smith v. Brady*, 17 N. Y. 175, 72 Am. Dec. 442; *Nolan v. Whitney*, 83 N. Y. 650; *Bowery Nat. Bank v. New York*, 63 N. Y. 333; *Schilling Fire Proof Cement & A. Co. v. Arnott*, 66 Hun, 182.

The contract of plaintiffs as subcontractors was made outside of this state, and was performed outside of this state, and was between nonresident plaintiffs and a foreign corporation, and no lien attaches under the statute.

Birmingham Iron Foundry v. Glen Cove Starch Mfg. Co. 78 N. Y. 81.

Gray, J., delivered the opinion of the court:

The learned judges of the general term below have reversed the judgment recovered by these plaintiffs in their action for the foreclosure of a mechanic's lien, and have ordered a dismissal of the complaint, upon the ground, as we find in the opinion, that "the right to a lien pursuant to the provisions of the mechanic's lien law [chap. 842, Laws 1885] does not extend to contracts made and to be performed out of this state." I think that their conclusion was erroneous, and that a consideration of the case fails to disclose any ground for the reversal of the plaintiff's judgment. It appears from this record, following the findings of facts, that the defendant, Amalie Coon, contracted with the Vanderbeck Iron Work Company, a corporation created by the laws of the state of New Jersey, to furnish and erect the iron work in a certain building she was about constructing in the city of New York. That company then made a contract with the plaintiffs, who were also residents of the state of New Jersey, by which the latter agreed to make certain iron lutes and iron separators, at an agreed price, and in accordance with the contract between the company and Mrs. Coon, and to deliver the same to the iron-work company "at and for the building" in question. The plaintiffs performed their agreement, and the materials called for in their agreement were delivered to the iron-work company "at the city of Hoboken, in the state of New Jersey, and at No. 368 Greenwich street, in the city of New York" (that being the place where the building was being erected); and all of them "were actually used in the construction of the building, with

38 L. R. A.

the knowledge and consent" of Mrs. Coon. It is perfectly clear, therefore, in the first place, that, under their contract, the plaintiffs were required to deliver the materials which they had agreed to furnish to the iron-work company "at and for the building in the city of New York;" and, in the second place, that those materials were actually used in its construction. And is there any satisfactory reason for denying to them the protection of the statute because the contract or agreement was one made without the state, and between nonresidents of the state? I see no reason for so narrowly construing the provisions of the mechanic's lien law. By its terms, "any person" may have a lien who shall have furnished any materials which have been used in the erection of any building within any of the cities or counties of this state. Undoubtedly, the statute has no extraterritorial force, and was intended for the protection of those furnishing materials within the state; as it was held by this court in the case of *Birmingham Iron Foundry v. Glen Cove Starch Mfg. Co.* 78 N. Y. 80, a case cited and and relied upon in the opinion of the general term. The facts, however, in that case, were quite other than those before us. There the defendant, a New York corporation, ordered the construction of a steam engine by the Woodruff Company, a Connecticut corporation, and the bed plate for the engine the Woodruff Company ordered of the plaintiff, also a Connecticut corporation. Under the contract between the defendant and the Woodruff Company, the engine was to be delivered to the defendant at Hartford, in the state of Connecticut, and the bed plate for the engine, under the subcontract with the plaintiff was also to be delivered at that city. The delivery of the engine complete was in fact made to the defendant at Hartford, and the defendant brought it into this state and to its factory. Under these circumstances, it was very properly decided, inasmuch as, when the engine was brought into this state, it belonged to the defendant, that the plaintiff "furnished no materials in this state," and therefore could not claim the benefit of the statute. In this case the fact was (and such was the finding by the referee) that, under the plaintiffs' agreement, they were to deliver the materials at and for the building in New York city, which the defendant was to put up, and they performed their agreement in that respect, and their materials were actually used in its construction.

In the opinion of the general term, stress is laid upon the fact that no place of payment was specified, and that it was reasoned that because the state wherein the contract was made and the contracting parties resided was, in legal contemplation, the place for payment, no right could be deemed to exist under the statute entitling the plaintiffs to a lien upon the building for their security. That proposition again assumes for the statute a purpose which, in our judgment, is not conveyed by its language. The operation of the mechanic's lien law does not depend upon such incidents of the contract with the materialman as relate to its character or to the place of payment, but solely upon the fact that the materialman has performed labor upon, or furnished materials to, any building within the state. The very case

to which the general term opinion refers, and which we have cited above, rested in its decision, upon the fact that the plaintiff had really furnished no materials in this state. The language of this act is very broad, and we perceive no limitation in its language, nor any good reason for reading one into it, by which the mechanic is required to be a resident of the state, and to make his contract here. The materials must have been furnished and used in the erection of a building within a city or county of this state; and, when that is the case, the right of the materialman to a lien follows, if the provisions of the statute are otherwise complied with.

The respondent, however, further argues that the plaintiffs could not recover, because, at the time their notice of lien was filed, there was nothing due under the contract from Mrs. Coon to the contractor, the iron-work company, and nothing became due prior to the commencement of this action. With respect to that point, the case shows that under the contract between Mrs. Coon and the iron-work company, if the contractor, during the progress of the work, refused or neglected to supply a sufficiency of materials or workmen, she had the power to provide them, after three days' notice in writing being given, and to finish the work herself, deducting the expense from the amount of the contract. Mrs. Coon, after making a first payment of \$1,000 under the contract, had occasion to enforce this provision, and did proceed to complete the iron work of her building herself. At the time when she assumed to complete this work, the plaintiffs had already performed their agreement, and had furnished the materials called for by it, and their notice of lien had been filed. While it is true that at that time nothing was due from Mrs. Coon to her contractor, nevertheless when she had completed the work called for by the

contract between them, there remained a balance of \$654, after deducting from the contract price of \$3,250 the cost of completing the work (a sum of \$1,596) and the \$1,000 previously paid to the contractor. To that balance in Mrs. Coon's hands, on account of the contract, the plaintiffs' lien attached. In *Van Clief v. Van Vechten*, 130 N. Y. 571, although there was nothing due upon the contract there depended upon, when the lien was filed, the judgment which the plaintiffs, as subcontractors, had recovered, was upheld, upon the principle, as stated in the opinion, that "if nothing is due to the contractor pursuant to the contract when the lien is filed, and he abandons the undertaking without just cause, but the owner completes the building according to the contract and under a provision thereof permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed." The authority of that case is direct.

The further point taken by the respondent, with respect to the absence of the architect's certificate, is clearly untenable. We need only say of it that this provision of the contract had its application only under the condition that the contractor was performing his contract. Its purpose was to furnish the owner of the building with authentic evidence that the work certified had been performed. *Weeks v. O'Brien* 141 N. Y. 199. In this case, as the owner completed the work, no architect's certificate was called for.

The order and judgment appealed from should be reversed, and the judgment entered upon the report of the referee should be affirmed, with costs to the appellants at the general term and in this court.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Samuel C. BURNEY, *Appt.*,

v.

CHILDREN'S HOSPITAL.

(.....Mass.....)

An action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian and who intrusted the child to the hospital for treatment, does not fail on the ground that there was no right of property in a dead body.

(June 16, 1897.)

NOTE.—As to the right to control the disposition of a dead body, see *Larson v. Chase* (Minn.) 14 L. R. A. 85, and *note*; *Hackett v. Hackett* (R. I.) 19 L. R. A. 558; *Choppin v. Dauphin* (La.) 33 L. R. A. 133; and *Thompson v. Deeds* (Iowa) 35 L. R. A. 55.

As to *post mortem* examinations ordered by coroners, see *note* to *Young v. College of Physicians & Surgeons* (Md.) 31 L. R. A. 540.
33 L. R. A.

A PPEAL by plaintiff from an order of the Superior Court for Suffolk County sustaining a demurrer to the complaint in an action brought to recover damages for the alleged wrongful performance of an autopsy on the body of plaintiff's child. *Reversed*.

The facts are stated in the opinion.

Mr. Ralph W. Gloag, for appellant:

The plaintiff, as the father and natural guardian, having the care and custody of the child, is the proper party suing; he is the person whom the law compels to bury the remains.

Reg. v. Vann, 2 Den. C. C. 325.

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside the law if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.

Holmes, Common Law, 41, 42.

Assuming that there cannot be property in a corpse in the sense of title to or ownership in such, yet the right to be let alone and free from interference with one's dead, the right of custody or the right of unimpaired possession, like the right to vote, constitute a *res*, that is, broadly speaking, property.

4 Am. Law Times, 127; 8 Chicago Legal News, 978; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Larson v. Chase*, 47 Minn. 807, 14 L. R. A. 85; *Foley v. Phelps*, 1 App. Div. 551.

Messrs. Hutchins & Wheeler, for appellee:

No such action has ever been maintained in this commonwealth or in England, and it has been repeatedly laid down that there is no property in a dead body, and that no civil action can be maintained for disturbing it.

Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; *Driscoll v. Nichols*, 5 Gray, 438; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Williams v. Williams*, L. R. 20 Ch. Div. 659; *Reg. v. Sharpe*, Dears. & B. C. C. 160.

The burial of the *cadaver* that is *coro data* *terribus* is *nullis in bonis*, and belongs to ecclesiastical cognizance, but as to the monument, action is given (as hath been said) at the common law for defacing thereof.

3 Co. Inst. 202; 2 Bl. Com. 429.

For the very reason that no civil action lies for disturbing a body, the court has enforced the criminal law against persons removing bodies unlawfully from their place of burial.

Reg. v. Sharpe, Dears. & B. C. C. 160.

A court of common law does not recognize sufficient right of property in a dead body to support an action of tort against a carrier for nondelivery of it.

Driscoll v. Nichols, 5 Gray, 438.

The furthest extent to which this court has gone in taking jurisdiction over dead bodies has been in assuming to decide in equity controversies between relatives as to the place of burial.

Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

In *Young v. College of Physicians & Surgeons*, 81 Md. 358, 31 L. R. A. 540, the autopsy was held to be justifiable.

Lathrop, J., delivered the opinion of the court:

The demurrer in this case is a general one, and the question is whether the father of a child, who is its natural guardian, and who has intrusted the child to a hospital for treatment, can maintain an action against the hospital for an autopsy performed on the dead body of his child without his consent. The sole contention of the learned counsel for the defendant in support of the demurrer is that the action cannot be maintained because there is no right of property in a dead body. 2 Bl. Com. 429; 3 Co. Inst. 202. Even in England, before a dead body is buried, while there is no right of property in it, there is a right of possession for the purposes of burial or other lawful disposition of it. Thus, in *Reg. v. For*, 2 Q. B. 246, where a prisoner in jail on execution died, and the jailer refused to deliver the body to the executors of the deceased unless

they would satisfy certain claims made against him, the court of Queen's bench issued a mandamus peremptory in the first instance, commanding that the body should be delivered up to the executors. So, in *Williams v. Williams*, L. R. 20 Ch. Div. 659, while it was held that there is no property in a dead body, it was also held that the executors had a right to the possession of the body, and that it was their duty to bury it.

In this commonwealth the precise question before us has not been passed upon. It is, however, apparent from the decisions that a right of possession is recognized, which is vested in the husband or wife or next of kin, and not in the executors. In *Lakin v. Ames*, 10 Cush. 198, the defendants were sued in trespass for tearing down a horseshed. The defense was that the shed was on the public common of the town, and was erected in front of a tomb lawfully on the burying ground, adjoining the common, so as to obstruct the entrance thereto, and that the first named defendant, having the legal right to open the tomb, and deposit the body of his deceased brother therein, peaceably removed the shed, doing no unnecessary damage. Liberty given by the town to a man to build a tomb was held to be a grant to the man and his heirs. The first named defendant had no legal interest in the tomb, nor had he express authority from his mother, one of the heirs of the former owner. But it was said by the court: "The law will imply a license from the nature and exigencies of the case, the relation of the parties, and the well established usages of a civilized and Christian community." In *Durrell v. Hayward*, 9 Gray, 248, 69 Am. Dec. 284, it was held that a husband who had buried his wife in a public burying ground was not liable as a trespasser for removing a grave stone, since placed at her grave by her mother, without injuring the stone, and for the purpose of substituting another. It was said by Mr. Justice Bigelow: "The plaintiff had no right to erect a stone at the grave of the defendant's wife without his knowledge or consent. The indisputable and paramount right, as well as duty, of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place, carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well known and long-established usage of the community." In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, it was held that, if the plaintiff owns the lot in which the body of his child is buried, he may maintain an action of tort in the nature of trespass *quare clausum fregit* for the unlawful removal of the body; and, in measuring damages, the jury may take into consideration the injury to the plaintiff's feelings, if it appears that the defendant acted in wilful disregard or careless ignorance of the plaintiff's rights. In *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465, the right of a husband to bury his wife was again recognized, and it was held that if he had not freely consented to the burial of her body in the lot owned by another person, with the intention or understanding that it should be her final resting place, a court of equity would permit him, after such burial, to remove her body, coffin, and tombstones to his own land. In *Driscoll v. Nichols*,

5 Gray, 488, cited by the defendant, the plaintiff was a stranger in blood to the deceased. The action was in contract or tort for not carrying the dead body. The case was decided on the ground that the plaintiff had no legal interest in the dead body by reason of which he could maintain the action against the carrier without proof of a special contract with himself. The case differs widely from the case at bar. In Rhode Island it was held that there is a quasi right of property in a dead body which the law will protect. Thus, in *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 237, 237, 14 Am. Rep. 667, it is said by Mr. Justice Potter: "That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead, a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation. It may therefore be considered as a sort of quasi property, and it would be discreditable to any system of law not to provide a remedy in such a case." So, in *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558, it was held that there was a quasi right of property in a dead body, and that, as a general rule, a widow had the primary right to control the burial of her husband, dependent, however, upon the peculiar circumstances of the case, or the waiver of such right by consent or otherwise.

In the case at bar there was no executor, and there could be none, as the deceased was a minor. The father, as the natural guardian of the child, was entitled to the possession of its body for burial. Being entitled to the possession of the body for the purposes of burial, is not his right against one who unlawfully interferes with it, and mutilates it, as great as it

would be if the body was buried in his lot, and was thence unlawfully removed? That an action may be maintained in the latter case we have already seen, and we are of the opinion that it may be in the former. This is so held in a well-considered case in Minnesota, where, in an action brought by a widow for the unlawful dissection of the body of her dead husband, an order overruling a demurrer to the complaint was affirmed. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85. This was followed in a similar case in New York, — *Foley v. Phelps*, 1 App. Div. 551, where the right to possession was defined thus: "The right to the possession of the corpse in the same condition it was in when death supervened. It is the right to what remains when the breath leaves the body, and not merely to such a backed, hewed, and mutilated corpse as some stranger, an offender against the criminal law, may choose to turn over to an afflicted relative." See also *Renshan v. Wright*, 125 Ind. 536, 9 L. R. A. 514; *Young v. College of Physicians & Surgeons*, 81 Md. 858, 81 L. R. A. 540, 19 Am. L. Rev. 251, 10 Alb. L. J. 71, 4 Am. Law Times, 127, 8 Chicago Leg. News, 378; Perley, Mortuary Law, 26 *et seq.*

The question has not been argued by the defendant whether the nature of the defendant hospital is such that an action against it cannot be maintained for the alleged illegal acts of its officers and servants, and we express no opinion upon it. Nor do we need to inquire under what circumstances an autopsy is justifiable, as this question has also not been argued. These questions can better be determined when the facts are before us after a trial of the case. All that we need now to decide is whether the objection raised by the defendant is valid or not. As we are of opinion that it is not valid, *the order sustaining the demurrer, and directing a judgment for the defendant, must be set aside.*

MINNESOTA SUPREME COURT.

MINNEAPOLIS BASEBALL COMPANY.

Respt.,

and

Charles D. Whitall *et al.*, Interveners, *Appls.*,
v.

CITY BANK *et al.*, *Respts.*

(.....Minn.....)

*A receiver appointed in an action for the sequestration of the assets of an insolvent corporation, under the provisions of Gen. Stat. 1894, chap. 78, has no authority, except in cases where it is otherwise provided by statute, to enforce the individual liability of the stockholders for the debts of the corporation.

*Headnote by STARR, Ch. J.

NOTE.—For a decision to similar effect respecting the enforcement of statutory liabilities of stockholders by an insolvent's assignee, see *Runner v. Dwiggins* (Ind.), 36 L. R. A. 645.

33 L. R. A.

(December 16, 1906.)

APPEAL by interveners from orders of the District Court for Hennepin County denying their motion for an order making the stockholders of the defendant corporation parties to their suit and requiring them to answer for the purpose of enforcing their statutory liability for the debts of the corporation, and requiring the stockholders to answer the bill of the receiver of the corporation for the purpose of enforcing their liability at his suit. *Reversed.*

Messrs. Millard F. Bowen and John Hay, for appellants:

The stockholders' liability is not a corporate asset, but is a fund provided by statute, belonging to all the creditors to be enforced by them, or by one creditor on behalf of all.

Cook, Stock & Stockholders, § 218; High, Receivers, § 317a; *Lane v. Morris*, 8 Ga. 468; *Mason v. New York Silk Mfg. Co.* 27 Hun, 307;

Billings v. Trask, 80 Hun, 314; *Bristol v. Sanford*, 12 Blatchf. 341; *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435; *Jacobson v. Allen*, 20 Blatchf. 525; *Wright v. McCormack*, 17 Ohio St. 86; *Arene v. Weir*, 59 Ill. 25; *Wincock v. Turpin*, 96 Ill. 135; *Liberty Female College Assn. v. Watkins*, 70 Mo. 13; *Morse, Banks & Banking*, § 696; *First Nat. Bank v. Harper*, 61 Minn. 875; *Re People's Live Stock Ins. Co.* 56 Minn. 185; *Dunn v. State Bank*, 59 Minn. 221.

This liability of stockholders belongs to all the creditors, and is to be enforced by them or by one on behalf of all.

Arthur v. Willius, 44 Minn. 409; *First Nat. Bank v. Harper*, 61 Minn. 875; *Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Minnesota Thrasher Mfg. Co. v. Langdon*, 44 Minn. 37; *Basting v. Ankny*, 64 Minn. 133.

The receiver is not empowered by statute to enforce the liability of stockholders.

Beach, Receivers, § 438; *High, Receivers*, 815; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 273.

The receiver is a trustee for the corporation and shareholders and represents the property rights of the corporation only by taking charge of the property, effects, and rights of the corporation, but not the property and estate of the creditors.

20 Am. & Eng. Enc. Law, p. 18.

Trusts should not be conferred upon the same person if those trusts may cause a conflict of interests.

High, Receivers, §§ 74, 75; *Re Mast, B. & B. Co.* 55 Minn. 318.

It is not the purpose or spirit or tendency of American law to place in the hands of a trustee in preference to a beneficiary the enforcement of a right or remedy.

Gen. Stat. 1894, § 5156; *Pom. Rem. & Rem. Rights*, § 138; *Beach, Receivers*, § 448; *Cook, Stock & Stockholders*, § 214; *McKusick v. Seymour S. & Co.*, 48 Minn. 158; *Curtis v. Leavitt*, 15 N. Y. 9.

The decisions in New York have always been that a receiver of a corporation had not the authority to enforce the liability of stockholders.

Bank of Poughkeepsie v. Ibbotson, 24 Wend. 473; *Garrison v. Howe*, 17 N. Y. 458; *Mathez v. Neidig*, 72 N. Y. 100; *Pfohl v. Simpson*, 74 N. Y. 137; *Weeks v. Love*, 50 N. Y. 568.

An action by a creditor against a stockholder based upon a statute providing that the stockholders shall be jointly and severally personally liable for all debts and demands contracted by the corporation was sustained in—

Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; *Moss v. Acerell*, 10 N. Y. 449; *Rogers v. Decker*, 131 N. Y. 490; *Shelington v. Howland*, 53 N. Y. 371; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Fiash v. Conn*, 109 U. S. 380, 27 L. ed. 970.

In *Farnsworth v. Wood*, 91 N. Y. 309, a receiver undertook to enforce the liability of stockholders. He was appointed upon the sequestration of the property of an insolvent corporation on the return of an execution unsatisfied.

The receiver was held not vested with the right of action of creditors but only with the stock, property, things in action and effects of

such corporation" which had been sequestered under a section of which § 5897, Gen. Stat. 1894, is a copy.

Mann v. Pentz, 3 N. Y. 415; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199.

The powers of a receiver can be no greater than the statute authorizes. When a receiver's powers are prescribed by statute he cannot exceed them.

Spooner v. Bay St. Louis Syndicate, 44 Minn. 401; *Allen v. Walsh*, 25 Minn. 548; *Johnson v. Fischer*, 30 Minn. 178; *McKusick v. Seymour S. & Co.* 48 Minn. 158; *Hoespe v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Palmer v. Bank of Zumbrota (Minn.)* 67 N. W. 893.

The nature of the remedy prescribed by §§ 5905-5911 in favor of a creditor, and its exclusive character, as well as the functions of a receiver, under these sections and the whole chapter, were characterized in the same way as in—

Allen v. Walsh in *Walther v. Seven Corners Bank*, 58 Minn. 434; *Klee v. E. H. Steele Co.* 60 Minn. 355; and *International Trust Co. v. American Loan & T. Co.* 62 Minn. 501.

The proceedings in this case did not vest in the receiver authority to enforce the liability of stockholders.

Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193.

A receiver has no powers except such as are conferred upon him by the order by which he is appointed.

Beach, Receivers, § 249; *Kerr, Receivers*, 196; *Yeager v. Wallace*, 44 Pa. 294; *Singely v. Fox*, 75 Pa. 112; *Grant v. Davenport*, 18 Iowa, 179; *Hooper v. Winston*, 24 Ill. 353; *Verplanck v. Mercantile Ins. Co.* 2 Paige, 438.

If the complaint had shown a cause of action against stockholders such power could not be conferred on a receiver, because the appointment of a receiver is not required in a proceeding to enforce the liability of stockholders until assets shall arise from the enforcement of this liability.

Walther v. Seven Corners Bank, 58 Minn. 434; *Klee v. E. H. Steele Co.* 60 Minn. 355; *International Trust Co. v. American Loan & T. Co.* 62 Minn. 501.

The receiver cannot supersede the proceeding of appellants.

First Nat. Bank v. Harper, 61 Minn. 375; *State v. Bank of New England*, 55 Minn. 139; *Walther v. Seven Corners Bank*, 58 Minn. 434.

The receiver cannot in this action institute a proceeding to enforce the liability of stockholders nor supersede the proceeding initiated by appellants because his complaint does not state facts sufficient to constitute a cause of action and because it is deficient in other respects.

The showing of the receiver's complaint is not of debts which the stockholders are liable for, but of liabilities. The liabilities the stockholders are not liable for unless they are debts.

Cook, Stock & Stockholders, § 217; *Beach, Priv. Corp.* § 151; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038; *Bohn v. Brown*, 33 Mich. 257; *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126; *Child v. Bos'on & F. Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *International Trust Co. v. American Loan & T. Co.* 62 Minn. 501; *Harper v. Carroll*, 62 Minn. 153.

Messrs. Harlan P. Roberts and Victor J. Welch, for respondent:

The position occupied by the creditor coming into the main action in such case as this, and for such a purpose as this, is not that of an intervenor in any proper sense.

McKusick v. Seymour, 48 Minn. 158.

This ought to be enough to show that the provisions of chapter 68, relating to practice in ordinary suits, have no application to the case in hand.

Very little can be obtained upon the proper practice in this state by decisions outside of our own state.

McKusick v. Seymour, 48 Minn. 158, would seem to settle the whole matter in dispute here.

Arthur v. Willis, 44 Minn. 409; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *St. Louis Car Co. v. Stillwater Street R. Co.*, 53 Minn. 129; *Farmers' Loan & T. Co. v. Funk*, 49 Neb. 358; *Wilson v. Book*, 18 Wash. 676.

Start, Ch. J., delivered the opinion of the court:

This action was originally commenced against the defendant bank alone, on January 15, 1896, under the provisions of Gen. Stat. 1894, chap. 76, for the sequestration of its assets, and the appointment of a receiver. On the following day, the appellants herein filed their cross bill or complaint, as creditors of the bank, seeking thereby to enforce the double liability of its stockholders for its debts, alleging therein a cause of action against them, and naming them as parties defendant. The appellants then moved the court for an order joining the stockholders as defendants, and requiring them to answer the cross bill. The trial court denied the motion, without prejudice, and with leave to renew it, upon the ground that it was not advisable to proceed against the stockholders until it became apparent that the assets of the corporation would not pay its debts in full. On January 23, 1896, David C. Bell was appointed receiver of the property and assets of the defendant corporation, and to take charge of its property and effects, with power to collect, sue for, and recover the debts and the property that belonged to the defendant. On March 30, 1896, it was apparent that the assets of the corporation were insufficient to pay its debts, and the appellants renewed their motion to bring in the stockholders to answer their cross bill. Thereupon the court made its order requiring the bank and the receiver to show cause on the 4th day of April, 1896, why the motion should not be granted. On April 3, 1896, the receiver filed what is designated as a "supplemental complaint" (it is difficult to classify it) asking that the stockholders be made parties to the action, and to answer his complaint wherein he sought to enforce their individual liability. Upon the hearing of the motion of the appellants, on the next day, the receiver opposed it, and claimed that the stockholders should be made parties, and required to answer his complaint, and not that of the creditors. The court thereupon made its order denying the motion of the appellants, and its further order directing the stockholders to be made parties on the application of the receiver, and to answer his complaint. The appellants appealed

from each order. Their motion was denied, on the sole ground that the receiver was the proper party to enforce the personal liability of the stockholders. If such is the case, and he is authorized by law to enforce the liability of the stockholders for the debts of the corporation, then the order should be affirmed. We say "order," because, practically, there was but one; for the refusal to bring the stockholders in on the appellant's cross bill, and ordering them joined on the receiver's petition or complaint, might properly have been included in one order. The only question, then, in this case is: Has a receiver of a corporation appointed in sequestration proceedings under Gen. Stat. 1894, chap. 76, authority to enforce the personal liability of stockholders for the debts of the corporation? We answer the question in the negative. This is not a mere question of practice, which does not affect the substantial rights of the appellant, as claimed by the respondents. While it is true, as claimed, that the time when, and upon whose cross bill or complaint, stockholders shall be brought into the action, where the plaintiff has omitted to make them parties, rests largely in the discretion of the trial court, and that when stockholders are once legally made parties, and required to answer a complaint stating a cause of action against them on account of their individual liability, no other creditor or party is entitled to file such cross bill, yet each creditor has the legal right, where the corporate assets are insufficient to pay the debts, to have the stockholders made parties to the action, upon a complaint which they are bound to answer. Therefore, if the receiver is not authorized to enforce the liability of the stockholders, they are not bound to answer his complaint, and may demur or move to dismiss it, and have judgment accordingly.

We do not deem it necessary to enter upon any extended general discussion in support of our conclusion, that the receiver in this case was not empowered to enforce the personal liability of stockholders for the debts of the defendant bank, for the reason that such conclusion necessarily follows from the previous decisions of this court. It is clear that the provisions of chapter 76 do not expressly or impliedly confer upon receivers the power here in question. On the contrary, the language used as to the powers of receivers and the rights of creditors unmistakably indicates that the liability of stockholders for the corporate debts cannot be enforced by the receiver, and that it must be enforced on the application of creditors, or by one in behalf of all; and such has been the practice in all former cases reaching this court.

In the case of *Allen v. Walsh*, 25 Minn. 548, it was held that the stockholders' liability was for the equal benefit of all creditors, and all had an equal right to enforce it, and that Gen. Stat. chap. 76, provided an efficient and sole remedy for such enforcement, in a single action in which all persons interested should be joined, and their respective rights, equities, and liabilities finally settled and determined. This case was followed in *Johnson v. Fisher*, 30 Minn. 173, wherein it was held that the liability could only be enforced by or in behalf of all creditors; and against all of the stockhold-

ers upon whom the liability rested. The case of *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 87, which holds that the right to recover capital withdrawn and refunded by the corporation to its stockholders, as a gratuity, passes to the receiver, is not out of step with the cases holding that the stockholders' liability for the corporate debts can be enforced only by creditors, because such capital was at one time the property of the corporation, and its return to stockholders without consideration was a fraud as to creditors. The right of the receiver, representing the creditors, to recover the capital so given away, rests upon the same basis as does his right to recover any other property disposed of by the corporation in fraud of creditors. But there is no analogy between such an action by the receiver to reclaim assets at one time belonging to the corporation, which it has fraudulently transferred, and an action to enforce the individual or double liability of the stockholder for the debts of the corporation. Such liability sustains the relation of surety for the debts of the corporation; hence, from its very nature, it is not, and never can be, an asset of the corporation. In the last case cited, the court simply holds (following *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 548), that a receiver appointed under the provisions of Gen. Stat. 1894, chap. 76, has the same powers and functions as a receiver upon a creditors' bill, or upon proceedings supplementary to execution. Everything becomes assets in the hands of such a receiver which are still assets of the corporation or debtor as to creditors. Among the rights which pass to him as the representative of creditors is the right to recover property of the corporation conveyed in fraud of creditors, or capital refunded, without consideration, to stockholders; that is, his powers and functions relate only to what is or was at some previous time, and still is, as to creditors, the property or estate of the corporation. In *Arthur v. Willius*, 44 Minn. 409, it was held that the individual liability of stockholders for the corporate debts might be enforced upon the application of any creditor who is a party to the proceedings, though the plaintiff creditor did not demand in his complaint any such relief. *McKusick v. Seymour, S. & Co.* 48 Minn. 158, relied upon by the respondents to sustain their contention that a receiver is empowered to enforce the individual liability of a stockholder, does not support the claim, except by an *obiter dictum* to the effect that the liability could be enforced on the complaint of the receiver, and that, ordinarily, such would be the most appropriate mode of procedure. But two questions only were involved and decided in this case: (a) That § 8 of article 10 of the Constitution, imposing the liability, was self-executing; (b) that such liability could be enforced after the appointment of a receiver in an action brought under Gen. Stat. 1894, chap. 76, for the sequestration of the corporate assets, on the application of a creditor. It was not decided that a receiver could enforce the liability. The case of *St. Louis Car Co. v. Stillwater Street R. Co.* 53 Minn. 129, is also relied on by the respondents. The question in this case was whether a creditor could have the assets of a corporation sequestered, and a receiver ap-

pointed, under Gen. Stat. 1894, chap. 76, where a receiver of the corporation in a foreclosure action had already been appointed, and it was held that he could. This was all that the case decided. But in the opinion the difference between the powers of a receiver in a foreclosure suit and a receiver under chapter 76 was set in contrast, and, in speaking of the powers of the latter, this language was used: "Everything becomes assets in his hands which are assets as to creditors, although not [then] assets as to the corporation, as, for example, property conveyed in fraud of creditors, capital withdrawn without provision for the payment of corporate debts, the personal liability of stockholders." The examples were simply illustrations of a general proposition. The first two were in point, and a correct statement of the law, but there is, as already pointed out, no analogy between the last example and the first two. The last one was inadvertently added by the writer of the opinion. *Re People's Live-stock Ins. Co.* 56 Minn. 180, was a proceeding under Gen. Stat. 1894, §§ 8430-8485, inclusive, to dissolve the corporation, and it was held that unpaid stock subscriptions were corporate assets, and might be recovered by the receiver. But it was further said: "The constitutional or statutory liability is directly to the creditors. The corporation cannot enforce it. It is no part of its assets." See, on this last point, *Olsen v. Cook*, 57 Minn. 552. The rule that it is a right belonging to creditors to have the stockholders brought into the action, to the end that their liability for the debts of the corporation may be ascertained and enforced by the court, was expressly recognized in the case of *National German-American Bank v. St. Anthony Park N. R. E. Improv. Co.* 61 Minn. 359; and again, in the case of *Pioneer Fuel Co. v. St. Peter Street Improv. Co.* 64 Minn. 886; also, in *Palmer v. Bank of Zumbrota* (Minn.) 67 N. W. 893, which further holds that a judgment in an action by a creditor, under Gen. Stat. 1894, chap. 76, to sequester the assets of a bank, and for the appointment of a receiver, where the plaintiff in his complaint did not ask to have stockholders made parties, was erroneous in so far as it directed the receiver to sue the stockholders upon their liability for the corporate debts, for the reason that the receiver could not maintain such actions.

It appears from this summary of the decisions of this court that unpaid stock subscriptions, property transferred by the corporation in fraud of its creditor, and capital fraudulently withdrawn, are assets in the hands of the receiver as to creditors, though not as to the corporation except as to the first, and he may recover them, because they were at one time assets of the corporation, and as to creditors they remain so; but that, as to the liability of stockholders for the corporate debts, it is not, and never was, a corporate asset, for it is due directly to creditors; and that the receiver cannot enforce it, in the absence of a statute authorizing him to do so. This conclusion is also supported by the authority of the text-writers. *Morse, Banks & Banking*, § 696; *Thompson, Liability of Stockholders*, § 842; *Cook, Stock & Stockholders*, § 218; 2 *Morawetz, Priv. Corp.* § 869.

The action of the receiver in this case in

seeking to enforce the liability of the stockholders was gratuitous, and the stockholders were not bound to litigate the question of their liability with him. If it be desirable in order to secure a speedy, economical, and practical method of enforcing the liability, to invest the receiver with such power, it must be done by statute. This has already been done in cases where the receiver of an insolvent banking corporation is appointed on the application of the superintendent of banks. Such a receiver is expressly authorized to enforce the individual liability of stockholders. Laws 1895, chap. 145, § 20. While the liability of the stockholders must be enforced on the application of creditors, and not on that of the receiver, except in cases where the statute otherwise provides, yet it does not follow that the trial court has not the same control of the litigation as if it was conducted by the receiver. The creditor who first takes action to have such liability enforced, whether he is plaintiff or subsequently comes into the action, has no ex-

clusive right to control the litigation; and, whenever the stockholders are once brought into the action, the trial court should so far control the conduct of the litigation as to conserve and protect the rights and equities of both creditors and stockholders. Whether it may not be feasible in this case to substitute the appellants' complaint for that of the receiver, and let the answers of the stockholders stand as answers to the substituted complaint, whereby a saving of time and expense may be made, is a question we are, for obvious reasons, not in a position to determine, and leave the matter for the consideration of the trial court. If it shall be impracticable or illegal to make the substitution, then the district court will make its order, bringing in the stockholders to answer the cross bill or complaint of the appellants.

Orders reversed, and case remanded, with instructions to proceed in accordance with this opinion.

WISCONSIN SUPREME COURT.

William CONROY

v.

CHICAGO, ST. PAUL, MINNEAPOLIS, &
OMAHA RAILWAY COMPANY, *App't.*

(.....Wis.....)

1. A passenger on a railway train which is stopped for some time by tanks of burning oil upon the track, and who from motives of curiosity and pleasure leaves a place fixed as a temporary station at a safe distance from the burning oil and goes within 85 feet of the same and remains there for several minutes, is guilty of such contributory negligence as will prevent a recovery for injuries caused by an explosion of a tank by which burning oil is thrown upon him.
2. A burning tank of oil on a railroad track the flames from which ascend several feet into the air is sufficient notice of the danger of an explosion to a passenger on a train temporarily stopped by the fire to render unnecessary any caution to him from the company not to approach too near the tank.
3. No recovery can be had for personal injuries by one whose own negligence contributed to the result.
4. A railroad company is not required to restrain by physical force a passenger on a railway train which is temporarily stopped by a burning tank of oil on the track from unnecessarily exposing himself to danger from an explosion of the tank by approaching too close to it.
5. The relation of carrier and passenger exists between a railroad company and a passenger on a train which is temporarily stopped by a burning tank of oil on

the track during which time the passengers on the train were taken to a place some distance from the tank while waiting for a train to receive them on the other side of the obstruction.

6. A railway company is required to exercise only ordinary care and prudence towards a passenger, who is temporarily prevented from continuing his journey by a burning tank of oil on the track while waiting for a train to come from the other side of the tank to receive him.
7. A material finding in favor of plaintiff cannot be stricken from the record and a judgment rendered for defendant where there is any evidence to support it.
8. Judgment non obstante veredicto cannot be given for either party where the special verdict is inconsistent and contradictory until the conflicting portions of it are set aside.

(March 16, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Pierce County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Pinney, J.:

This action was brought for the recovery of damages sustained by the plaintiff while a passenger on its easterly bound train of cars from Ellsworth to Marshfield, Wisconsin, by reason of the alleged negligence of the defendant. A part of the western-bound freight train of the defendant, consisting of a car load of coke, three metal tanks, two of which were filled with naphtha, and one with kerosene oil, and the caboose in the rear, had been separated from the rest of the train, and had been wrecked early in the morning, and the said cars were on fire, and in a dangerous condition, on

NOTE.—As to the rights and liabilities of passengers temporarily leaving a vehicle, see note to *Finnegan v. Chicago, St. P. M. & O. R. Co.* (Minn.) 15 L. R. A. 369.

28 L. R. A.

the defendant's track between said places, about 3 miles east of the station called Roberts, and west of Hammond. The defendant carried the plaintiff on its passenger train to Roberts, where the fact that such wreck had occurred was made known to the plaintiff and other passengers. When the passenger train arrived within about 400 feet of the wreck, the passengers were directed to retain their places in the cars until such time as a train might arrive to carry them on their journey, and to which they would be transferred on the east side of the wreck. The forward tank, containing naphtha, exploded soon after the wreck, and everything in the rear of it, as well as the coke car in front, caught fire. This was quite a violent explosion, and portions of the tank were thrown a considerable distance, and the tank containing naphtha next to it was so broken as to permit much of the contents to run out. The kerosene tank in the rear was thus set on fire, and continued to burn from that time until nearly 11 o'clock, a considerable part of the time with great violence, and producing a loud, roaring noise, with flames shooting up. A wrecking train and car had arrived at about 8 o'clock in the morning, and were operating upon the wreck, and had hitched to the tank of kerosene oil, and attempted to draw it out, scatter the burning coke, and thus clear up the track. Attempts to remove it opened the seams in the tank, and it began to burn more violently. The wreck occurred in a farming country, and the right of way was 100 feet wide, extending through cultivated fields on either side. A gap was opened in the right of way fence on the south side, 257 feet west of the tank, and another in the wire fence, running through the fields at right angles with the road, at a point 95 feet south of the right of way, but 147 feet from the burning tank, and the third gap was opened in the right of way fence 256 feet east of the burning tank, in order to transfer the baggage, express matter and mails. Efforts were unavailing to keep the passengers in the cars. A large number of them had got out, and thereupon it was concluded to transfer them, through the gaps, around the wreck, to a point east of the east gap, where they were to take the other train, and they were transferred accordingly, as well as the baggage, mail, and express matter; the latter being deposited about opposite the east gap, and the passengers occupied, in groups, a considerable space east from the east gap, along the right of way, for a distance of over 100 feet. The plaintiff, with other passengers, walked around said wreck, through said gaps, to the place where the eastern gap was opened, and said mail matter, baggage, etc., had been deposited, to wait for a train to continue his journey. The injury complained of occurred about an hour after the passenger train arrived at the scene of the wreck, and when the plaintiff had approached to, and was standing, about 85 feet east of the burning tank, or one third of the distance from said tank to where the east gap had been opened. The plaintiff was standing at said place for about half or three quarters of an hour before the explosion occurred; having left the eastern gap, and walked westward, towards the burning oil tank. At the time of the explosion the flame from the burning tank

ascended about 100 feet or more, and, as one witness said, there was nothing but fire in the sky. Just before the explosion the flames were burning quite high—from 3 to 5 feet,—right in the middle of the tank, and kept rising and going down. The plaintiff received his injuries from the burning oil, cast on him by the explosion. It was contended by the plaintiff that the defendant was guilty of negligence in not warning him of the danger to which he was exposed by said burning wreck, and in not providing a safe place, and in designating an unsafe one, for the plaintiff and other passengers to wait for the train designed to carry them eastward, and in not warning the plaintiff of the danger to which he was exposed at the place he was waiting, and in allowing him to leave said train, and go to said place and there remain, and in allowing said train wreck to be and remain in a dangerous and unsafe condition. The defendant denied all allegations of negligence, and alleged and gave evidence tending to show that, by its officers and agents, it directed the plaintiff and other passengers to a place at the east gap, and eastward thereof, designed as a temporary station, to wait for the train to carry them eastward, which was a sufficient distance from the wreck to insure safety from any injury on account thereof, or the subsequent explosion. The plaintiff, in his complaint, alleged that the defendant directed the plaintiff to go around said wreck to a point east and south thereof, and he accordingly walked around the same to a point on defendant's right of way, designed by the defendant as a temporary station, to wait for said train to carry said passengers eastward. A special verdict was taken. By this it was found, among other things, in substance, that the plaintiff understood that he was to wait with the other passengers at or near the east gap for the train to carry him on his journey; that, after passing "around through the gaps to a point at or near the east gap, the plaintiff unnecessarily, and from motives of curiosity and pleasure, went from there to a place much nearer the burning tank," but not "for the purpose of boarding the outgoing train, or supposing that was the proper place to do so," and "that the plaintiff's injuries were caused by his going nearer the burning tank," and that he "would not have been seriously injured if he had remained at or near the east gap;" further, that "a reasonable and prudent man, under the circumstances, situate as the plaintiff was, and with his means of knowledge, would not have anticipated that there was danger of an explosion of the burning oil tank, or that it might explode, and that there was danger in being so near it when he was injured;" that he "was not guilty of any want of ordinary care that contributed to his injury," but that "the defendant's officers and agents, by the exercise of ordinary care and prudence, would have anticipated that the explosion might occur;" that they "did not exercise reasonable care and prudence in designating a safe place where the plaintiff and other passengers were to take the train east;" that they "were guilty of negligence which was the proximate cause of the plaintiff's injuries, and did not give the plaintiff any warning whatever with respect to the danger to which he

was exposed by virtue of the burning tank;" and, among other things, that "the defendant's officers, in the exercise of reasonable care, ought to have anticipated the plaintiff would leave the east gap, or near there, and go back nearer to the tank, and thus incur unnecessary danger; that the defendant, its officers or agents, knew, or, in the exercise of ordinary prudence should have known, of the plaintiff's position in time to warn him of the danger which threatened on account of the burning tank." The jury found the plaintiff's damages at \$2,500. The defendant moved for judgment on the verdict in its favor, which was denied. It then moved to set aside the verdict, and for a new trial, on the grounds, among others, of error in the charge to the jury, and in refusing instructions requested by the defendant's counsel, and that the verdict was adverse to, and not sustained by, the evidence; but the motion was denied, and judgment entered thereon against the defendant, from which it appealed.

Messrs. Thomas Wilson and L. K. Luse for appellant.

Messrs. J. W. Hancock, O. A. Turner, and E. A. Jaggard for respondent.

Pinney, J., delivered the opinion of the court:

The carrier owes to its passenger, while that relation exists, the duty of providing reasonably safe stations, whether permanent or temporary, where he may await the arrival of trains, as well as the duty to seasonably warn him, when reasonably necessary, of any existing or apprehended danger which may interfere with or imperil his personal safety. The defendant contends it performed towards the plaintiff the full measure of its duty, and that the proximate, or, at least, a contributing, cause of the plaintiff's injury was his own negligence in unnecessarily exposing himself to danger. The point to which the plaintiff and his fellow passengers were directed to go by the defendant's agents, and to which he went as a temporary station, as thus directed, to wait for the train which was to convey him and his fellow passengers eastward to their respective destinations, was the gap opened about 16 rods east of the burning wreck, and at and east of which the mail, express matter, and baggage had been deposited. The wreck and remaining bapthra and the kerosene oil in the oil tank were burning fiercely, and flames were shooting from the joints in the oil tank or car, and flashed up to the height of many feet, making at times a loud, roaring noise. The gaps opened in the right-of-way fence, on the south side of the railway, by which a way had been opened around the burning wreck, diverged to the south, in order to avoid it. The details of the entire scene, about which there is no material dispute, were open and obvious, even to a casual observer, and gave clear and emphatic warning to the humblest intelligence of impending danger from the burning tank of oil. The situation spoke for itself, and in no uncertain tones. The plaintiff had nothing to do but to observe these facts as they appeared before him, and to consult his own safety. His actual transit as a passenger had been interrupted, and, until the train arrived from the

east, he was free to go and come as he chose; and the company had no power to restrain him in the least.

1. Whether the company had performed its entire duty towards him, under the circumstances, or not, it was his duty to exercise ordinary care and caution to secure his own safety. The railway company was not an insurer of his personal safety, and it is familiar law that, under the circumstances stated, the duties of the plaintiff and of the defendant to observe proper care and caution are reciprocal. If the plaintiff failed to exercise ordinary care and caution, and by reason of such failure he sustained the injuries complained of, he was guilty of contributory negligence, and must be held to have assumed the consequent risk or danger of injury. Assumption of risk in such cases is a species of contributory negligence. *Darcey v. Farmers' Lumber Co.* 87 Wis. 249; *Nadav v. White River Lumber Co.* 76 Wis. 120-131. The plaintiff was in the open country, and under no restraint. Whatever of danger there was, in consequence of the alleged negligence of the defendant, he was free and able to avoid it. It is not a question of what he thought or believed would be safe and prudent, under the circumstances, for him to do. If he unnecessarily exposed himself to a danger, obvious to a person of ordinary care and prudence, and was injured in consequence, he cannot recover. He was an adult, and must be held bound to the exercise of the same care and prudence as a person of ordinary care, intelligence, and judgment. The defendant, on the other hand, had a right to assume that the plaintiff would act with reasonable care and caution, and occupy the position or situation to which he had been conducted; and we are unable to perceive anything in the case to warrant the inference that the defendant had any reason to apprehend that the plaintiff would expose himself to, or incur, unnecessary danger. The actual transit of the plaintiff in the defendant's passenger train having been interrupted, its duty required that it should exercise towards the plaintiff at the temporary station, as it is called, to which he had been directed, such reasonable and proper care as one of ordinary care and prudence would exercise, under the circumstances. The plaintiff appears to have disregarded all the plain and obvious warnings of danger suggested by the facts and circumstances, and which could not have failed, it would seem, to arrest the attention of a person of ordinary intelligence, care, and prudence. The special verdict finds that, if the plaintiff had remained at the place designated, "he would not have been seriously injured," but that he "unnecessarily, and from motives of curiosity and pleasure, went from there to a place much nearer the burning tank," as already indicated, and where he remained twenty minutes, and up to the time of the explosion from which he received his injuries; that "the plaintiff's injuries were caused by reason of his so going nearer the burning tank." It is true that it is found that the defendant, its officers, etc., "in the exercise of ordinary prudence, should have known of the plaintiff's position in time to warn him of the danger which threatened on account of the

burning tank," and that in the exercise of reasonable care they ought "to have anticipated that the plaintiff would go nearer to the burning tank, and thus incur unnecessary danger;" and they found that the defendant gave the plaintiff warning with respect to the danger to which he was exposed by virtue of the presence of the burning tank, but that "it was insufficiently or negligently given." The jury acquitted the plaintiff "of any want of ordinary care that contributed to his injury," and found that he was "not guilty of any want of ordinary care, however slight, in so going much nearer the burning oil tank," and that "a reasonably prudent man, under the circumstances, situate as the plaintiff was, with his means of knowledge, would not have anticipated that there was danger of an explosion of the burning oil tank." The verdict finds that the defendant's officers, etc., "by the exercise of ordinary care and prudence, would have anticipated that an explosion might occur," and "did not exercise reasonable care and prudence in designating a safe place where the plaintiff and other passengers were to take the train which was to carry them east," and that, through its officers, etc., it was "guilty of negligence, which was the proximate cause of the plaintiff's injuries."

The verdict is inconsistent and contradictory on vital points, and no judgment should have been entered on it. It was the duty of the defendant to give proper and sufficient warning of actual or apprehended danger; but the evidence tends to show quite clearly that the plaintiff had ample notice, from the situation and circumstances, of the danger to be apprehended from the burning wreck and tank of kerosene. A considerable number of witnesses on the part of the defendant gave evidence tending to show that its agents and servants gave reasonable warning of danger, and indicated where the passengers were to remain; but the plaintiff denied that he heard anything of the kind, and so did two others who testified in his behalf. Aside from this, there was little or no material dispute as to the facts. The question is as to the proper inferences to be drawn from them. The highly inflammable and dangerous character of kerosene is a matter of common knowledge. Its irregular and rapid combustion from a lamp in an ordinary room justly conveys alarm and an immediate sense of danger. Here was an entire tank or car of it; upon a burning wreck, and in a highly heated condition, and flames escaping from joints in the tank. It was liable at any time to explode with great violence and serious injury. It would seem that no notice that could be given would convey more clearly a sense of impending danger than the actual situation, open and obvious to anyone who would make a reasonable use of his senses.

2. The plaintiff cannot recover for injuries caused by the defendant's negligence if he himself failed to exercise proper care, and his own negligence contributed to the result. In *Hickey v. Boston & L. R. Co.* 14 Allen, 429, the rule we think applicable to the case is stated: That if an injury has happened while a party is occupying a place provided for the accommodation of passengers, nothing further is ordinarily necessary to show due care on his

part; but when the evidence shows that he left the place assigned for passengers, and was occupying an exposed position, and "that the injury was due in part to the fact of such position, he must necessarily fail, unless he can also make it appear that by some ground of necessity or propriety his being in that position was consistent with the exercise of proper care or caution on his part." All the adjudged cases agree that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence which substantially contributes to the result. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697-702, 24 L. ed. 542, 543; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 813; *Reynolds v. New York C. & H. R. R. Co.* 53 N. Y. 243, 252. A passenger is not justified in incurring risks unnecessarily, however rare the chances may be that he will suffer by it (*Todd v. Old Colony & F. R. R. Co.* 8 Allen, 18, 80 Am. Dec. 49); and, "if passengers voluntarily take exposed positions, with no occasion therefor caused by the managers of the road, except a bare license by noninterference or passive permission of the conductor, they take the special risks of that position on themselves." *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 868, 87 Am. Dec. 644; *Pennsylvania R. Co. v. Zebe*, 38 Pa. 818-827; *Coleman v. Second Ave. R. Co.* 114 N. Y. 609, 612, 613. The plaintiff in this case voluntarily, and out of mere curiosity, and for his own pleasure, took an exposed position, not intended or pointed out for passengers, and he cannot hold the defendant liable for injuries to which such act contributed. *Torrey v. Boston & A. R. Co.* 147 Mass. 412, 418. The defendant and its agents were not bound, under the circumstances of this case, to restrain the plaintiff by physical force, in order to keep him out of manifest danger, which was as obvious to him as to them. It was not negligence on their part that they did not restrain him by physical force from unnecessarily exposing himself to danger from the burning tank of oil. *Pennsylvania R. Co. v. Zebe*, 38 Pa. 827; *Hickey v. Boston & L. R. Co.* 14 Allen, 433.

3. The relation of carrier and passenger we think existed between the plaintiff and defendant at the time of his injury, although his actual transit as such had been interrupted for the time being, and he had been directed, and had proceeded, to a place on the defendant's premises, to await the arrival of another train upon which to complete his journey. He had not abandoned his right to complete it in the defendant's cars. He had merely taken up, it is claimed, an exposed and dangerous position with reference to the burning tank of oil on the defendant's right of way, which may perhaps, disentitle him to recover on account of the injuries he received.

4. The defendant did nothing, either expressly or by implication, to invite, entice, or allure the plaintiff to the position of danger he appears to have voluntarily and unnecessarily assumed. Neither the impending danger, nor its cause, was concealed. He was not a child of immature years, but an adult, and, as we must assume, of reasonable intelligence, judgment, and prudence. With a full

knowledge of the facts, or the means of knowledge before him, he took this position of danger, and kept it for twenty minutes before the explosion, watching the tank and its surroundings, to gratify his curiosity. The case does not come within the rule of *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235, and cases there cited. Here there was no pitfall or trap, nor had there been any invitation to the plaintiff, express or implied, to occupy the position he did. He was still under obligation to use reasonable care on his part for his own safety. Nor is the case, for the reason stated, governed by the principles upon which the cases of *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Keefe v. Milwaukee & St. P. R. Co.* 21 Minn. 207-211, and *Union P. R. Co. v. McDonald*, 152 U. S. 282, 38 L. ed. 434,—much relied on by the plaintiff, were decided.

5. In respect to the alleged negligence of the defendant, the court erroneously charged the jury "that it was the duty of the carrier to exercise extraordinary vigilance, aided by the highest skill, and to exercise the highest degree of care, to prevent the interposition of any obstacle to expose the plaintiff to danger while waiting for the train to arrive;" although the court correctly said elsewhere in the charge that the duty the defendant owed to the plaintiff, to protect him from injury from the burning oil tank, was "only that of ordinary care and prudence, and no greater, under like circumstances, than the obligation the plaintiff was under to protect himself from such danger and consequent injury." The charge upon this material point was contradictory and misleading, and constitutes reversible error. A railroad company is held to the highest degree of care in respect to the condition and management of its engines and cars, for negligence in that respect involves extreme peril to passengers, against which they cannot protect themselves. *Moreland v. Boston & P. R. Corp.* 141 Mass. 81; *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678; *Kelly v. Manhattan R. Co.* 112 N. Y. 443, 3 L. R. A. 74; *Pulmer v. Pennsylvania Co.* 111 N. Y. 488, 2 L. R. A. 252. The plaintiff was under no restraint, and was free to adopt such precautions as might seem necessary to protect himself from injury, and the defendant was bound to the exercise of only ordinary care and prudence, in view of the situation and existing circumstances.

6. The questions of negligence on the part of the plaintiff, as well as of the defendant, were, in this case, we think, for the jury in the first instance, under proper instructions

from the court. What may be negligence under some circumstances and conditions may not be under others. It is to be inferred from the facts and circumstances given in evidence, and is for the jury, where the conclusion is debatable, or rests in doubt. *Langhoff v. Milwaukee & P. du C. R. Co.* 19 Wis. 499. If the jury arrive at conclusions wholly unwarranted, the court, in the exercise of sound discretion, may set aside the verdict, and grant a new trial. *Valin v. Milwaukee & N. R. Co.* 82 Wis. 5, 6, and cases cited. Judgment could not be given for either party on the verdict, by reason of its being inconsistent and contradictory, or upon the uncontradicted evidence, until the verdict, or the conflicting portions of it, were set aside. The defendant could not have judgment *non obstante veredicto*. *Sheehy v. Duffy*, 89 Wis. 18. The defendant, in order to render its main contentions available in this court, should have moved the trial court to set aside the parts of the special verdict not sustained by the evidence, and for judgment on the remainder, and on the uncontradicted evidence. This practice was held proper in *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.* 91 Wis. 447-458. In *Schweickhart v. Stuewe*, 75 Wis. 160, where the previous cases were cited, it was said that the "utmost extent to which this court has gone in authorizing the trial courts to disregard the special verdict rendered by a jury, when such verdict is wholly unsupported by the evidence, is to set aside such verdict, and then, in its discretion, and not as an absolute duty, to enter judgment in accordance with the undisputed evidence in the case, or to set aside the verdict entirely, and grant a new trial." *J. & H. Otagens Co. v. Silber*, 87 Wis. 357; *Murphey v. Weil*, 89 Wis. 150, 151. It is only where there is no evidence to support a material finding that it can be set aside or stricken from the record, but, where it is against the decided preponderance of the evidence, upon setting it aside, there should be a new trial. *Sheehy v. Duffy*, 89 Wis. 18; *Ohtweiler v. Lohmann*, 82 Wis. 198; *Dahl v. Milwaukee City R. Co.* 65 Wis. 371; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 60, 58 Am. Rep. 843. This court has no original power to correct or to set aside any part of a special verdict. Its jurisdiction of such matters is appellate only. All applications for that purpose must be made to the trial court. For the reasons stated, there must be a new trial.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

OREGON SUPREME COURT.

FARMERS' LOAN & TRUST COMPANY,
Respt.,

v.

OREGON PACIFIC RAILROAD COM-
PANY *et al.,*

R. H. Graham *et al., Petitioners, Appts.*

(.....Or.....)

A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is insufficient to pay them, unless such responsibility was imposed by the court as a condition to the appointment or the continuance of the receiver in office.

(May 1, 1897.)

APPEAL by petitioners from an order of the Circuit Court for Benton County refusing to compel plaintiff to pay their claim for services rendered to a receiver appointed in a proceeding to foreclose a mortgage which had been instituted by plaintiff. *Affirmed.*

Statement by Bean, J.:

This is an appeal from an order of the circuit court of Benton county denying the petition of certain employees of the receivers of the Oregon Pacific Railroad Company for an order requiring the plaintiff in the foreclosure suit in which such receivers were appointed to pay the wages of the petitioners. On October 28, 1890, the Farmers' Loan & Trust Company, as trustee for the bondholders of the Oregon Pacific Railroad Company and the Willamette Valley & Coast Railroad Company, commenced a suit in the circuit court of Benton county to foreclose a mortgage on the franchise and property of the defendant corporations, to secure the payment of the bonded indebtedness thereof, amounting, as alleged, to \$15,000,000, and, on its motion T. Egerton Hogg, the president of the corporation, was appointed receiver, and clothed by the court with authority to operate the railroad, and receive the income and earnings thereof, and to that end he was empowered from time to time to employ and discharge all needful assistants, managers, clerks, servants, agents, and employees, at such salaries and compensation as he might deem advisable. Under this appointment, Hogg operated the road as a receiver until March 6, 1893, when he was removed, and one Hadley appointed in his place, who continued in the operation thereof, until January 6, 1894, when he was also removed, and another receiver appointed. Under the management of Hogg and Hadley, the earnings of the road were wholly insufficient to pay the expenses of the receivership, and, as a consequence, the wages of the employees were allowed to fall greatly in arrears, so that, at

the time of Hadley's removal, there was due the petitioners herein a very large sum for wages, and no funds whatever in the hands of the receiver with which to pay it; and we take it (although not directly averred in the petition) that the receiver had exhausted his power to float receivers' certificates.

Prior to this time, several unsuccessful attempts had been made to dispose of the road under the decree in the foreclosure suit rendered on the 27th of April, 1891. In this condition of affairs some of the employees, despairing, and with reason, as the sequel showed, of ever being able to obtain payment of their wages from the earnings or the corpus of the mortgaged property, filed a petition on January 26, 1894, setting out substantially the facts hereinbefore detailed, and praying an order of the court requiring the plaintiff in the foreclosure suit to deposit in court sufficient money for the payment of their wages. This petition was denied, and hence this appeal.

Mr. George G. Bingham, for appellants:

The receiver is an officer of the court, and his possession is the possession of the court; and the expenses of the receivership as between the parties are disbursements, and these payments are to be provided for in the same manner as other disbursements.

The receiver having been appointed on the petition of respondent to preserve the property for the benefit of respondent as between respondent and the petitioner in this proceeding, respondent is liable for the payment of the expenses of the receivership.

High, Receivers, § 2; 20 Am. & Eng. Enc. Law, pp. 13, 14; *Musser v. Good*, 11 Serg. & R. 247; *Tillman v. Wood*, 58 Ala. 578; *Hove v. Jones*, 86 Iowa, 156; *Cutter v. Pollock*, 4 N. D. 205, 25 L. R. A. 377.

The amounts sought to be recovered here are necessary expenses incurred at the instance of respondent, and respondent is liable in the first instance.

4 Am. & Eng. Enc. Law, p. 326; *Weston v. Watts*, 45 Hun, 219; *French v. Gifford*, 81 Iowa, 428; *Johnson v. Garrett*, 23 Minn. 565.

The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful and against the unsuccessful party.

Radford v. Folsom, 55 Iowa, 276.

The fact that respondent and defendants are great corporations will not change the rules of law applicable to the liability of either of them to pay costs.

Jones, Railroad Securities, § 547; *Toms v. King*, 64 Md. 166; *Vermont & C. R. Co. v. Vermont O. R. Co.* 50 Vt. 500; *Langdon v. Vermont & C. R. Co.* 54 Vt. 593; *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 146; *McLans v. Placerville & S. Valley R. Co.* 66 Cal. 606.

Allowances may be made from time to time during the receivership.

Special Bank Comrs. v. Franklin Inst. for Savings, 11 R. I. 557.

NOTE.—As to the liability of a mortgagee for wages of receiver's employees during foreclosure when the assets are insufficient to pay them, the above case is believed to be one of first impression.
38 L. R. A.

For some cases as to the payment of running expenses out of the assets, see note to *Decker v. Gardner* (N. Y.) 11 L. R. A. 480.

This proceeding is the same as that sanctioned in—

Mitchell & L. Co. v. Downing, 23 Or. 448; *Schneider v. Sears*, 18 Or. 76; *City Bank v. Tucker*, 7 Colo. 220; Hill's Code, §§ 554, 555; *Outter v. Pollock*, 4 N. Dak. 205, 25 L. R. A. 377.

Messrs. Turner, McClure, & Rolston, J. R. Bryson, and H. C. Watson, for respondent:

The commission and expenses of a receiver must be paid out of the fund, and cannot be taxed against the complainant.

Hembree v. Dawson, 18 Or. 474.

When the fund is not sufficient to pay these debts, no one of the parties can be said to be benefited by the receivership, unless, indeed, it be those very claimants, whose rights arose out of the receivership, but for whose existence they would have had no claims.

Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 97, 36 L. ed. 637; *Texas & St. L. R. Co. v. Rust*, 17 Fed. Rep. 275; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 23 Fed. Rep. 803; *Ames v. Union P. R. Co.* 60 Fed. Rep. 966; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. Rep. 278.

The character of receivers is really two fold: Firstly, they take charge of the property, to hold it pending the litigation. In this respect they resemble a sheriff, and their custody is in the nature of an equitable execution. Secondly, they operate the property, as the railroad company would have had to do, for the protection of the rights of public and parties alike. In this latter respect their position is peculiar. They are *sui generis*, and so are their contracts.

Vanderbilt v. Central R. Co. 43 N. J. Eq. 669.

Their debts incurred in the operation of the property are chargeable as a lien upon it.

Wallace v. Loomis, 97 U. S. 162, 24 L. ed. 901.

But beyond the giving to these receivers' debts a lien upon the property, the court cannot go.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459, 483, 20 L. ed. 199; *Dow v. Memphis & L. R. R. Co.* 124 U. S. 852, 31 L. ed. 566; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 460, 29 L. ed. 972; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 879; *Myer v. Western Car Co.* ("Myer v. Car Company") 102 U. S. 1, 26 L. ed. 59; *Farmers' Loan & T. Co. v. Central R. Co.* 7 Fed. Rep. 538, 17 Fed. Rep. 758; *Turner v. Peoria & S. R. Co.* 95 Ill. 184, 85 Am. Rep. 144; *State v. Edgefield & K. R. Co.* 6 Lea, 353, *Davis v. Gray*, 83 U. S. 16 Wall. 218, 21 L. ed. 452; *Booth v. Clark*, 59 U. S. 17 How. 331, 15 L. ed. 167; *Corey v. Long*, 48 How. Pr. 498; *Devendorf v. Dickinson*, 21 How. Pr. 276.

Bean, J., delivered the opinion of the court:

This is, so far as we can ascertain, the first recorded instance in the judicial history of railroad receiverships in which the trust fund was insufficient to pay the employees of the receiver engaged in the operation of the road; and hence we are unaided in the determination of the question before us by any judicial de-

cision directly in point. The contention of the petitioners seems to be that a receiver of a railroad appointed in a suit to foreclose a mortgage on the road, and clothed with authority to operate it, is as much the representative of the plaintiff as a sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the sheriff in the case referred to, are collectible from the plaintiff. But this argument is based upon an entire misapprehension of a railroad receivers' position and duties. He is not, like a sheriff in an attachment action, the agent of the plaintiff in the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of the court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the court. The parties to the litigation have not the least authority over him; nor have they any right to determine what liabilities he may or may not incur. His authority is derived solely from the act of the court appointing him, and he is the subject of its order only. "A receiver of a railroad," says Mr. Justice Caldwell, is a person appointed to receive and preserve the property of a railroad company, and is clothed with authority to operate the railroad and receive the earnings and income therefrom during the pendency of the foreclosure suit. In contemplation of law, the railroad is in the custody of, and operated by, the court appointing the receiver. The receiver is the agent of the court. He is an officer of the court and his possession of the property is the possession of the court. He is not the agent of either party to the suit, and neither party is responsible for his contracts or for his malfeasance or misfeasance in office. . . . The liabilities incurred by the receiver in the operation of the road are, strictly speaking, the liabilities of the court appointing the receiver." 30 Am. L. Rev. 161. And in *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632, the court, speaking of the Wabash receivers, said: "They were ministerial officers appointed by the court of chancery to take possession of and preserve *pendente lite*, the fund or property in litigation; mere custodians, coming within the rules stated in *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 236, 34 L. ed. 344, 346, where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.'" So, also, in the case of *New York, P. & O. R. Co. v. New York, L.*

E. & W. R. Co. 58 Fed. Rep. 268, it is said: "Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and directions of the courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads, as public carriers, are charged with great public duties, and the public are interested that their operation shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line. These considerations have developed the present well-settled proposition that such receivers are the mere custodians of the property, and hold for and as mere agents of the court. Speaking of the character of such trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice Waite said: "The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place." *Fosdick v. Schall*, 99 U. S. 251, 25 L. ed. 343; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632. A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession, or its effects upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class." To the same effect, see *Texas & St. L. R. Co. v. Rust*, 17 Fed. Rep. 275; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 23 Fed. Rep. 863; *Ames v. Union Pac. R. Co.* 60 Fed. Rep. 966; and *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 455, 29 L. ed. 970.

A railroad receiver is therefore more than a mere custodian of the property, like a sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the court, which holds the property while it operates the road pending the litigation for the benefit of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his

to exceed the value of the mortgaged property thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, Shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself? We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order. 80 Am. L. Rev. 161; *Fosdick v. Schall*, 99 U. S. 255, 25 L. ed. 399. If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out, or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employees must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the court, and not of the parties. Their wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case.

It follows that the order appealed from must be affirmed, and it is so ordered.

TENNESSEE SUPREME COURT.

WEST MEMPHIS PACKET COMPANY

et al., App'ls.,

v.

B. WHITE.

(.....Tenn.....)

1. A charge is not erroneous because of generalization and abstractions which lead up to the statement of the law determining the rights and responsibilities of the parties on the issues of fact involved.
2. The lawfulness of the act of a passenger on an excursion boat in using his gun with a loaded shell will not excuse the owners of the boat from liability for an injury resulting in such passenger's negligence or lack of caution, provided his action is such as to excite apprehension in a reasonably prudent person.
3. The owner of a steamboat is required to exercise the utmost vigilance and diligence in protecting its passengers from injuries from another passenger by the negligent and careless use of a loaded gun exhibited by him, where under all the circumstances such owner or his officers and agents might reasonably have expected or anticipated the injury.
4. An instruction in an action against a steamboat company for personal injuries to a passenger, that the evidence must satisfy them that the boat was being run by and in the interest of defendant at the time of the injury, sufficiently presents the theory that the excursion during which plaintiff was injured was an individual affair of a third person for which the company was not liable.
5. A verdict for \$3,500 for an injury to a laborer who is shot in the finger and through his thumb, and whose right arm is perforated with shot from the shoulder to his hand, many of which are never extracted, and whose right leg also receives several shot by which his capacity for lifting is permanently affected, is not excessive.

(May 22, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Shelby County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. William M. Randolph & Sons,
for appellants:

The motion to exclude the plaintiff's evidence from the jury was proper.

Louisville & N. R. Co. v. Woodson, 184 U. S. 614, 33 L. ed. 1032; *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 455, 32 L. R. A. 354; *Whirley v. Whiteman*, 1 Head, 610; *Schnylk & D. Improv. & R. Co. v. Munson*, 81 U. S. 14 Wall. 448, 20 L. ed. 872; *Parks v. Ross*, 52 U. S. 11 How. 373, 18 L. ed. 735; *Memphis & C. R. Co. v. M'honev*, 89 Tenn. 311; *Merchants' Nat. Bank v. State Nat. Bank*, 77 U.

S. 10 Wall. 637, 19 L. ed. 1015; *Pleasants v. Fant*, 89 U. S. 22 Wall. 119, 22 L. ed. 782; *Schuchardt v. Allen*, 68 U. S. 1 Wall. 369-371, 17 L. ed. 646; *Nickman v. Jones*, 76 U. S. 9 Wall. 201, 19 L. ed. 553; *Marion County Comrs. v. Clark*, 94 U. S. 284, 24 L. ed. 61; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 38, 35 L. ed. 60; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 264, 28 L. ed. 541.

The issues of fact passed upon by a jury in a civil case will not be considered in the supreme court, unless the error assigned is that there is no evidence to sustain the verdict.

Kirkpatrick v. Jenkins, 96 Tenn. 87.

In order to impeach the verdict successfully on the ground that there is no evidence, the complaining party must take as true the strongest legitimate view of the testimony against him, and show that it affords no support for the finding of the jury.

Citizens' Rapid Transit Co. v. Seigrist, 96 Tenn. 124; *Mobile & O. R. Co. v. House*, 96 Tenn. 556; *Summers v. Louisville & N. R. Co.* 96 Tenn. 459; *Illinois C. R. Co. v. Brown*, 96 Tenn. 559.

The evidence is fatally defective in two particulars: (1) It does not show that the defendants, or either of them, were in charge of or operating the steamer *Golden Gate*, when the injury was done the plaintiff, or were in any way chargeable for the misconduct of the steamboat, or those managing it when that injury occurred. (2) There is no evidence whatever that any officer, agent, or servant or employee of the steamboat *Golden Gate* brought about or participated in the particular act which resulted in the injury to the plaintiff, of which he complains in his declaration, nor that any such officer, agent, servant, or employee knew of, or had notice of the probable occurrence of the act, which brought about such injury, or any opportunity or means of anticipating or preventing the same.

If a person simply adds to the signature of his name "agent," "trustee," "treasurer," without disclosing his principal, he is personally bound.

De Bian v. Gola (Md.) 24 Am. L. Reg. N. S. 777.

It is a difficult and delicate task to state, hypothetically, to a jury the proof relied on by the opposite sides, so that each side shall feel that his evidence has been fully and fairly arrayed; yet such is the duty to be performed, unless a special verdict is ordered.

Memphis Gayoso Gas Co. v. Williamson, 9 Heisk. 341; *Whirley v. Whiteman*, 1 Head, 617; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 622, 24 Am. Rep. 344; *Gregory v. Underhill*, 6 Lea, 211; *James v. Drake*, 3 Sneed, 840; *Lawrence v. Hudson*, 12 Heisk. 671; *Lacy v. Sugarman*, 12 Heisk. 354; *Johnson v. McCampbell*, 11 Heisk. 27; *Wilson v. Smith*, 5 Yerg. 390; *Goodall v. Thurman*, 1 Head, 209; *Mariner v. Smith*, 7 Baxt. 423; *Douglas v. McWhirter*, 9 Heisk. 69; *People's Ins. Co. v. Kuhn*, 12 Heisk. 515; *Louisville & N. R. Co. v. Campbell*, 7 Heisk. 253; *East Tennessee & W. N. C. R. Co. v. Winters*, 85 Tenn. 240; *Louisville & N. R. Co. v. Wallace*, 90 Tenn. 53; *Dobson v.*

NOTE.—As to the protection of passengers from assault, see note to *Davis v. Houghtelin* (Neb.) 14 L. R. A. 736; also *Baltimore & O. R. Co. v. Barger* (Md.) 26 L. R. A. 220; and *Lucy v. Chicago G. W. R. Co.* (Minn.) 81 L. R. A. 561.

38 L. R. A.

State, 5 Lea, 272; *Mann v. Grove*, 4 Heisk. 406; *Rerford v. Pulley*, 4 Baxt. 364; *Hill v. Childress*, 10 Yerg. 514; *Morris v. Platt*, 32 Conn. 73; *Pink v. Evans*, 95 Tenn. 413; *Webb v. East Tennessee, V. & G. R. Co.* 88 Tenn. 119; *Persons v. State*, 90 Tenn. 292; *East Tennessee & W. N. C. R. Co. v. Collins*, 85 Tenn. 227; *Nashville, C. & St. L. R. Co. v. Seaborn*, 85 Tenn. 391; *Citizens' Ins. Co. v. Ayers*, 88 Tenn. 728; *Southern R. Co. v. Pugh*, 95 Tenn. 419; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 718; *Allen v. Goodwin*, 92 Tenn. 385.

Phillipi was not a servant or agent or representative of the defendants, or of the Golden Gate. He was a third party, acting only for himself, and the liability of the defendants, if any exists, grows simply out of the fact that they neglected some duty they owed White, the plaintiff, in not preventing Phillipi's exploding the cartridge in the gun which wounded White.

In such a case the liability results exclusively from the negligence of the party sought to be charged—the defendants here—and if the evidence discloses no such negligence, no cause of action exists.

An action is maintainable only "where (1) there is a misfeasance or negligence in some particular as to which there was a duty toward the party injured or the community generally; and (2), where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

McDonald v. Snelling, 14 Allen, 295, 92 Am. Dec. 768; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *State, Hartlove, v. Fox*, 79 Md. 514, 24 L. R. A. 679.

The defendants have done nothing, and have omitted nothing, directly injuring White, but his injury is admitted to have proceeded from Phillipi.

No case can be found where a steamboatman is held liable to one passenger for what may be termed the careless or negligent acts of another passenger, in which the steamboatman does not participate, and of which he has no knowledge or notice, and no means or opportunity of preventing, and that the steamboatman's rules or the absence of rules on the particular subject have nothing to do with the question.

Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 109, 14 Rep. 190.

Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong.

Ray, Negligence of Imposed Duties, Personal, chap. 9, pp. 133, 134; *Parrott v. Wells ("Nitro-Glycerine Case")* 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Roberts v. Johnson*, 58 N. Y. 613; *Colterill v. Starkey*, 8 Car. & P. 691; *The Clara Clarita v. Cox ("The Clarita and The Clara")*, 90 U. S. 23 Wall. 1, 23 L. ed. 146; *Ashley v. Hart*, 147 Mass. 573; *Buck-* 88 L. R. A.

ley v. Gutta Percha & R. Mfg. Co. 113 N. Y. 540.

Extraordinary and unusual occurrences are not to be as readily anticipated, under any circumstances, as are those which frequently happen.

Ray, Negligence of Imposed Duties, Personal, chap. 9, p. 142; *Sjogren v. Hall*, 53 Mich. 274; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Graeff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L. R. A. 606; *Thomson v. Manhattan R. Co.* 75 Hun, 548; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 474, 14 L. ed. 504; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535.

The carriers of passengers only contract for their own acts, and for such a degree of watchfulness and diligence as is practicable, short of incurring an expense which would render it altogether impossible to continue the business.

Redf. Car. § 847; *Chicago, B. & Q. R. Co. v. Hazard*, 26 Ill. 373; *Tuller v. Talbot*, 23 N. Y. 357, 76 Am. Dec. 695; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 584, 75 Am. Dec. 258; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554, 6 Blatchf. 158.

The carrier must have positive notice of the facts or circumstances endangering his passenger before he is required to exercise any particular diligence for the passenger's safety, or can be found guilty of negligence for not having done so.

Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 109, 14 Am. Rep. 190; *Bowen v. New York C. R. Co.* 18 N. Y. 408, 73 Am. Dec. 629; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Orocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 306; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554; *Cleveland v. New Jersey S. B. Co.* 89 N. Y. 627, 125 N. Y. 299; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 38 Am. Rep. 533; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522.

The owner of a vessel is not responsible for an injury caused by the firing of a gun therefrom, where the firing was by one of the crew, not in the line of his employment, and against the owner's orders.

Haack v. Fearing, 5 Robt. 529.

That the defendants are corporations, having charters granting them specific powers, exempts them from the torts of their agents and servants, when committed outside the powers and duties embraced by the charters, at least in cases where they are not acting or professing to act under those powers.

Mallory v. Hanauer Oil Works, 86 Tenn. 599; *Buckeye Marble & F. Co. v. Harcey*, 92 Tenn. 115, 18 L. R. A. 252; *Miller v. American Mut. Acci. Ins. Co.* 93 Tenn. 179, 20 L. R. A. 765; 2 Morawetz, Priv. Corp. § 730; 2 Beach, Corp. § 422; Mecham, Agency, §§ 737, 738.

Where the acts of the master of a boat occasioning the damage are not within the scope of his ordinary duties, nor directly sanctioned by the owners, they are not responsible.

The Druid, 1 W. Rob. Adm. 301; *Dias v.*

Owners of the Revenge, 3 Wash. C. C. 262; *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110; *McGuire v. The Golden Gate*, 1 McAll. 104.

The charterer of a boat or vessel during the term of the charter is the owner *pro hac vice* of the boat or vessel, and represents it fully with reference both to contracts and torts arising or accruing during the charter, and the owner is relieved from all responsibility upon such contracts, or for such torts.

1 Parsons, Shipping & Admiralty, 1st ed. pp. 106, 125, etc., and 278, etc.; *Thorp v. Hammond*, 79 U. S. 13 Wall. 415-417, 20 L. ed. 421, 422; *Leary v. United States*, 81 U. S. 14 Wall. 610, 611, 20 L. ed. 756, 757.

There could have been no ratification of what Couch had done, unless that company had such knowledge, or notice.

Mechem, Agency, §§ 129, 750, and cases cited; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4.

The Constitution recognizes the right of the citizen to keep and to bear arms.

Const. U. S. Amendments, art. 2.

Shotguns and rifles are arms within the sense of the Constitution.

Aymette v. State, 2 Humph. 154; *Andrews v. State*, 8 Heisk. 179, 8 Am. Rep. 8; *Porter v. State*, 7 Baxt. 108; *Andrews v. State*, 3 Heisk. 178, 8 Am. Rep. 8.

How is it possible to charge the defendants with negligence because Phillipi had the gun or exhibited the gun? Phillipi himself had the lawful right to do just what he did, and whether he had or not, what he did imposed no liability on the defendants.

Cooley, Torts, title *Misadventures*, p. 598; *Underwood v. Hewson*, 1 Strange, 596; *Wentzer v. Ward*, Hob. 134; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Cole v. Fisher*, 11 Mass. 138; *Welch v. Durand*, 86 Conn. 183, 4 Am. Rep. 55; *Morris v. Platt*, 32 Conn. 75; *Moebus v. Becker*, 46 N. J. L. 41; *The Burgundia*, 29 Fed. Rep. 464; *Allan v. State S. S. Co.* 182 N. Y. 91, 15 L. R. A. 166; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623; *Carpenter v. Blake*, 75 N. Y. 12; *Morris v. Platt*, 32 Conn. 75; *Simonds v. Henry*, 39 Me. 155, 63 Am. Dec. 611; *Fleet v. Hollenkemp*, 18 B. Mon. 219.

The rule for the assessment of damages, in cases like the present, where the shipowner is sued for a tort done by those in charge of the vessel, is that the measure of damages is the actual damage incurred, the owners being innocent of any participation in the tort. In such cases the damages are not to be made punitive.

McGuire v. The Golden Gate, 1 McAll. 108; *The Amiable Nancy*, 16 U. S. 8 Wheat. 546, 558, 4 L. ed. 456, 458; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554, 30 L. ed. 253; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 344; *East Tennessee, V. & G. R. Co. v. Lee*, 90 Tenn. 570; *Cherokee Packet Co. v. Hilsen*, 95 Tenn. 1.

Messrs. Metcalf & Walker also for appellants.

Messrs. Turley & Wright for appellees.
28 L. R. A.

Beard, J., delivered the opinion of the court:

This is a suit for damages, brought by the defendant in error against the West Memphis Packet Company and the Memphis & Arkansas Ferry Company; the gravamen of the complaint being that, while a passenger on the steamboat Golden Gate, operated, as is alleged, by and in the joint interest of plaintiffs in error, owing to the failure of their servants to preserve order and decorum on this boat, the defendant in error was severely injured by a shot fired from a gun negligently handled by a fellow passenger. Upon pleas which made issues upon all the material averments in this declaration a trial was had, which resulted in a verdict of \$3,500 against both plaintiffs in error, from the judgment on which they have prosecuted their appeal to this court.

As to the facts, it is only necessary to say that the evidence tended to show that plaintiffs in error were rival corporations, operating different streams, doing a ferry business from Memphis to different points on the west shore of the Mississippi river, and something of a coasting trade as well, and at the same time giving occasional excursions for revenue, to which the public were invited; that this rivalry was attended with much loss, and at last resulted in litigation; that, pending this litigation, they came together, and entered into an agreement by which the West Memphis Packet Company was to retire and tie up its steamer the C. B. Bryan until necessity should call it out, and that the Memphis & Arkansas Ferry Company should continue its steamer the Golden Gate in operation, and that it was to do the work theretofore done by the two steamers, in the interest of both companies, they sharing the losses and profits; that this agreement provided for a board of arbitrators, who should choose the officers of the combination and the employees to man this boat; that this board was never constituted, but that all officers of the Memphis & Arkansas Ferry Company, as well as crew of the Golden Gate, were retained by the combination, and C. B. Bryan, of the West Memphis Packet Company, was made treasurer of this combination. The evidence further discloses that one of the general officers of the company owning the Golden Gate, and engaged in operating this steamer, was one James Couch; that he, through the newspapers of Memphis, advertised that an excursion would be given by that boat to a point some 20 miles below Memphis; that this advertisement had general publicity, and was known to Mr. Bryan of the West Memphis Packet Company, and treasurer of the combination, several days before it occurred, and he made no objection to it; that while both boats before the combination made similar excursions, in the interest of the rival companies, such as occurred afterwards were made by the Golden Gate on joint account; and that the proceeds of this excursion were paid by Couch into the treasury of the Memphis & Arkansas Ferry Company. The evidence also discloses that the defendant in error, with his children, in company with 75 or 100 other persons, of all ages and both sexes, embarked as passengers on this excursion, and that among these pas-

passengers were a number who were armed with guns and pistols, who, occupying positions on the different decks of the boat, soon after it left its moorings and got under way, began an indiscriminate firing at objects in the water, to the great alarm of many persons on board. At this time the defendant in error was seated on the middle deck, where he was directed by Couch to go, and where many of the other passengers were. He was seated with one of his children on his knee, and the others near by, while on the deck above were a party of three or four persons who were practising with their guns. One of these parties, a passenger named Phillippi, while manipulating a repeating gun, for the purpose of exhibiting its construction and movements to those persons immediately around him, placed a loaded shell in one of the chambers of the cylinder, which, while the muzzle of the gun was pointed down, in some unknown and accidental way exploded, the shot therefrom passing through the thin covering or roof of the hurricane deck into the body of White and the child in his arms, inflicting the injuries for which he here sues, and a mortal wound on the child. Among the persons standing near Phillippi, watching and interested in the experiment, was Couch, the party who advertised the excursion. The evidence shows that not only he had not endeavored to stop the firing, but he had encouraged it by actively participating in it. The contention of the plaintiffs in error was that this excursion was an individual enterprise of Couch's, in which their combination was not interested, and also that Couch was not the master, nor in charge of the boat, on this excursion; but there was evidence tending to show otherwise, and upon which, with the various issues of fact, the jury could—and, it must be assumed in this court, did—rest their verdict. This is equally true with regard to the other issues of fact passed upon in the court below.

After the evidence of the plaintiff below was in, the defendants below moved the court to exclude it from the jury, upon the ground that it would not support a verdict in his favor. This motion was overruled, and the action of the court in this regard is assigned for error; and an earnest argument is submitted, insisting upon this as a proper practice in this state. Whether the practice is a wise one, and as such should be adopted, it is not necessary for us to determine. It is sufficient to say that it has never prevailed in Tennessee, and there was certainly nothing in the testimony, as we read it in this record, which would have warranted its introduction and application in this case.

A sweeping objection is made to the charge of the trial judge,—that it abounds in generalities without application to the facts of the case, and that its effect was to confuse or mislead the jury, rather than guide them to an intelligent verdict. We have carefully examined this charge, in view of the interest involved and the hurt that could easily in such a case be unnecessarily inflicted by the trial judge on plaintiffs in error, and, while we find in it more or less of generalization and abstraction, which it would have been wiser to avoid, yet we do not regard it as amenable to this criticism. While general or abstract propositions are

stated, it is with a purpose, as we understand it, to illustrate and emphasize the relations of a carrier to his passengers, and their respective rights and responsibilities, and we are not able to discover, in doing this, that the jury were led to the consideration of false, or left to grope in the dark as to the true, issues. Whatever generalizations are indulged in, they led up to the statement of the law which determined the rights and responsibilities of the parties upon the issues of facts presented in the record, and in language within the easy apprehension of the jury.

Among the instructions given, and which it is now insisted were either misleading generalities or else positively erroneous when applied to the facts of this case, is the following: "The lawfulness of an act from which injury results is no excuse for the negligence, unskillfulness, or incaution of the party. Every one in the exercise of a lawful act is bound to use such reasonable and vigilant precaution as that no injury may be done to others. Nor is it material in this action whether the injury was wilful or not, but the gist of the action is whether or not the defendant used proper care in allowing the passengers using guns to use them in the manner the evidence shows they did use them on this trip." It is conceded that if this was an action against the party who placed the loaded shell in the gun, and pointed it downward towards defendant in error, when it was discharged, to his hurt, the fact that the explosion was unexpected and accidental would not discharge such party from liability; for the rule admittedly is well settled that, "if the injury is not the effect of an unavoidable accident, a person by whom it is inflicted is liable to respond in damages to the sufferer." *Talty v. Ayres*, 8 Sneed, 677. While this is conceded to be a sound principle, yet it is insisted it has no application to this case, and that the effect of the court's instruction is to make the plaintiffs in error liable for the incaution of Phillippi however blameless they themselves might be. We do not think so. It is true the court does say to the jury, in substance, that the lawfulness of an act will not excuse incaution or negligence in its performance, yet he distinctly informs them that the right of recovery in this action depends upon whether plaintiffs in error exercised proper care in allowing Phillippi to use the gun in the manner disclosed. Apparently to guard against all misapprehension on this point, a little further along the trial judge said: "If the conduct of the passengers was such as to create in the minds of any reasonable person any apprehension of danger, then the officer would be justified in permitting the passengers their course of conduct, and cannot be charged with negligence in so doing, or made liable for injuries resulting therefrom." In other words, while saying to the jury that, however lawful it might be in Phillippi to manipulate his gun, even with a loaded shell, on an excursion boat, with men, women, and children on board, yet this would not excuse the injury resulting in his incaution or negligence in doing the act, but the right of recovery against plaintiffs in error depended upon whether they had been careless or negligent in permitting Phillippi to make this experiment, and the trial judge cautions the jury that they

would not be negligent, if there was nothing in the action of Phillippi to excite apprehension in a reasonably prudent person. Thus regarded, we have no doubt of the soundness of the proposition charged.

It is next insisted that there was error in giving the following instructions: "While he [the carrier] is not an insurer, or bound to carry passengers safely at all events, yet the rule as to the care and foresight to be exercised makes him responsible for injuries and losses arising from even the slightest negligence in not providing safe and suitable means of transportation, or skilled, competent, and careful officers and crew, or in formulating and enforcing such rules of order and decorum as will secure and protect the passengers from injuries arising from careless, thoughtless, or negligent acts of their fellow passengers. The defendants in this case were bound to exercise the utmost care and vigilance for maintaining order and guarding the plaintiff, White, who was a passenger on board the boat, against personal injury, from whatever source arising, which might reasonably have been expected to occur, in view of all the circumstances of the case, and the number and character of the passengers on board the boat." It will be seen that the trial judge lays down the rule which requires the exercise of the utmost vigilance and diligence on the part of the boat's officers and agents in protecting the defendant in error, yet he carefully limits its operation to cases of danger which, under all the circumstances, they might reasonably have expected or anticipated. He does not make them insurers, and liable at all hazards, but in effect tells the jury that they were bound, and only bound, to give to the protection of defendant in error the utmost care and vigilance against a danger which prudence would suggest as possible to occur under the circumstances of the case. We are satisfied, not only that this language could not have been misunderstood but that it announced the law. In the leading case in America of *Flint v. Norwich & N. Y. Transp. Co.* 6 Blatchf. 158, 84 Conn. 554 [*Norwich & N. Y. Transp. Co. v. Flint*], 80 U. S. 18 Wall. 8, 20 L. ed. 556, Justice Shipman, in submitting to the jury a case involving the liability of a steamer and its owners for an injury sustained by one passenger from the act of a fellow passenger, said: "The defendants were bound to exercise the utmost vigilance and care, in maintaining order and guarding the passengers against violence from whatsoever source arising, which might reasonably be anticipated, or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board." This is regarded as a fair statement of the rule, and it has been adopted and approved by the courts where they have had occasion to deal with this question. See *Goddard v. Grand Trunk R. Co.* 57 Me. 203, 2 Am. Rep. 39; *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. See note to *Meyer v. St. Louis, I. M. & S. R. Co.* 4 C. C. A. 281, 10 U. S. App. 677, 54 Fed. Rep. 116.

But it is contended that this rule of the "utmost vigilance" may be sound when applied to the protection of passengers against injuries resulting from faulty machinery or wrongful

acts of the employees of the carrier, yet it does not apply to injuries arising from the misconduct of fellow passengers; that in the class of cases embracing the latter, "reasonable diligence" is the measure of liability. This distinction was insisted on in *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224, and there rejected; the court saying that, if the employees of the carrier had no control or power over the passengers, the argument would be sound. The case of *Chicago & A. R. Co. v. Pillsbury*, 128 Ill. 9, is relied upon as authority for this contention; but it will be found that the trial judge there gave in charge to the jury the rule of "utmost vigilance," and the judgment on a verdict following his instruction was affirmed. While there will be found some general observations of the court which give some support to the view here insisted upon, yet, taking the opinion as a whole, we think it in line with *Flint v. Norwich & N. Y. Transp. Co.* 6 Blatchf. 158. The court, says: "It is the duty of carriers by rail to preserve order in their carriage, and to protect passengers from all danger, from whatever source arising on their trains. . . . [But], with regard to danger and hazard to travel arising otherwise than on the train, and not incidents of such travel," as was the case there, the degree of care required will depend upon the attendant circumstances. Yet "in no case," continues the court, "must the carrier expose the passenger to extra hazardous dangers that might readily be discovered or anticipated by all reasonable care and diligence." It is well to observe, also, that the injury to the passenger complained of in that case was one that resulted from an invasion of the cars by a violent mob from the outside, and the general observations of the trial judge here relied on were addressed particularly to that phase of the facts. In *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 98 Am. Dec. 99, the court does make a distinction in the degree of care to be exercised in the one case and then in the other. The court there says: "The defendants were bound to see that their officers, agents, and servants, used the utmost care and diligence in keeping the steamboat constantly provided with suitable machinery, boats, . . . and competent officers and crew, . . . and in making all the arrangements necessary to secure the passengers against any danger which might reasonably be anticipated from the action of the winds and seas, of the officers, . . . or of other passengers. They were not indeed responsible for the negligent or wrongful acts of the passengers to the same extent as for those of their own officers and crew. . . . And they were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers." It will be seen that there is a slightly appreciable difference in the degrees of care exacted in the two classes of cases and it falls far short of the modification of the rule insisted on by the plaintiffs in error. Nor do we see any sound reason for such modification. On the contrary, we think that carriers by land as well as on the water, with power conferred by law to protect passengers who have committed themselves to their care, ought to be held to the greater degree of diligence in

guarding them from the negligence as well as violence of their fellow passengers, when, as prudent men, knowing the surrounding facts, they might well anticipate, from the attendant circumstances, that the acts in question might be attended with injury. And we certainly find nothing in the facts of this case, especially so far as the Memphis & Arkansas Ferry Company is concerned that should induce a relaxation of the rule, as we think the conduct of the parties in charge of this boat was only a little short of gross negligence.

But, again, it is contended that this rule of "utmost care" had been enforced alone in cases where passengers had received injuries from mobs, riots, or from assaults or other form of violence of drunken or insane parties, and never in cases where the injury resulted from the negligence of a fellow passenger. In this contention the counsel for the carrier is also in error. *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99, is a leading case enforcing a contrary view. In that case plaintiff was a passenger on the steamboat, and took a position on deck, as he had the right to do, and at a point underneath a small boat which was suspended by tackle and falls, a part of the necessary equipment of the steamer. There was nothing in the evidence to indicate that this small boat was improperly hung or insecurely fastened. The plaintiff showed, however, that when he took his position there were already two persons in this boat, and that shortly after this number was increased to five. It was also in evidence that passengers, before the day in question, rode in this boat, with the knowledge and permission of the officers of the steamer. While plaintiff was standing under it, the stern bolt broke, and it fell on plaintiff, and injured him seriously. The court says: "They [the steamboat company] were bound to use the utmost skill and care of prudent men in taking precautions to prevent any passenger from being injured by the ignorant, negligent, or reckless acts of other passengers. As to the boat, the fact that it was hung in the place in which it was by order of the government inspector did not protect the defendants from responsibility for negligence in the manner of hanging or using it. They were still bound to use the utmost skill and care, consistent with the nature and extent of their business, in so keeping it secured and preventing passengers from getting into it, as to guard against injury by its falling upon a passenger from any cause, including careless or irregular acts of other passengers, which might reasonably be anticipated." In *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540, the same rule was applied. There a passenger, while entering a station for the purpose of taking a train, was struck by a mail bag carelessly and negligently thrown from the mail car by a postal clerk employed by the United States government; and it was held that the clerk and the injured party were fellow passengers, that the railroad owed the duty of utmost vigilance to protect the one from an injury resulting from the negligence of the other, that the manner of throwing off these mail bags was dangerous, and that this had been so long the customary method of disposing of them that notice to the railroad company might be fairly

implied. On the same point see *Galloway v. Chicago, M. & St. P. R. Co.* 56 Minn. 346, 23 L. R. A. 442.

A number of special requests were submitted by plaintiffs in error, some of which were rejected, and others given in a modified form. As we are satisfied with the general charge, only one of these will be noticed. The trial judge was asked, and declined, to give the following: "If the jury believe, from the evidence, that the defendant the West Memphis Packet Company did not own and had no interest in the steamboat Golden Gate, and had nothing to do with the running or navigating of the said steamboat on the occasion alleged in the said declaration, . . . then the jury will find for the defendant the West Memphis Packet Company." The real contention of both plaintiffs in error in the progress of this cause has been that this excursion was an individual affair of Couch's, for which neither was responsible, with the additional incidental insistence of the West Memphis Packet Company that it was not liable because the Golden Gate was not managed by the regular officers of the Memphis & Arkansas Ferry Company, who were for the time being the officers of the joint enterprise. Both phases of this contention were submitted sufficiently to the jury. In the outset of his charge the trial judge says distinctly to the jury that, among other essentials to recovery by plaintiff below, the "evidence must satisfy you [them] that the Golden Gate was being run by and in the interest of defendants at the time of the injury." This clearly put the burden on the plaintiff below of showing that the West Memphis Packet Company was interested in this venture as a prerequisite to recovery, and in this sentence the trial judge covers the point to which this special request was directed. The same reply may be made as to the refusal of the trial judge to give the further special request as to the liability of the Memphis & Arkansas Ferry Company, with this addition: that in granting the fifth special request of the company, even with the qualification attached, the fourth special request was more than covered, and left nothing that this company could complain of on this point.

But we are asked to reverse this judgment upon the ground that the verdict is excessive. The testimony shows that the defendant in error received shot in the finger, and through the thumb of his left hand, and that his right arm was perforated from his shoulder to his hand with shot, a great number of which were never extracted. It also appears that several shot entered the right leg, and one at the joint of left ankle. The surgeon who attended him said he regarded the wounds as not at all serious; yet there is testimony, upon which the jury was warranted in acting, that this injury has permanently affected his strength, and especially his capacity for lifting,—a power very valuable to him as a laboring man. This question of damages was one peculiarly for the jury, and in the absence of a conviction that their verdict is the result of caprice, prejudice, or corruption, we do not feel authorized to interfere with it.

Judgment is affirmed.

Rehearing denied.

NEBRASKA SUPREME COURT.

William M. CLARK *et al.*, Exrs., etc., of
John J. Turner, Deceased, *Piffs. in Err.*,
v.

William J. TURNER *et al.*

(30 Neb. 200.)

*1. The contents of a lost will cannot be proved solely by the declarations of the testator.

*Headnotes by IRVINE, C.

NOTE.—Evidence to establish lost or destroyed wills.

I. Presumption as to revocation of missing will.

- a. Generally.
- b. Burden of proof.
- c. Rebutting presumption.
- d. Declarations.
- e. Where there is more than one will.

II. Proof of execution.

- a. Generally.
- b. Declarations.
- c. Witnesses.

III. Evidence of the contents.

- a. Sufficiency.
 1. In general.
 2. Wills torn in pieces.
 3. Proof by copy.
 4. Number of witnesses.
 5. Proving part of the contents.
- b. Declarations.
- c. Loss after probating or filing for record.

I. Presumption as to revocation of missing will.

a. Generally.

The presumption that a will is revoked arises where a will is not shown to be in existence at the death of the testator, and this presumption, although not conclusive, must be overcome.

So, where a will was traced to the possession of the testator and was not found after his death, it was presumed that it was destroyed by the testator *animo revocandi*, under N. Y. Rev. Stat. 67, § 67, providing that no will shall be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the testator or be shown to have been fraudulently destroyed in his lifetime. *Bulkley v. Redmond*, 2 Bradf. 281.

And under this statute it was held that a will could not be established where it was destroyed by the testator's wife in his presence, and not fraudulently. *Timon v. Claffy*, 45 Barb. 498.

So, under this statute, where a will was duly executed and in the custody of the testatrix, and was not found after her death, the presumption was that it was destroyed by her *animo revocandi*, and it could not be proved as a lost will unless it was shown to have been in existence at the time of the death of the testatrix, or to have been fraudulently destroyed in her lifetime. *Re Marsh*, 45 Hun. 107; *Betts v. Jackson*, Brown, 6 Wend. 173; *Idley v. Bowen*, 11 Wend. 236; *Knapp v. Knapp*, 10 N. Y. 276.

And under the same section (3 N. Y. Rev. Stat. 5th ed. 144), a lost will could not be admitted to probate where there was no evidence that the testator had not destroyed it. *Re Nichols*, 40 Hun. 287.

In *Snider v. Burks*, 34 Ala. 53, it was said that the presumption that a will was revoked applied where it was traced to the testator's possession and could not be found after his death, but if not in his possession the presumption did not apply.

And where a will was traced to the possession of a decedent, and could not be found, the presumption 38 L. R. A.

2. The testimony of a witness as to the contents of a will, his knowledge being derived from testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations.

3. Such declarations, it seems, are admissible to corroborate more direct evidence.

4. Attorney's fees cannot be allowed in the contest proceedings to unsuccessful proponents of a will. If such proponents are entitled to reimbursement out of the estate, it must be

tion was that it had been destroyed *animo revocandi*. *Holland v. Ferris*, 2 Bradf. 384.

And the presumption of revocation in the case of a lost will prevailed, where there was no evidence to overcome the same. *Mercer v. Mercer*, 37 Ky. 21.

So, it was not enough to show that someone other than the testator had an opportunity and motive to destroy the will, where it was not traced out of the possession of the testator. In such a case it would be presumed to have been revoked. *Blüble's Estate*, 3 Pa. Dist. R. 16.

In *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 38, it was said: "If the will had remained in the custody of the testator, or it had appeared that, after its execution, he had access to it, the presumption of law would be, from the fact that it could not be found after his decease, that the same had been destroyed by him, *animo revocandi*."

And it was held not sufficient to establish the fraudulent destruction of a will, to show that persons interested had opportunity to destroy it. *Collyer v. Collyer*, 110 N. Y. 481.

So, under Cal. Code Civ. Proc. § 1330, providing that no will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the life time of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses, the probate of a lost will was set aside where it was proved to have been burned before the testator's death; but there was no averment in the petition that it was fraudulently destroyed, and the contestant was not called upon to meet any issue of that kind. *Kidder's Estate*, 37 Cal. 282.

And where a will was found with the seal cut off the same, the presumption was that it was revoked. *Lambell v. Lambell*, 3 Hagg. Eccl. Rep. 568; *Hare v. Nasmyth*, 3 Hagg. Eccl. Rep. 192, note.

And the fact that a will was found mutilated raised the presumption that it was revoked, which presumption should be overcome by evidence. *Roberts v. Round*, 3 Hagg. Eccl. Rep. 552.

Where the testatrix lost her will and directed the scrivener to prepare another to take its place, and to keep it to prevent it from being lost, and her husband induced him to give it up about two weeks before she died, and it could not be found after her death, it was a question for the jury whether or not the will was destroyed. *Re Soule*, 40 N. Y. S. R. 600.

And the probate of a draft of a first codicil was refused where a will and second codicil were found, but the first codicil could not be found, although the residuary legatee who would be prejudiced by the draft forming part of the probate had consented to its probate. The court held that the presumption of revocation was not overcome. *Goods of Shaw*, 1 Swab. & T. 62.

So, in *Brown v. Brown*, 8 El. & Bl. 373, 27 L. J. Q. B. N. S. 173, 4 Jur. N. S. 163, it was said that parol evidence was admissible to prove a lost will, the weight of which evidence was to be a

had in the course of administration, and after administration granted.

(January 7, 1897.)

ERROR to the District Court for Lancaster County to review a judgment refusing probate to the will of John J. Turner, deceased. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Marquette, Dewese, & Hall, and *G. M. Lambertson* for plaintiffs in error.

question for the jury. But the will was not established in this case because the presumption that it was destroyed by the testator was not overcome.

And in *Dawson v. Smith*, 3 Honst. (Del.) 335, it was held that proof of the execution of a will and of its contents, and a diligent search for it after the death of the testator without its having been found, was sufficient ground for the admission of parol evidence to prove the substance and contents, and the presumption that the testator destroyed the will, because it was not found, was purely a question of fact to be determined by the jury.

And where a will was lost or destroyed in the testator's lifetime, and its loss was known to him months before his death, the probate of the same could not be established by evidence of its contents. *Deaves's Estate*, 140 Pa. 242.

And before probate of a lost will was allowed the court required that an advertisement be made offering a reward for the production of the will. *Goods of Callaghan, Jr.* L. R. 13 Eq. 245.

But where the testator had stopped before he had torn the will in pieces it was no revocation. *Doe, Perkes, v. Perkes*, 3 Barn. & Ald. 489.

And the fact that a testator knew a few days before his death that his will was lost, was not sufficient to make the deduction that the will was revoked, although he did not renew it in writing. *Steele v. Price*, 5 B. Mon. 58.

And the presumption that a will was destroyed did not arise where the evidence did not satisfy the court that it was not in existence at the time of the testator's death. *Finch v. Finch*, L. R. 1 Prob. & Div. 371, 36 L. J. Prob. N. S. 78, 16 L. T. N. S. 268, 15 Week. Rep. 797.

In *Re Waldron*, 19 Misc. 333, the question of testator's competency when he destroyed his will was involved, but such questions do not come within the scope of this note.

b. Burden of proof.

The burden of proof is on the propounders of a lost or destroyed will to show that it was in existence at the death of the alleged testator, or was destroyed in his lifetime without his consent or knowledge, in order to overcome the presumption of revocation.

The legal presumption where the will is last seen in the possession of the testator and cannot be found after his death is that he destroyed it for the purpose of revocation, and the burden of proof is on the propounders to overthrow that presumption. *Re Nichols*, 40 Hun. 387; *Collyer v. Collyer*, 110 N. Y. 481; *Idley v. Bowen*, 11 Wend. 227; *Betts v. Jackson*, Brown, 6 Wend. 173; *Holland v. Ferris*, 2 Bradf. 334; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Hatch v. Sigman*, 1 Dem. 519; *Lorley v. Jackson*, 3 Phillim. Eccl. Rep. 123; *Behrens v. Behrens*, 47 Ohio St. 323; *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340; *Minkler v. Minkler*, 14 Vt. 126; *Minor v. Guthrie* (Ky.) 4 S. W. 179; *Wargent v. Hollings*, 4 Hagg. Eccl. Rep. 245; *Lillie v. Lillie*, 3 Hagg. Eccl. Rep. 184; *Pinhalow v. Robinson*, 3 Hagg. Eccl. Rep. 182, note; 88 L. R. A.

Messrs. Sawyer, Snell, & Frost and *Charles O. Whedon*, for defendants in error:

The burden lies on the proponents to show that the will cannot be found, and that a diligent but unsuccessful search has been made for it.

Mercer v. Mackin, 14 Bush. 439.

When the proof fails to show that a will last known to have been in the possession of the testator was not among his effects at his death, there is no presumption either that he had or that he had not destroyed it *animo reco-*

Jaques v. Horton, 74 Ala. 238; *Saunders v. Saunders*, 6 Notes of Cases, 518; *Newell v. Homer*, 120 Mass. 277; *Fuentes v. Gaines*, 25 La. Ann. 85, 3 Woods. 77; *Harris v. Harris*, 10 Wash. 553.

So, in *Gurdner's Estate*, 184 Pa. 420, it was held: "The burden having been on the proponents in this case to overcome the presumption of revocation which sprang out of the fact that the will, which Lot Gardner admittedly executed, could not be found at his death, made not only testator's character, conditions, acts, and declarations, but the conduct and interests of those who were around him, from and after the date of his will, legitimate subjects of inquiry."

And where a will was executed in duplicate, and the one that was in the possession of the testator before his death was not found after his decease, the burden of proof was upon the executor setting up the duplicate to show that the testator had not destroyed the one in his possession, and that he did not intend also to annul the duplicate. *Colvin v. Fraser*, 2 Hagg. Eccl. Rep. 286.

So, the burden of proof was upon the propounders endeavoring to establish a lost will, to show that the will was in existence at the time of the testator's death, or that it was fraudulently destroyed in his lifetime, under N. Y. Code Civ. Proc. § 1863, providing that the plaintiff is not entitled to a judgment establishing a lost or destroyed will, unless the will was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime. *Perry v. Perry*, 42 N. Y. S. R. 291.

So, under this section, where a will could not be found, the burden of proof was on the propounders of the will to show by proof clear and convincing, not only in respect to the provisions of the will, but that it was in existence at the time of the testator's death. *Kahn v. Hoes*, 14 Misc. 63.

c. Rebutting presumption.

In order to lay the grounds for secondary evidence of the contents of a will, and in order to overcome the presumption that the will was revoked where it cannot be found, it is necessary to show that the will had been surreptitiously destroyed before the testator's death, or that he destroyed it when he was of unsound mind, or that it cannot be found and that it was out of the power of the testator to have access to the place where such will was deposited, or that it was in existence at the time of his death.

So, the presumption that the will was destroyed by the testator *animo revocandi* was rebutted, where it was shown that it was deposited by the testator with a custodian, and that the testator did not thereafter have it in his possession, or have access to it. *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88.

So, where the presumption of revocation from the fact that the will was not found was rebutted by circumstantial evidence, a duplicate will was probated. *Saunders v. Saunders*, 6 Notes of Cases, 518.

And the presumption that the testatrix had de-

candi. In such cases, it is simply a question of fact.

The court left it to the jury to decide from all the evidence whether or not the deceased left an unrevoked will. This was proper.

Podmore v. Whotton, 8 Swab. & T. 451; *Finch v. Finch*, 16 L. T. N. S. 268.

There was no competent testimony as to the contents of the will alleged to have been made by Dr. Turner.

The testimony of the witness Curtis as to conversation between himself and Dr. Turner was inadmissible as evidence under the pro-

visions of the statute above quoted. Mr. Curtis was pastor of the church, and in that capacity visited Dr. Turner during his last illness.

When objection is made to the testimony of a minister of the gospel as to communications made to him by a member of his church, the question of the admissibility of the testimony is to be determined by the same rule that is applied where objection is made to the testimony of an attorney as to communications made by his client, or a physician where a communication has been made by a patient.

stroyed her will with intention to revoke was rebutted by evidence indicating that the administrator had suppressed or destroyed it, and the testatrix was too ill to have access to the place where the will was kept. *Podmore v. Whotton*, 8 Swab. & T. 449, 38 L. J. Prob. N. S. 143, 10 Jur. N. S. 756, 10 L. T. N. S. 754.

The presumption of revocation was overcome where the testamentary intention of the testator was shown to exist up to time of his death, and he was unable to have access to the place where his will was kept. *Scoggins v. Turner*, 98 N. C. 135.

And the probate of the draft of a will was proved where the will could not be found, and the presumption of revocation was overcome by many circumstances tending to negative the presumption. This was shown by affection manifested by the deceased, the way the will was made under the influence of that feeling as expressed at that time and afterwards, and by proof that the testatrix never expressed a desire to benefit by her will any other, and that she knew that her children would receive no part of her property if she died intestate. *Patten v. Poulton*, 1 Swab. & T. 55, 27 L. J. Prob. N. S. 41, 4 Jur. N. S. 841.

And the presumption of revocation was overcome where it had been admitted on the morning after the testator's death that the will was in the house and the will could not be found, and the party making the admission was interested in having the will suppressed. *Brown v. Brown*, 10 Yerg. 84.

In *Colvin v. Fraser*, 2 Harg. Eccl. Rep. 266, it was said that the presumption that a will was destroyed by the testator where it could not be found after his death may be rebutted by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence, such as proving the existence of the instrument after the testator's death, or by proving that he himself destroyed it when of unsound mind or that it was fraudulently destroyed by some other person. But under this last supposition the proof should be clear to overcome the presumption of innocence.

So, in *Minkler v. Minkler*, 14 Vt. 125, a will was established where such evidence was produced as satisfied the court that although the will had been destroyed by someone before the death of the testator it was not with his privy.

Where a will is destroyed by the testator, the presumption of revocation may be overcome by evidence showing that the testator had not sufficient capacity to revoke his will, and the will may be established by proper proof of its execution and contents. So, where a will is attempted to be revoked by destruction and the revocation is not in accordance with a statute, as where someone not in the testator's presence attempts to destroy a will claiming that he authorized such destruction.

So, where a will was duly executed and destroyed in the lifetime of the testator when he was in a

condition not to be able to revoke a will, it was established on satisfactory evidence of its destruction and of its contents. *Idley v. Bowen*, 11 Wend. 227.

And in *Hook v. Pratt*, 8 Hun. 102, it was held that under 2 N. Y. Rev. Stat. tit. 1, chap. 6, § 63, providing that whenever a will be lost or destroyed by accident or design the court of chancery shall have power to establish the same, and § 67, providing that no such will shall be proved as a lost or destroyed will unless the same shall be shown to have been in existence at the time of the death of the testator or be shown to have been fraudulently destroyed in his lifetime, it was held that upon due proof that the testator had destroyed certain clauses of his will while he was of unsound mind the same would be established.

So, a will and codicil were probated where the testator in a fit of insanity tore the codicil in pieces, but the pieces were preserved, and the testator afterwards, on being restored to his right mind regretted the act of attempted destruction. *Borlase v. Borlase*, 4 Notes of Cas. 106.

And a will was probated where the testator tore his will in pieces after its execution and while he was in a delirium, and the pieces were preserved, and on his recovery he had made declarations that he was very sorry for what he had done and intended to make another will. *Brunt v. Brunt*, L. R. 3 Prob. & Div. 37, 38 L. T. N. S. 363, 21 Week. Rep. 362.

So, where the testatrix, who tore up and destroyed a will previously executed by her, was in such a condition and laboring under an excitement which prevented her from having a reasonable intention of revocation, such act was held not to be a revocation of the will. *Re Forman*, 54 Barb. 274.

The presumption that a will was destroyed by the testator where it had been executed and could not be found after his death did not apply where the testator became insane after the execution and continued insane to the time of his death, and the burden of showing the will was destroyed was on the party setting up the revocation, and the will was established by proof of a copy. *Sprigge v. Sprigge*, L. R. 1 Prob. & Div. 608, 38 L. J. Prob. N. S. 4, 19 L. T. N. S. 462, 17 Week. Rep. 8.

And a will was established where it was destroyed by the testator through fraud and undue influence. *Voorhis v. Voorhis*, 50 Barb. 119.

And the codicil of a will was probated where it had been burned by testatrix's orders but not in her presence, and its contents were proved by the draftsman who had a copy, and by the attesting witness and by another party who had read the codicil before it was burned, and believed the draft to be a correct copy. *Goods of Dadds, Deane & S. Eccl. Rep. 290.*

In *Wilmot v. Talbot*, 3 Harr. & M'H. 2, 1 Am. Dec. 374, in an action of ejectment where evidence of a daughter-in-law of the testator was offered to prove the destruction of a will and its contents, it was held that she was a competent witness to prove the destruction of the will by her husband, where

In order to exclude a privileged communication, it is not necessary to first prove that the communication was proper or necessary to enable the minister, physician, or attorney to discharge the functions of his office; that will be presumed from the relationship of the parties.

Edlington v. Mutual L. Ins. Co. 67 N. Y. 185; *Keeney v. Long Island R. Co.* 116 N. Y. 375, 5 L. R. A. 544; *Pennsylvantia Co. v. Marion*, 128 Ind. 415, 7 L. R. A. 687.

Such communications made to a physician or surgeon are confidential, and cannot be disclosed.

she had relinquished her right of dower, and the will devised the land to the grandchild of the testator.

In *Morris v. Swaney*, 7 Heisk. 591, there was evidence sufficient to overcome the presumption of revocation.

The presumption of revocation arising from the failure to find a will might be rebutted by evidence. *Davis v. Sigourney*, 8 Met. 487; *Legare v. Ashe*, 1 Bay, 464.

And evidence of the scrivener of the contents of a will which he had prepared for the deceased before his death should have been received, where there was some other evidence tending to show that it was the same will which had been executed. In this case an agreement of the parties dispensed with preliminary proof of destruction or loss. *Ford v. Teagle*, 63 Ind. 61.

The presumption of revocation did not apply where the will was left with a solicitor, and the testator had no access to it, and the will could not be found after the testator's death. *Hildreth v. Schillenger*, 10 N. J. Eq. 197.

And the presumption of revocation did not have to be rebutted by three witnesses which number was required to prove the contents of a will, but might be overcome by such other evidence as satisfied the jury. *Kitchens v. Kitchens*, 39 Ga. 163, 99 Am. Dec. 453.

But evidence of the contents was not admissible where the will was not shown to have been fraudulently destroyed before the testator's death, or lost or destroyed after his death, although the execution of a will was duly proved by the subscribing witnesses, and that the testator was competent. *Knapp v. Knapp*, 10 N. Y. 276.

And parol evidence of the contents of a will was not authorized where the deceased said he had made a will, and his housekeeper was a daughter having an interest adverse to the will, and the same could not be found in a search made three days after his death, under 2 N. Y. Rev. Stat. 63, § 67, providing that no will shall be proved as a lost or destroyed will unless proved to have been in existence at the death of testator or be shown to have been fraudulently destroyed in his lifetime, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. *Knapp v. Knapp*, 10 N. Y. 276.

And in establishing and probating a lost will, the loss of the instrument should, except in rare instances, be proved before evidence is received of its contents; but the order of evidence was held to be within the control of the presiding judge. *Conoly v. Gayle*, 61 Ala. 116.

And before parol evidence could be given of the contents of a will alleged to be destroyed, where there was not sufficient evidence to warrant the conclusion of its destruction, it must be shown that the party has made diligent search and inquiry after the will where it would probably be found. *Eure v. Pittman*, 3 Hawks (N. C.) 364. 33 L. R. A.

Houston v. Simpson, 115 Ind. 62; *Westover v. Elina L. Ins. Co.* 90 N. Y. 56, 52 Am. Rep. 1; *Loder v. Whelpley*, 111 N. Y. 239; *Parker v. Carter*, 4 Munf. 273, 6 Am. Dec. 513.

The testimony of Capt. Scott was inadmissible for two reasons—first, because he was the attorney for Doctor Turner, and should not have been permitted to disclose any communications made to him by his client.

Morris v. Cain, 39 La. Ann. 712; *Loder v. Whelpley*, 111 N. Y. 239; *Re Colman*, 111 N. Y. 230; *Bacon v. Friable*, 80 N. Y. 394, 36 Am. Rep. 627; *Root v. Wright*, 84 N. Y. 72, 33 Am. Rep. 495; *Sweet v. Owens*, 109 Mo. 1.

So, a new trial was granted where a lost will was proved, but the proponders did not show that they had made diligent search. *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 385.

And it was necessary to prove that a will was lost, spoliated, or destroyed subsequently to the death of the testator, in order to establish the same, under Swan's (Ohio) Stat. Rev. ed. 1030, § 47, providing that the several courts of common pleas shall have the power to probate any lost will and testament, where such original will had been lost, spoliated, or destroyed subsequently to the death of such testator. *Re Sinclair*, 5 Ohio St. 230.

And parol evidence of the contents of a will was not admissible, where it was not satisfactorily proved that the will was lost. *Jackson, Bush, v. Hasbrouck*, 12 Johns. 192.

6. Declarations.

Some cases hold that declarations of the testator are admissible in evidence to overcome or to sustain the presumption of revocation, arising from the inability to find a will which was in existence prior to the testator's death. But there is some conflict, and some cases deny this rule. And it is generally held that declarations alone are insufficient to overcome this presumption.

The declarations of the testator were admissible to overcome the presumption that a will was revoked by destruction by the testator where the alleged will could not be found. *Tucker v. Whitehead*, 59 Miss. 504; *Tynan v. Paschal*, 27 Tex. 236, 84 Am. Dec. 619; *Re Pare*, 116 Ill. 573, 59 Am. Rep. 395; *Patterson v. Hickey*, 32 Ga. 156; *Behrens v. Behrens*, 47 Ohio St. 323; *Whiteley v. King*, 17 C. B. N. S. 758, 10 Jur. N. S. 1079, 11 L. T. N. S. 342, 13 Week. Rep. 83; *Southworth v. Adams*, 11 Blas. 257; *Keen v. Keen*, L. R. 3 Prob. & Div. 105, 42 L. J. Prob. N. S. 61, 29 L. T. N. S. 247; *Re Johnson*, 40 Conn. 587; *Bauskett v. Keitt*, 22 S. C. 187; *Betta v. Jackson*, Brown, 6 Wend. 173, per Chancellor Walworth; *Durant v. Ashmore*, 3 Rich. L. 184, but see *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

So, where a will was found in an old barrel, torn in pieces, evidence of the declarations of the testatrix was admissible to determine whether or not it had been destroyed. *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

So, in an action of partition where the due execution of a will was proved, it was held that declarations of the testator at the time of his death should have been admitted to prove that the will was still in existence and had not been canceled by him. *Reeves v. Booth*, 2 Mill. Const. 334, 12 Am. Dec. 679.

And in *Youse v. Forman*, 5 Bush, 337, where a will was found with the name of the testator cut off the paper, it was held that the presumption of revocation might be strengthened by extrinsic evidence of declarations to show the intention of the testator.

So, where the presumption that the testator de-

Second, because he claimed to have been one of the executors named in the proposed will, and therefore had a direct legal interest in the result of the proceeding, by which it was sought to have the will admitted to probate.

Rasmussen v. Schmela, 13 Neb. 73.

Clark was not a competent witness as to any conversations he may have had with the deceased, because he also claimed to be an executor, and had the same interest in the result that Scott had.

The contents of this alleged will could not be shown by the declarations of the deceased.

Chisholm v. Ben, 7 B. Mon. 412; *Colligan v.*

destroyed his will was strengthened by parol evidence in his declarations and of his increased attachment for his wife, and was not overcome by other evidence, an engrossed draft of the will was refused probate. *Lillie v. Lillie*, 8 Hagg. Ecol. Rep. 184.

So, in *Weeks v. McDeth*, 14 Ala. 474, the declarations of the testator were admissible to strengthen or repel the presumption of revocation arising from the inability to find the will.

And the presumption of revocation was overcome by declarations of the testator corroborated by other evidence. *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 369, 24 Week. Rep. 479.

So, the presumption that the will was revoked was overcome where the testator a short time before his death sealed a package containing his will, inscribed, "*Pour être ouvert en cas de mort*," and made declarations up to the time of his death, and had centered all his affections on his only daughter provided for in the will. *Gains v. Lizardi*, 8 Woods, 77.

And where a duplicate second will was retained by the testatrix but was not forthcoming at her death, the presumption of revocation was overcome by declarations and other circumstances. *Saunders v. Saunders*, 6 Notes of Cases, 518.

And where declarations of the testator, and his conduct up to the evening of his death, indicated that he had not destroyed his codicil, and overcame the presumption of revocation. *Davis v. Davis*, 2 Add. Ecol. Rep. 223.

And the testator's declaration that his will was in his trunk as he started on a journey was sufficient to overcome the presumption of its revocation, where he died before reaching his destination and the will could not be found in the trunk. *Southworth v. Adams*, 11 Biss. 256.

Declarations of the testator that he would burn his will, followed by declarations that he did burn it, were confirmatory of the presumption of revocation. *Richards v. Mumford*, 2 Phillim. Ecol. Rep. 23.

But where a will was canceled by mutilation, and it was uncertain when the cancellation took place, a statement in a letter found with the will referring to her will, and loose declarations that she had made a will, were not sufficient to overcome the presumption of revocation. *Re White*, 25 N. J. Eq. 501.

And a will was not probated where it could not be found after the testator's death, and declarations of the testator as to his intentions and contents of the will, which were held to be admissible, were rebutted by other declarations that he had destroyed the will and did not intend to leave the property as indicated by the will. *Keen v. Keen*, L. R. 3 Prob. & Div. 105, 42 L. J. Prob. N. S. 61, 29 L. T. N. S. 247.

Evidence of vague declarations of the testator that he had destroyed the will was held inadmissible, and the probate of a will which had been out 38 L. R. A.

McKernan, 2 Dem. 421; Whart. Ev. § 992; *Mercer v. Mackin*, 14 Bush. 442; *Clark v. Morton*, 5 Rawle, 285, 38 Am. Dec. 670; *Pemberton v. Pemberton*, 18 Ves. Jr. 818.

Even in *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, it was not held that the declarations of St. Leonards, made after the execution of his will, were sufficient in themselves to prove its contents.

The subject of the admission and exclusion of parol declarations of a testator falls into six classes:

1. They are not admissible to prove a revocation of a legal will, except when accompany-

in pieces was granted, where the court did not believe the evidence of a witness to the effect that this had been done by the testator for the purpose of revocation. *Staines v. Stewart*, 2 Swab. & T. 320, 31 L. J. Prob. N. S. 10, 8 Jur. N. S. 440.

And a will was refused probate where the only evidence tending to overcome the presumption that it was destroyed by the testator *animo revocandi* was the declarations of the testator, where a will was found after the testator's death in his private drawer with the first page torn off and absent. *Williams v. Jones*, 7 Notes of Cases, 108.

And the probate of a will was refused where it was found the morning after the day he died under the bolster of his bed with his signature torn off, although the deceased had made declarations up to the time of his death to one witness, as to his satisfaction in regard to executing his will. *Goods of Lewis*, 1 Swab. & T. 31, 27 L. J. Prob. N. S. 31, 4 Jur. N. S. 248.

So, the probate of a will was denied where a will was proved to have been executed, and evidence of declarations of testator up to a short period before his death showed that he had a will, but there was no satisfactory proof that he had a will at the time of his death, or that it had been destroyed previous to that time. *Appling v. Eades*, 1 Gratt. 236.

And under N. Y. Code Civ. Proc. § 1835, formerly 2 Rev. Stat. 68, 3 Rev. Stat. 6th ed. 70, § 67, requiring the provisions of a lost or destroyed will to be clearly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness, it was held that the evidence of one witness as to the provisions of the will and the copy or draft proved by him only was not sufficient; and it was further held that declarations of the testator as to the contents of the will were not available for this purpose. It was held that the declaration of the testatrix, made before her death, as to the execution of a will, was not sufficient to rebut the presumption of its destruction by her, where no will could be found after diligent search made soon after her death. *Collyer v. Collyer*, 17 Abb. N. C. 328.

And in *Elghym v. People*, 79 N. Y. 546, it was held that the offer to prove the declarations of the deceased after the alleged destruction of the will was properly overruled, for the reason that such declarations were not accompanied by acts, and in no way constituted a part of the *res gestæ*.

In *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, it was said that the case of *Durant v. Ashmore*, 2 Rich. L. 184, was "in conflict with authority as well as with principle. The fact to be proved in such cases is, the act claimed as a revocation, together with the intent with which it is done, and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay, and should be treated as such."

For declarations, see *Gardner's Estate*, 164 Pa. 420.

In *Re Marsh*, 45 Hun, 107, the New York cases on

ing an act of revocation as part of the *res gesta*.

Gay v. Gay, 60 Iowa, 415, 46 Am. Rep. 78.

2. Subsequent ones are inadmissible to impeach the validity of a will for duress, or on account of some fraud or imposition practised upon the testator, or for some other cause not involving his mental condition.

Waterman v. Whitney, 11 N. Y. 157, 63 Am. Dec. 71.

3. In cases of insanity or undue influence, subsequent as well as prior declarations are admissible, not as evidence of the facts stated, but only as tending to show the mental ca-

pacify of the testator at the execution of the will.

Boplan v. Meeker, 28 N. J. L. 274.

4. When the will is not forthcoming, and a copy is submitted for probate, subsequent declarations are admissible on the question of the existence of the will, or of its revocation by the testator.

Behrens v. Behrens, 47 Ohio St. 323.

5. In explanation of the provisions of a will, such declarations may or may not be admissible:

(a) When the language employed is clear and unambiguous, they are not.

(b) They are to remove a latent ambiguity.

the question of admissibility of declarations to prove the existence of a will are ably reviewed as follows: "But a question arises upon exceptions taken to the admission of evidence of the declarations of the testatrix made from time to time and up to a short time prior to her death, to the effect that she had a will and by it had given her property to Ruth. This evidence was evidently given as bearing upon her intention as of the time they were made, and to repel the presumption that she had during her life revoked the will (which it appeared she had made), and as tending to prove that it was in her possession up to the time of her death. The cases in this state and elsewhere are not entirely in harmony on this question. In *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 385, which was a proceeding for the partition of land, evidence of this character was received without objection, but on review Woodworth, J., remarked that he did not lay any stress upon the declarations of the testator. They were made long after the execution of the will and shortly before his death. They are not evidence unless they relate to the *res gesta* or to an act done." In *Jackson, Brown, v. Betts*, 6 Cow. 377, which was an action of ejectment involving the consideration of the same will, the declarations referred to of the testator were rejected and the plaintiff nonsuited, and although a new trial was granted on review, on the ground that the evidence was sufficient to go to the jury. *Sutherland, J.*, said: "The declarations of the testator during his last sickness, as to the existence of his will, and the place where it would be found, were incompetent evidence, and were properly rejected by the judge. This point was decided in *Dan v. Brown*, 4 Cow. 490, in relation to this very will." The case of *Jackson, Brown, v. Betts*, after another trial, came up for review again (9 Cow. 208), in which the question now under consideration was not presented, but the case went off on the ground that no presumption of revocation by the testator of a will which he had made arose from the mere fact that it was not found after his death. The court of errors on review (6 Wend. 173) held to the contrary, and reversed the court below. The chancellor, however, in referring to the decision of the court (reported in 6 Cow. 377) that evidence of the declarations of the testator was not admissible, remarked that there was sufficient doubt as to the correctness of the decision of the supreme court on that point to authorize them to direct a reargument of the question if it should again come there. In *Knapp v. Knapp*, 10 N. Y. 276, evidence of the declarations of the testator, made a while before his death, that he had made a will and it was in his desk, was received without objection. The views of the court in the cases cited, so far as they express any determination, are against the admissibility of evidence of such declarations. But it may be observed that in the case where that decision was announced, the determination of the question was not necessary to the result given, as the view of the trial court was in that respect approved on review, and a new trial was granted for the reason before mentioned (63 L. R. A.

Cow. 377). But in *Waterman v. Whitney*, 11 N. Y. 157, 63 Am. Dec. 71, after referring to the cases of *Dan v. Brown* and *Jackson, Brown, v. Betts*, *Seiden, J.*, in delivering the opinion adds: "I consider these cases as establishing the doctrine that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gesta*, and for the purpose of showing the intent of the act."

e. Where there is more than one will.

Some cases hold that where the intentions of the testator in destroying his will can be shown, such intentions will control where there is more than one will and one of them is destroyed.

So, where a testator destroyed a will on the supposition that he had made a subsequent will, but which was not duly executed, the probate of the first was granted on a copy and execution of the original being duly proved. *Scott v. Scott*, 1 Swab. & T. 258.

And where a holographic will was destroyed by the testator in order to use a more perfect copy, which was ineffectual, the probate of the destroyed will was allowed, and the contents were proved by a copy which was shown to be accurate. *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363.

And a draft of a will was probated where the will was destroyed by the testator acting on the belief that a subsequent will superseded the former, but the latter will was void. It was held that under 1 Vict. chap. 26, § 20, providing that a will may be revoked by the burning, tearing, or otherwise destroying the same by the testator, with the intention of revoking the same, the revocation was not effected where the intention was wanting. *Clarkson v. Clarkson*, 2 Swab. & T. 497, 31 L. J. Prob. N. S. 143, 6 L. T. N. S. 506, 10 Week. Rep. 731.

The court decreed for an intestacy where the intentions of the testator were shown by his declarations that he would have no will unless he made a new one and he had made two and destroyed the last. This was held not to revive the former one. *Hooton v. Head*, 3 Phillim. Ecol. Rep. 28.

So, where the question was whether a testator who had destroyed a will intended to revive the same by destroying a subsequent will or to die intestate, it was held that declarations of the testator were competent, and the jury found that he died intestate. *Boudinot v. Bradford*, 2 U. S. 3 Dall. 265, 1 L. ed. 375.

So where there was full proof that a later will contained a revocatory clause annulling a previous will, and the second will was destroyed but not by the testator, declarations of the testator at the time of his death were admissible to prove that the subsequent will was not destroyed by him. *Yount v. Yount*, 3 Grant, Cas. 140.

The general rule is that the declarations can be shown to establish whether or not the testator intended to revive the former will. But this note is not intended to discuss the question of the revival

Morgan v. Burrows, 45 Wis. 211, 30 Am. Rep. 717.

6. They are not admissible to establish the contents of a lost will.

Woodward v. Goulstone, L. R. 11 App. Cas. 478; *Hunter v. Gardenhire*, 18 Lea, 662; *Chisholm v. Ben*, 7 B. Mon. 412.

Contents of this alleged will are not shown by that positive and clear-cut testimony the law requires.

Southworth v. Adams, 11 Biss. 260; *Davis v. Sigourney*, 8 Met. 487; *Johnson's Will*, 40 Conn. 589; *Woodward v. Goulstone*, L. R. 11 App.

Cas. 475; *Hunter v. Gardenhire*, 18 Lea, 662.

The law will presume a destruction of a will by the testator (an innocent act) rather than by the heirs simply because of their opportunity of so doing, as this would be a criminal act.

Bauskett v. Keitt, 22 S. C. 187; *Collyer v. Collyer*, 110 N. Y. 481.

Attorney's fees should not be allowed.

Mumper's Appeal, 8 Watts & S. 441; *Royer's Appeal*, 18 Pa. 569; *Andrews v. His Administrators*, 7 Ohio St. 152; *Collyer v. Collyer*, 4 Dem. 53; *Brown v. Vinyard*, Ball. Eq. 460.

of a prior will by the destruction of the second, but simply to show that in this class of cases it becomes material to ascertain by evidence the execution and the contents of the lost will as well as to ascertain the intentions of the testator, if possible, by his declarations. For a discussion of the question as to the revival of a prior will by the destruction of a second will, see *Cheever v. North* (Mich.) 37 L. R. A. 551, note.

The evidence of the intention of the testator in destroying a second will should be considered, in order to determine whether the first will was revoked or revived, and to show this fact evidence of the contents of the second will and declarations of the testator are competent. *McClure v. McClure*, 86 Tenn. 172; *Elintham v. Bradford*, 10 Pa. 82; *Williams v. Williams*, 142 Mass. 515; *James v. Shrimpton*, L. R. 1 Prob. Div. 431, 45 L. J. Prob. N. S. 45, 35 L. T. N. S. 423, 24 Week. Rep. 740; *Usticke v. Bawden*, 2 Add. Ecol. Rep. 125; *Welch v. Phillips*, 1 Moore, P. C. 292; *Linginfetter v. Linginfetter*, Hardin (Ky.) 119; *Bates v. Holman*, 3 Hen. & M. 502; *Hawes v. Nicholas*, 73 Tex. 481, 2 L. R. A. 888; *Marsh v. Marsh*, 3 Jones, L. 77, 64 Am. Dec. 598; *Colvin v. Warford*, 20 Md. 357; *Lady Kirkcudbright v. Lord Kirkcudbright*, 1 Hagg. Ecol. Rep. 325; *Powell v. Powell*, L. R. 1 Prob. & Div. 209, 35 L. J. Prob. N. S. 100, 14 L. T. N. S. 800.

Where it was contended that a will was canceled because part of one will was canceled and another will was found uncanceled, the intention of the testator should be shown to overcome the presumption. *Burtenshaw v. Gilbert*, 1 Cowp. 49, Loft, 465.

Where a canceled duplicate was found in the custody of the testator, it was presumed that the deceased canceled it herself. *Bouhey v. Moreton*, 3 Hagg. Ecol. Rep. 191.

So, where the deceased made a codicil in duplicate in 1839 and in 1845 made another, and then destroyed the copy of the codicil of 1839, which was in the custody of his solicitor, but the copy retained by him was found in his papers, it was presumed to have been revoked by the destruction of the duplicate. *Goods of Hains*, 5 Notes of Cases, 621.

And where there were two wills in duplicate and one of them was canceled and a subsequent codicil was made, it was held that if the testator canceled that part which was with him the legal presumption was that the duplicate in possession of another was not to prevail, and if the testator had possession of both the same presumption held, though weaker, and having both in his possession and altering one and destroying that which was altered, there was also the presumption, but it was still weaker; and after three verdicts for the will the court refused to grant another trial. *Pemberton v. Pemberton*, 13 Ves. Jr. 290.

But where the deceased executed a will in duplicate, and left it in England with his solicitor, and took the duplicate with him to Africa and died there, and the duplicate was found in his papers, but the will could not be found among the papers of the solicitor, who also died, there was no pre-

sumption of revocation. *Goods of Pechell*, 6 Jur. N. S. 406.

And there was no presumption of revocation where the testator executed a will in duplicate and retained one, and the other could not be found. *Saider v. Burks*, 84 Ala. 53.

And probate was refused where a testator having made two wills destroyed the last will and subsequently on the same day stated that her intention in doing so was to have her former will take effect, and a motion was made for the probate of the draft of the destroyed will, and it was held that "in the case of *Powell v. Powell*, L. R. 1 Prob. & Div. 209, 35 L. J. Prob. N. S. 100, 14 L. T. N. S. 800, there was distinct and undoubted evidence that at the very moment the deceased destroyed his last will, he stated he did so in order that the earlier will should prevail. In this case the supposed declarations were not made at the time the deceased destroyed the will. They were far more vague, and not wholly reliable. I reject the motion; the daughter may propound the draft if she thinks proper." *Goods of Weston*, L. R. 1 Prob. & Div. 633, 38 L. J. Prob. N. S. 53, 20 L. T. N. S. 330.

Some cases hold as in case of intestacy, where the last will is lost or destroyed, and the intentions of the testator are not sufficiently shown.

So it was held that the deceased died intestate where three wills were made, and the two of later date were burned by deceased, and the will of latest date was not properly signed and executed, and it was not clear that the deceased destroyed the wills with the sole intention of setting up some other paper. *Eckersley v. Platt*, 36 L. J. Prob. N. S. 7, L. R. 1 Prob. & Div. 231, 15 L. T. N. S. 327, 15 Week. Rep. 232.

And where a second will could not be found after the testator's death and was shown by proof of draft to revoke a former will, and the later will was presumed to have been destroyed, there was no revival of the prior will where such was not shown to be the intention of the testator. *James v. Cohen*, 3 Curt. Ecol. Rep. 770.

And the court refused to place reliance on intemperate declarations by a capricious person, and held that the destruction by mutilation of a will did not revive a prior will. *Moore v. Moore*, 1 Phillim. Ecol. Rep. 403; *Moore v. De La Torre*, 1 Phillim. Ecol. Rep. 375.

The contents of a lost or destroyed will may be proved by secondary evidence to show that it contained a clause revoking a prior will. Some cases hold that proof of the execution of a prior will is sufficient to show a revocation of a lost will where other intention is not shown.

So, where it was shown that a second will was destroyed by the testator after its execution, and that it contained an express clause of revocation of the former will, the first will was revoked. *James v. Marvin*, 3 Conn. 576, Approved, *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685.

So where a testator destroyed his second will, and his third will was destroyed by his wife at his request, and the evidence showed that the third will

Irvine, C., filed the following opinion:

John J. Turner was an elderly citizen of the city of Lincoln, blessed with a pious disposition and a considerable quantity of this world's goods. He died March 1, 1890, leaving, him surviving, two sons, William J. Turner and R. Morris Turner. Some time after his death, William M. Clark and Nahum S. Scott propounded for probate what purported to be a copy of John J. Turner's last will and testament, it being alleged that said will had been deposited in a valise belonging to the testator, which, after his death, had been delivered to his sons, and that thereafter it was claimed

that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The probate was contested by the two sons. The result of the proceedings in the county court does not appear from the record. The case was, however, appealed to the district court, where, as a result of what appears to have been a third trial there, a verdict was rendered in favor of the contestants. Judgment was rendered denying probate, and the proponent Clark (the proponent Scott having died pending the proceedings) prosecutes to this court proceedings in error to reverse that judgment.

contained a revocation clause, the first will was refused probate. *Scott v. Fink*, 45 Mich. 241.

So, secondary evidence was inadmissible to show the contents of a second will which could not be found after the testator's death, and which established that this revoked a prior will. *Brown v. Brown*, 8 El. & Bl. 376, 27 L. J. Q. B. N. S. 173, 4 Jur. N. S. 163.

Where the *factum* of a later will was fully proved by two subscribing witnesses who swore that the third witness was since dead, and as to the contents the proof was made by one who swore that the executrix and residuary legatee of the later will was Mrs. H. which differed from the former will, it was held that the execution of the second will of a different purport was by law a revocation of the first although the second did not appear, and that it was presumed that the second will was revoked because it was not shown to have been out of the testator's custody and could not be found, and the court decreed as in case of intestacy. *Heljar v. Heljar*, 1 Lee, Ecol. Rep. 473.

And parol evidence of the contents of a third will was admissible where such will was lost or mislaid, in order to establish the revocation of two former wills. It was said that if the will had been designedly destroyed parol evidence would not be admissible because it would be making a new will. *Legare v. Ashe*, 1 Bay, 404.

And a will was held to be revoked by a subsequent will where parol evidence showed that it contained a clause of revocation, and the second will could not be found after the testator's death. The court pronounced for an intestacy. *Eckersley v. Platt*, L. R. 1 Prob. & Div. 361, 36 L. J. Prob. N. S. 7, 15 L. T. N. S. 227, 15 Week. Rep. 232; *Goods of Brown*, 1 Swab. & T. 32, 27 L. J. Prob. N. S. 20, 4 Jur. N. S. 244.

So, it was held that the deceased died intestate where a will was found, but a subsequent will which could not be found had been executed containing a clause of revocation, and there was some evidence of revocation by the drawer of the will by an entry in his book, and also the declaration of a witness, whose interest was opposed to the destruction of the lost will, that the deceased told her he should tear it up. *Wood v. Wood*, 36 L. J. Prob. N. S. 34, L. R. 1 Prob. 309, 15 L. T. N. S. 593.

And evidence of a revoking clause in a second will which was lost was admissible to prove the revocation of a former will, although the contents of the second will could not be proved sufficiently to probate the second will. *Re Cunningham*, 38 Minn. 199.

And strict proof of the contents of a second will was not necessary in order to establish the fact that it revoked a former will, where the second will had been destroyed by spoliation. *Jones v. Murphy*, 8 Watts & S. 275.

And where the testator made two wills and the last revoked the first, and both were destroyed without his consent, the first will could not be established although the evidence failed to show the 38 L. R. A.

contents of the second but did show the contents of the first. *Day v. Day*, 3 N. J. Eq. 549.

Under N. Y. Code Civ. Proc. § 2821, providing that a lost or destroyed will can be admitted to probate in the surrogate's court, but only in a case where a judgment establishing a will can be rendered in the supreme court, under § 1865, providing that a lost or destroyed will cannot be established unless it was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, it was held that where a will was revoked by a later will, which was destroyed, it was not necessary that two witnesses should testify as to the contents of the later instrument, nor was it necessary to show that such instrument was in existence at the time of the testator's death, or that if not then in existence it had been fraudulently destroyed in his lifetime in order that the subsequent will should revoke the former one. *Culligan's Estate*, 5 N. Y. Civ. Proc. Rep. 198; *Colligan v. McKernan*, 2 Dem. 421.

Probate was refused where a subsequent will was lost and the evidence was contradictory and uncertain as to the contents of the will, and it was held that such proof must be clear, conclusive, and satisfactory. It was further held that where in such a case a revocatory clause was clearly proved, but was only attested by two witnesses, the clause of revocation should be probated as far as it affected personality. *Vining v. Hall*, 40 Miss. 63.

In *Cleveland v. Booth*, 43 Minn. 16, the contents of a codicil which had been destroyed by the testator were proved by parol evidence which showed that it was inconsistent with the will. (The question was whether the destroyed codicil revived the will.)

And evidence of the contents of a prior lost will should have been allowed to go to the jury, to establish that such will was inconsistent with the later one, where such former will was republished by the testator as his last will. *Harvard v. Davis*, 2 Binn. 406.

And evidence of the existence of a subsequent will was sufficient to show a revocation of a former will without proof of its contents, where the later will could not be found, under Ala. Rev. Code, §§ 1932, 1933, providing that no will can be revoked unless by some other will in writing. *Barker v. Bell*, 49 Ala. 284.

Where a later will had been lost or destroyed it was held that the prior will was revoked, in the absence of proof by three witnesses of its republication, under the Georgia statute requiring three witnesses to a will, and a "defunct dead" will could not be revived by a less number. In this case no proof was made or required of the contents of the last will. *Harwell v. Lively*, 30 Ga. 315, 78 Am. Dec. 619.

But some cases hold that the mere proof of execution of a subsequent will is insufficient to prevent

The copy of the will, as propounded, is as follows:

I, John J. Turner, of Lincoln, Nebraska, being of sound and disposing mind and memory, aged —, do hereby declare this to be my last will and testament, as follows:

First. I will that my debts and reasonable funeral charges be paid.

Second. I give and bequeath to the Board of Missions for Freedmen of the Presbyterian Church of the United States of America the value of the note of R. Morris Turner for four thousand, five hundred dollars, secured by mortgage on lot three (3), in block one hundred

and twenty nine (29), city of Lincoln, Lancaster county, Nebraska, less two thousand dollars borrowed at the First National Bank of Lincoln, Nebraska, and paid over to said board.

Third. I give and bequeath to the Board of Foreign Missions of the Presbyterian Church in the United States of America the value of a note made by William J. Turner to me for the sum of five thousand, seven hundred dollars, less the amount necessary to pay my note of \$2,000 at the First National Bank of Lincoln, Nebraska, for which this note of \$5,700 is pledged as collateral security.

the probate of a prior will where no inconsistency or revocatory clause is proved.

And a second will which could not be found at the testator's death was presumed to have been revoked by the testator, and this was held not to revoke a former will. In this case there was no proof of the contents of the second will. *Dawson v. Smith*, 3 *Houst.* (Del.) 93.

And a lost will was held not to be a revocation of a former will where the contents of the lost will were not proved, and it was not proved to have been in existence at the death of the testatrix but rather the contrary, and that she had canceled or destroyed it. *Lawson v. Morrison*, 2 *U. S.* 2 *Dall.* 286, 1 *L. ed.* 384, 2 *Hare & W. Am. Lead. Cas.* 482.

So in *Nelson v. McGiffert*, 3 *Barb. Ch.* 158, 49 *Am. Dec.* 170, it was held that a will was not revoked by a subsequent will where such subsequent will was destroyed, but there was not sufficient evidence to show that the subsequent will contained any clause revoking the former will, or that it was inconsistent with the same.

And a will was held not to be revoked where a subsequent will was made but could not be found after the testator's death, and there was no draft or instruction in writing. (After probate was refused the lost will was found and was probated.) *Cutto v. Gilbert*, 9 *Moore*, *P. C. C.* 131.

II. Proof of execution.

a. Generally.

In order to establish a lost or destroyed will its due execution must be proved. Where the proof is offered after the lapse of many years from the execution and in cases of spoliation the courts seem to exercise a good deal of latitude depending on the circumstances of each case. In many cases the question in issue was not the due execution, but overcoming the presumption of revocation, establishing the contents and the like. But where the question is fairly made it is essential that the propounders of a lost will establish its due execution, or, in other words, as stated in a great many cases, its existence and then the loss and then secondary evidence of its contents can be received. In establishing the due execution of a will, no greater strictness is required in any case than where the will itself is produced in court. Declarations of the testator are not of themselves sufficient to establish the execution of a will, although they are generally held competent evidence, and when corroborated are held to be of great weight. In most of the states there is a statutory provision regulating the proof in such cases.

Where a bill to establish a lost will charged that the will was duly executed, a demurrer to the bill admitted such due execution, and in such a case the due execution did not have to be proved. *Harms v. Tierreau*, 52 *Ga.* 153, 21 *Am. Rep.* 242.

In *Tucker v. Phipps*, 8 *Atk.* 380, it was said that in the case of a destroyed will the plaintiff in the ecclesiastical court must prove it a will in writing. 83 *L. R. A.*

The evidence should show that a will had existed in a legal form before probate could be granted. *Butler v. Butler*, 5 *Harr.* (Del.) 178.

And that a will was duly made and was lost should be proved before any testimony could be admitted as to its contents. *Dawson v. Smith*, 3 *Houst.* (Del.) 93.

So, the fact that a will was duly executed should first be proved, and that it had been lost, destroyed, or suppressed before evidence of its contents would be received. *Chisholm v. Ben*, 7 *B. Mon.* 408; *Fitzgerald v. Wynne*, 1 *App. D. C.* 107.

And after the due execution and existence of a will have been established, its contents may be proved by parol, in case of the loss or destruction of the original, like those of any other written instrument. *Reeves v. Booth*, 2 *Mill, Const.* 334; *Graham v. O'Fallon*, 3 *Mo.* 507.

A lost will could be admitted to probate on competent evidence of its execution and contents. *Jaques v. Horton*, 70 *Ala.* 238.

So, evidence of the execution of a lost will should be made by the fullest and most satisfactory proof. *Moore v. Whitehouse*, 8 *Swab. & T.* 567, 84 *L. J. Prob. N. S.* 31, 11 *L. T. N. S.* 458.

And proof of the due execution of a will must be of the clearest and most satisfactory character. *Buechle's Estate*, 5 *Pa. Dist. R.* 127.

And in order to establish a lost will the proof of its execution required clear, strong, and irrefragable evidence free from suspicion or doubt in its sources, exact and certain in its conclusions. *Podmore v. Wharton*, 3 *Swab. & T.* 449, 93 *L. J. Prob. N. S.* 143, 10 *Jur. N. S.* 756, 10 *L. T. N. S.* 754.

And in order to prove the execution of a lost will by parol evidence only, such evidence should be most clear, satisfactory, stringent, and conclusive. *Cutto v. Gilbert*, 9 *Moore*, *P. C. C.* 131.

The burden of proof is on the propounders of a lost will to prove its execution by strong, positive, and convincing evidence. *Southworth v. Adams*, 11 *Biss.* 256.

And under *Colo. Gen. Stat. chap. 115, § 21*, providing that whenever a will had been lost or destroyed and the fact of the execution thereof can be established as hereinbefore provided, and the contents are likewise shown by the testimony of two or more witnesses, the same may be probated, it was first necessary to make proof of the execution as in other cases. *Todd v. Rennick*, 13 *Colo.* 546.

And in *McDaniel v. Pattison*, 98 *Cal.* 86, it was said that a lost or destroyed will may be proved and established in the probate court if there is sufficient evidence of its execution and its terms.

And parol evidence of the contents of a lost will was allowed where the court was satisfied as to the factum of the alleged will. *Mahood v. Mahood*, 8 *Ir. Eq. Rep.* 359.

In *Lane's Will*, 2 *Dana*, 106, the due execution of a lost will was proved, and a sworn copy was probated.

And in *Davis v. Sigourney*, 8 *Met.* 487, it was said that the evidence in this case showed that the will had been duly executed by the testator.

Fourth. I give and bequeath to Keren Root-ham the entire use of my double house on North Twelfth street, east of the university, during her natural life, and in case the house shall be destroyed she may use the entire amount of the insurance to rebuild the same, or she may receive one half of the amount of the insurance and release her interest and claim upon the property. She may assign and dispose of her entire interest in rents and use of said house at any time, and at her death the said property shall go to my two sons, William J. Turner and R. Morris Turner.

And in *Brown v. Morrow*, 43 U. C. Q. B. 426, the execution and previous existence of a lost will which had been acted upon by the heir were sufficiently proved in an action of ejectment.

In *Chisholm v. Ben*, 7 B. Mon. 408, it was said "in case of a lost will, the proof by the subscribing witnesses of acknowledgment alone might be sufficient, in the absence of countervailing circumstances, to prove the due execution of the will."

So, the proof was sufficient where the evidence showed beyond doubt the execution of the will and the capacity of the testator. *Buchanan v. Matlock*, 8 Humph. 390, 47 Am. Dec. 622.

An order establishing a lost or destroyed will should set forth its contents, that it was duly executed when the testator was of sound mind and disposing memory, and showed that it was duly attested. *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

A lost or destroyed will could not be used as evidence to affect the title to property devised or bequeathed by it before it had been proved and established in the mode prescribed by law. *Mauck v. Melton*, 64 Ind. 414.

And a copy of a lost codicil was refused probate where there was not sufficient proof of the execution of the codicil, the attesting witnesses failing to identify the document attested. *Crickett v. Field*, 19 Week. Rep. 232, 23 L. T. N. S. 630.

The jury were properly directed to return their verdict for the respondents where the only evidence of the execution of any testamentary document except the original will of 1841, under which the respondents claimed, was the testimony of one witness who said that in 1857 or 1868, he with others witnessed an instrument which the testator either said was his will or that it was a codicil of his will, and no testimony was produced of the contents of this instrument nor was any attempt made to otherwise identify it. In this case the persons whose names appeared as witnesses upon the papers propounded as codicils were called by the appellant, and each denied that they had witnessed any testamentary paper for the alleged testator. There was no testimony that such papers existed at the time of the testator's death. *Newell v. Homer*, 120 Mass. 277.

And in an action of partition evidence of the contents of a lost or destroyed will was incompetent where such will had not been proved and established, under 3 Ind. Rev. Stat. 1876, p. 570. *Mauck v. Melton*, 64 Ind. 414.

In *Lawrence v. Kete, Aleyn*, 54, where the testator desired to have his will drawn by K., and his wife without consulting her husband sent for K., who from the mouth of the witnesses who heard the devise wrote the same, and the husband died before the will was executed, and it was afterwards lost, it was held that the writing of the will from the mouth of the witnesses was sufficient; but the evidence was not clear as to the desire of the testator to send for K., and the will was not sustained in an action of ejectment.

And where the evidence showed that a destroyed

Fifth. I give, grant, and bequeath to my son R. Morris Turner the house and lot where I now reside, with all the furniture and family library therein; also, my balance of the note of R. Morris Turner not bequeathed or paid at the time of my death.

Sixth. I give and bequeath to my son William J. Turner all my medical books, instruments, and medicines, books of account, and accounts belonging to me at the time of my death.

I hereby constitute and appoint Capt. N. S. Scott and William M. Clark to be the execu-

will was not signed by the deceased, nor his signature acknowledged in the presence of the witnesses, it was held that it was not duly executed. *Eckersley v. Platt*, 38 L. J. Prob. N. S. 7, L. R. 1 Prob. & Div. 231, 15 L. T. N. S. 337, 15 Week. Rep. 232.

b. Declarations.

Declarations of the testator are not of themselves alone sufficient to establish the execution of a lost or destroyed will, but are admissible in evidence and have great weight when corroborated by other evidence.

So, the probate of a copy of a lost will was refused, where the contents were proved but there was no proof of the execution of the original, except the declarations of the supposed testator. *Goods of Ripley*, 4 Jur. N. S. 342, 1 Swab. & T. 68.

And the bare declarations of the deceased that the paper which the witness saw was his will did not prove that it was executed as the statute required. *Re Russell*, 38 Hun. 271, Aff'd 98 N. Y. 633.

And in *Tynan v. Paschal*, 27 Tex. 236, 84 Am. Dec. 619, it was said: "Nor will the declarations and acts of a party, indicating a belief that he has a will, add but little, if any, strength to the other testimony adduced to prove its due execution."

So, it was incumbent on the party seeking to establish a lost or destroyed will to prove its due execution. It was said: "Nor does it seem legitimate or reasonable (except in cases of spoliation, when the wrongful act of withholding or destroying the means of furnishing direct testimony authorizes presumptions and conclusions which otherwise would not be indulged to infer its due execution from proof of facts which, if the will were before the court, would in no way tend to prove it, and which are usually and reasonably consistent with the contrary conclusion." *Tynan v. Paschal*, 27 Tex. 236, 84 Am. Dec. 619.

And under 2 N. Y. Rev. Stat. 67, § 63, requiring that a lost will should be proved by two witnesses, the declaration of a decedent was not competent to prove the execution of a will. *Grant v. Grant*, 1 Sandf. Ch. 235.

And the factum of a lost or destroyed will could not be proved by declarations of the testator, but should be proved in the same manner as though the will was produced in open court. *Collyer v. Collyer*, 4 Dem. 58, Affirmed 110 N. Y. 481.

In *Collyer v. Collyer*, 4 Dem. 58, Affirmed 110 N. Y. 481, the case of *Colligan v. McKernan*, 2 Dem. 421, was distinguished, as there the object of the proof was to defeat a will presented for probate by showing that it had been revoked by a subsequent will which was lost, and was not a proceeding to prove a lost will under the statute. There it was properly held that one witness to prove the lost will at common law was sufficient to sustain the objection to the earlier will propounded.

Declarations of the testator were not alone sufficient to prove the due execution of a will alleged to be lost. *Mercer v. Mackin*, 14 Bush, 434.

The probate of a holographic will which could not be found was refused, where the evidence did

tors of this my last will and testament, hereby revoking all former wills by me made.

Witness my hand and seal this _____ day of _____, 1888. John J. Turner.
Fred Schmidt.
Geo. A. Hagensick.

The foregoing instrument was, on the day of the date thereof, signed, sealed, published, and declared by the testator therein named, John J. Turner, as and for his last will and testament, in the presence of us, who, at his request, and in his presence and in the presence

of each other, have hereunto subscribed our names this _____ day of _____, 1888.

Fred Schmidt.
Geo. A. Hagensick.

Codicil to My Last Will and Testament.

I, John J. Turner, hereby will and direct that my executors shall pay to my brother living in _____, out of the interest of William J. Turner's note, the sum of three hundred and fifty dollars, to be used by him as a loan, for the term of five years, without interest. At the expiration of five years to be collected and

not show that such will was signed by the testator, and it was attempted to be established by evidence of his declarations that he had written a will and also declarations as to its contents. This evidence was inadmissible where no satisfactory evidence of the loss or destruction of the will was given, under Ky. Gen. Stat. chap. 31 (21), § 20, requiring signatures at the end of a writing, and chap. 118, § 15, providing that where a will is written by the testator he must have subscribed his name to it at its conclusion. It was said that if the deceased had declared that he wrote and signed it with his own name and hand, evidence of such declarations would not be sufficient to authorize the probating of a will. *Mercer v. Mackin*, 14 Bush, 434.

Where the attesting witnesses to a will and codicils were called, and a copy made by the testator's daughter was substantiated by the testator's declarations, it was held that the will and codicils were proved to have been duly executed. *Sugden v. Lord St. Leonards*, 24 Week. Rep. 209, 45 L. J. Prob. N. S. 1, 33 L. T. N. S. 861.

This is a leading case on the question, and goes farther than most other cases toward establishing execution by testator's declarations.

c. Witnesses.

Some cases hold that one witness is sufficient to establish the due execution of a will when corroborated, but other cases require proof by two witnesses. In some states at least two witnesses are required by statute, while under other statutes all the subscribing witnesses whose evidence can be had must be used to establish its execution.

In a suit for partition it was held that one of the subscribing witnesses could prove the execution of a will which was lost. The proof was sufficient where such witness who drew the will and subscribed as a witness proved its due attestation by three witnesses, although he had forgotten the name of one of them, but had no doubt that he was a competent witness. But a new trial was granted because the parties who claimed under the will did not prove that they had made diligent search. *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 205.

And evidence by an attesting witness, who made her mark, that the testator signed the will in the presence of all three subscribing witnesses, was sufficient to prove the due execution of a lost will over thirty years old. *Fetherly v. Wagoner*, 11 Wend. 500.

And a lost will was admitted to probate on the testimony of one subscribing witness, who was the only witness who professed to have read the will. *Skeggs v. Horton*, 22 Ala. 332.

And the probate of a lost will was granted where the execution and contents were proved by an affidavit of one of the attesting witnesses and the widow, where the testator left his will behind him in escaping from Delhi during the Indian mutiny in May, and died in June, 1857. *Goods of Gardner*, 1 Swab. & T. 109, 27 L. J. Prob. N. S. 55.

So, a will lost or stolen after the testator's death was properly probated, where the contents of the will were clearly established and two witnesses proved that the original was wholly written and

signed by the testator. It was said: "If its loss or destruction after the death of the testator be shown, and its contents be satisfactorily made out, the proof of its having been wholly written and signed by the testator himself, by a single credible witness, will suffice." *Baker v. Dohyna*, 4 Dana, 230.

And a due formal execution of a lost will was sufficiently proved where the attorney who drew the same testified that he and another party witnessed the testator sign the will, and that the witnesses in the testator's presence and in the presence of each other attested the same, and that the other witness was dead. *Re Page*, 118 Ill. 579, 59 Am. Rep. 595.

And evidence of a surviving witness that he signed, and saw the testator and the deceased witness sign, an instrument which the testator declared to be his will, was sufficient to establish the fact that there was a will made, under 1 Wash. Stat. § 1459, providing that when one of the witnesses of a will is dead, proof should be taken of the handwriting of the testator and of the witness who is dead. But the will was not established because its contents were not proved. *Harris v. Harris*, 10 Wash. 555.

A copy of a will was proved by one of the subscribing witnesses in ejectment where the adverse party had the original will on which the title depended, and refused to produce the same under a subpoena *duces tecum*. *Hamilton v. Lightbody*, 21 U. C. C. P. 123.

And in *Graham v. O'Fallon*, 3 Mo. 507, it was said that one witness would be sufficient to establish the due execution of a will that was lost if he proved that he saw the other witness subscribe it in the testator's presence.

So, a lost will was held to have been duly executed where a copy was tendered in evidence made by a person who represented himself to have been one of the attesting witnesses and who was dead, and was corroborated by a declaration in disparagement of the title in a deed made by a party in possession. *Sly v. Sly*, L. R. 2 Proc. Div. 91, 45 L. J. Prob. N. S. 63, 25 Week. Rep. 403.

And entries in the day book of a solicitor who was dead, which showed that he had drawn and attested a will and had been paid for the same, and proof of a draft of the will, were evidence of its execution. *Goods of Thomas*, 20 Week. Rep. 149, 41 L. J. Prob. N. S. 32, 25 L. T. N. S. 530.

And the execution of a stolen will was proved by copy and the affidavit of the attesting witness. *Goods of Cousins*, 1 Notes of Cases, 230.

And where one of the attesting witnesses was out of the jurisdiction of the court, and the other attesting witness testified that he did not see the testator sign, but that the testator acknowledged that he signed, sealed, and published it as his last will and testament, and another party testified positively that the testator signed it in the presence of the witnesses, it was held that the affirmative witness should prevail, and that the will was duly executed. *Bailey v. Stiles*, 2 N. J. Eq. 220.

In *Brown v. Brown*, 10 Yerg. 94, the execution of a lost will was proved by two witnesses.

paid over to the Board of Foreign Missions of the Presbyterian Church in the United States of America.

John J. Turner.

Dated December —, 1889.

Witness:

Sarah Turner.

Keren Rootham.

A few remarks in regard to the subject-matter of the testator's property may not be inappropriate, preliminary to the statement of other facts in the case. The alleged testator, John J. Turner, referred to usually in the evidence

as "Dr. Turner," by which term we shall hereafter designate him, was, at the time of his death, and at the time it is claimed this will was executed, seised of the land described in the will and also of another lot in the city of Lincoln not thereby disposed of. He had previously owned two other lots in the city of Lincoln, one of which he had conveyed to his son R. Morris Turner, receiving, in consideration for the conveyance, the latter's note for \$4,500, secured by mortgage on the lot. The other lot he had, at about the same time, conveyed to his son William J. Turner, receiving in return the latter's note for \$5,700. It ap-

And a destroyed will was probated where it was proved to have been duly attested by a requisite number of witnesses. *Anderson v. Irwin*, 101 Ill. 411.

And the execution of a lost will was duly proved where the attesting witnesses proved the signature of the testator by his mark, and that the subscribing witnesses attested it in his presence and in the presence of each other at the testator's request, and the testator declared the same to be his last will. *Voorhees v. Voorhees*, 30 N. Y. 463, 100 Am. Dec. 458.

So, in *Morris v. Swaney*, 7 Heisk. 591, the jury were properly instructed as to the requirements of the law as to the manner of executing a will, and that the propounders must introduce evidence clear, full, and satisfactory, to establish the facts in their favor, and that two witnesses were required to the *factum* of the will, but that two witnesses were not required to each particular fact.

And where a revocatory clause of a lost will was clearly proved, but was only attested by two witnesses, it was probated so as to affect personality. *Vining v. Hall*, 40 Miss. 53.

And the execution of a lost will was sufficiently proved by the two attesting witnesses, and the sanity of the testator was proved positively by the witnesses, and by the equalization in the will. *Payne's Will*, 4 T. B. Mon. 423.

So, where a lost will was proved by two subscribing witnesses, and the contents were proved by one witness, it was held to revoke a prior will. *Helyar v. Helyar*, 1 Lee, Eccl. Rep. 472.

The evidence of two subscribing witnesses relative to the due execution and contents of a will and verifying a copy was sufficient where a third subscribing witness was not called, but no objection was made for not producing him, and the will had been destroyed by the testator on the day of his death while in a fit of insanity. *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239.

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And a lost will was established where the proof was clear and uncontradicted as to the execution and contents of the will, by proof of a copy which had been verified before the will was executed and three witnesses who were present at the execution of the will and other witnesses who heard the will read and another witness who saw the execution, and the evidence of two witnesses who knew the handwriting of the testator, as well as that of the attesting witness. This satisfied 2 N. Y. Rev. Stat. 67, § 74, requiring that a lost will shall be proved to have been in existence at the time of the death of the testator, and that its provisions shall be clearly and distinctly proved by two credible witnesses, a correct copy or draft being deemed equivalent to one witness. *Everitt v. Everitt*, 41 Barb. 385, Affirming 29 N. Y. 39.

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So, where a will was presented and proved before the court of probate in order to be executed, and was afterwards lost, it was held that parol evidence was admissible to establish it by witnesses who had subscribed to the will and had been sworn before the judge of probate to prove it, and the propounders offered to prove the loss, and after such facts were proved offered to give evidence of its contents. *Thomas v. Thomas*, 2 La. 166.

So, where the attorney who prepared a will from personal instructions of the testatrix, together with his partner and clerk who witnessed its execution, testified clearly and positively to the fact and produced the original draft of the will, and their book showing credit for payment of charges, there was no doubt as to the will having been duly executed. *Podmore v. Wharton*, 8 Swab. & T. 449, 33 L. J. Prob. N. S. 143, 10 Jur. N. S. 756, 10 L. T. N. S. 754.

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And where a will had been destroyed by one of the subscribing witnesses, who with another subscribing witness were the only heirs, and they had made a sham effort to probate the will in the county court, and testified as to the attestation in such a manner that the probate was refused, and then destroyed the will, a court of equity notwithstanding the rejection by the probate court declared the proof of execution sufficient to enforce the same and grant a decree of emancipation to slaves that were emancipated by such will. It was held that the complainant should not be precluded by the rejection of the will when it was attested by their antagonists in interest, offered for probate by one of them, and defeated by the general statement of the other, without any cross-examination or any person present who was interested in establishing the will, as each of these interested witnesses showed himself capable of resorting to improper devices for the purpose of injuring the beneficiaries. *Mullins v. Wall*, 3 B. Mon. 445.

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And under Md. act 1715, chap. 39, conferring power on the probate judge to cause to be proved any last will and testament, although the same concerned title to land, and 29 Car. II., chap. 3, § 5, providing that all devises and bequests of lands shall be in writing, signed by the party devising the same or some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of said devisor by three or four credible witnesses, or else they shall be utterly void, a copy of a lost will admitted to probate by the register of wills was not admissible in

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Dated December —, 1889.

Witness:
Sarah Turner.
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And a destroyed will was probated where it was proved to have been duly attested by a requisite number of witnesses. *Anderson v. Irwin*, 101 Ill. 411.

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And a lost will was established where the proof was clear and uncontradicted as to the execution and contents of the will, by proof of a copy which had been verified before the will was executed and three witnesses who were present at the execution of the will and other witnesses who heard the will read and another witness who saw the execution, and the evidence of two witnesses who knew the handwriting of the testator, as well as that of the attesting witness. This satisfied 2 N. Y. Rev. Stat. 67, § 74, requiring that a lost will shall be proved to have been in existence at the time of the death of the testator, and that its provisions shall be clearly and distinctly proved by two credible witnesses, a correct copy or draft being deemed equivalent to one witness. *Everitt v. Everitt*, 41 Barb. 385, affirming 29 N. Y. 89.

So, where a will was claimed to have been fraudulently destroyed the evidence of its execution was sufficient, where one of the subscribing witnesses testified positively that the paper referred to was declared by the testator to be his last will, and the other witness so testified on his direct examination, but on cross-examination testified that such statement was made by the draftsman in the presence of the testator, as was also the request to sign. The will was read aloud to the testator and signed by

pears from the evidence that the object of both these conveyances was to provide annuities, by virtue of an arrangement entered into between Dr. Turner and his sons, whereby, in order to relieve the doctor of the burden of caring for the property, the conveyances were made to his sons, they to pay interest on the notes during the doctor's lifetime. They contend that, upon his death, interest was to cease, and the principal of the notes was not to be paid. These are the notes referred to in the second and third paragraphs of the will propounded. Dr. Turner's wife died in 1888. Soon thereafter one Keren Rootham, or, as she herself

signs her name, Kerenhappuch Rootham, a maiden of mature years, became installed in Dr. Turner's home as his housekeeper. It is to her that the fourth paragraph of the alleged will relates. Mr. Clark and Mr. Scott, who are named as executors, were prominent members of the Presbyterian Church, of which Dr. Turner was also a member. Capt Scott was a lawyer, and seems to have been Dr. Turner's legal adviser. Dr. Turner seems to have acquired somewhat of a habit of making wills, as there is evidence, chiefly from entries in his diary, of his having executed several such instruments in the last decade of his life. There

him in the presence of the witnesses, who signed it in his presence. *Early v. Early*, 5 Redf. 376.

In *Lewis v. Lewis*, 6 Serg. & R. 499, it was said: "If a will of land is lost or secreted, parol proof of its contents by one witness would be sufficient, the proof of its execution being made by the requisite number."

And in *Conoly v. Gayle*, 61 Ala. 116, it was held that the fact that one of the subscribing witnesses to a lost will was incompetent did not vitiate the same where the requisite number of competent witnesses attested the same.

So, where a will was presented and proved before the court of probate in order to be executed, and was afterwards lost, it was held that parol evidence was admissible to establish it by witnesses who had subscribed to the will and had been sworn before the judge of probates to prove it, and the propounders offered to prove the loss, and after such facts were proved offered to give evidence of its contents. *Thomas v. Thomas*, 2 La. 166.

So, where the attorney who prepared a will from personal instructions of the testatrix, together with his partner and clerk who witnessed its execution, testified clearly and positively to the fact and produced the original draft of the will, and their book showing credit for payment of charges, there was no doubt as to the will having been duly executed. *Podmore v. Wharton*, 3 Swab. & T. 449, 38 L. J. Prob. N. 143, 10 Jur. N. S. 755, 10 L. T. N. S. 754.

And a lost will was established where proof of a pencil memorandum in the testator's handwriting was corroborated by the attesting witnesses. *Southworth v. Adams*, 11 Bls. 256.

Under La. Old Code, art. 159, p. 244, New Code, art. 1648, requiring for the proof of an olographic will the testimony of two credible witnesses, who declare that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting, "as having often seen him write and sign during his lifetime," a will lost or destroyed after the testator's death was admitted to probate where the witnesses testified that the will was entirely written, dated, and signed by the testator, but they did not say that "they had often seen him write." It was held that this clause was not sacramental but directory, and the evidence showed an intimacy and relationship which left little room to doubt that they were really well acquainted with his handwriting and had probably seen him write often but did not expressly say so. *Clark's Succession*, 11 La. Ann. 124.

In *Fuentes v. Gaines*, 25 La. Ann. 85, the probate was set aside on the ground that the evidence was by witnesses who derived their knowledge of the contents from the verbal declarations of the testator. But this case was reversed in 92 U. S. 10, 23 L. ed. 524, on account of the failure of the state court to transfer the case to the Federal court.

And in *Gaines v. Lizardi*, 3 Woods. 77, on the removal to the circuit court, it was held that under La. Civ. Code, art. 1588 (1861), declaring an olographic will shall be entirely written, dated, and signed by the hand of the testator, this will was 88 L. R. A.

proved to have been executed by two witnesses, the evidence being the same as in *Clark's Succession*, 11 La. Ann. 125.

Different phases of subsequent proceedings of this celebrated case are found in 38 U. S. 13 Pet. 404, 10 L. ed. 221; 40 U. S. 15 Pet. 9, 10 L. ed. 642; 43 U. S. 2 How. 619, 11 L. ed. 406; 47 U. S. 6 How. 550, 12 L. ed. 553; 52 U. S. 15 Wall. 624, 21 L. ed. 215; 17 Fed. Rep. 16; 1 Woods, 118.

In *Harris v. Tisereau*, 52 Ga. 158, 21 Am. Rep. 243, it was said that if the will be lost the witnesses should be produced if accessible, if not, the next best evidence should be used to prove the execution.

And where a will had been destroyed by one of the subscribing witnesses, who with another subscribing witness were the only heirs, and they had made a sham effort to probate the will in the county court, and testified as to the attestation in such a manner that the probate was refused, and then destroyed the will, a court of equity notwithstanding the rejection by the probate court declared the proof of execution sufficient to enforce the same and grant a decree of emancipation to slaves that were emancipated by such will. It was held that the complainant should not be precluded by the rejection of the will when it was attested by their antagonists in interest, offered for probate by one of them, and defeated by the general statement of the other, without any cross-examination or any person present who was interested in establishing the will, as each of these interested witnesses showed himself capable of resorting to improper devices for the purpose of injuring the beneficiaries. *Mullins v. Wall*, 8 B. Mon. 445.

And in *Re Russell*, 33 Hun. 271, affirmed 98 N. Y. 633, proof of the execution of a lost will was required to be made, and the evidence was insufficient where it was not shown that there was a full attestation clause subscribed by proper witnesses.

The evidence of a solicitor that he drew the will for the decedent, but could not remember the witnesses who attested it, was insufficient. *Grant v. Grant*, 1 Sandf. Ch. 235.

And in *Collyer v. Collyer*, 4 Dem. 53, Affirmed 110 N. Y. 481, the factum of the will was not established where the draft produced contained neither the name of the decedent nor those of the witnesses, and the only witness in regard to this matter did not testify positively that he was a subscribing witness, and he was unable to state who the other witnesses were.

And under Md. act 1715, chap. 30, conferring power on the probate judge to cause to be proved any last will and testament, although the same concerned title to land, and 29 Car. II., chap. 3, § 5, providing that all devises and bequests of lands shall be in writing, signed by the party devising the same or some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of said devisor by three or four credible witnesses, or else they shall be utterly void, a copy of a lost will admitted to probate by the register of wills was not admissible in

is a little evidence of this character tending to show the execution by him of a will later than the one here in controversy, but this evidence would not be of such a character as to justify the rejection of this will, were this one satisfactorily established. It is claimed that the will propounded was executed in the summer of 1888, and it quite satisfactorily appears that Dr. Turner, during that summer, did execute a will, which was witnessed by Fred Schmidt and George A. Hagensick. Neither witness pretends to have been informed as to the contents of the will. There is evidence to the effect that, on one occasion, and perhaps on

three occasions, between the time when this will was executed and Dr. Turner's death, the doctor exhibited to Miss Rootham an envelope, and also, without displaying its contents, a paper inclosed in that envelope, telling Miss Rootham that it was his will, and calling her attention to the fact that he deposited it in a certain valise, which he hung in a closet in his house. He also placed the key to the valise in a drawer, and called her attention to that fact. He left with her an envelope marked "Miss Keren Rootham (after my death). J. J. Turner." This envelope, when opened, contained a direction to Miss

evidence to show a devise of real estate, where the paper offered was not proved to have been attested by three witnesses, and the certificate of register or probate did not show that the provisions of the statute were complied with in this respect. *Hale v. Monroe*, 28 Md. 93.

III. Evidence of the contents.

a. Sufficiency.

1. In general.

It is generally held that it will be sufficient if the contents of a lost or destroyed will are clearly and distinctly proved. Some courts require proof beyond all doubt, some hold that it is sufficient if the contents are substantially proved. The expressions used in various cases are set out below.

The contents of a lost or destroyed will should be proved in the same manner as a deed, note, or bond. *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340; *Jaques v. Horton*, 76 Ala. 238.

They should be proved in general terms. *Forthing v. Weber*, 99 Ind. 589.

They should be substantially proved. *Banning v. Banning*, 12 Ohio St. 437; *Jones v. Casler*, 139 Ind. 832; *Allison v. Allison*, 7 Dana, 91.

They should be substantially proved under Ohio act May 8, 1852, § 47, 50 (3 Curwin, 1910, 1904), providing that the contents shall be substantially proved. *Banning v. Banning*, 12 Ohio St. 437.

They should be clearly and fully proved. *Re Foster*, 13 Phila. 507.

They should be clearly established. *Baker v. Dobyns*, 4 Dana, 220.

They should be clearly and distinctly proved. *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646; *Re Paine*, 6 Dem. 361.

They should be clear and satisfactory. *Harris v. Tisereau*, 52 Ga. 153, 11 Am. Rep. 242; *McNeely v. Pearson* (Tenn. Ch.) 42 S. W. 165, Affirmed by supreme court.

They should be of the clearest and most satisfactory character. *Büchle's Estate*, 3 Pa. Dist. R. 16.

They should be clear and uncontradicted. *Everitt v. Everitt*, 41 Harb. 385, Affirmed 29 N. Y. 39.

Should be clear and convincing. *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

Evidence of the contents should be such as to satisfy the conscience of the jury, and should be very clear and strong. *Kitchens v. Kitchens*, 39 Ga. 163, 99 Am. Dec. 453.

Proof should be very clear and might be by parol. *Deaves's Estate*, 140 Pa. 242.

It should be full and satisfactory. *Dudley v. Wardner*, 41 Vt. 59.

The contents should be proved by evidence as cogent and satisfactory as that required to establish the validity when produced in open court. *Harris v. Harris*, 10 Wash. 555.

They should be proved by the most stringent evidence. *Huble v. Clark*, 1 Hagx. Eccl. Rep. 115.

Evidence should be strong, positive, and free from all doubt. *Davis v. Sigourney*, 8 Mot. 487.

Should be of a very cogent character, and not less 88 L. R. A.

than to rectify mistakes in written contracts and actions in chancery. *Wharram v. Wharram*, 10 Jur. N. S. 499, 8 Swab. & T. 301, 33 L. J. Prob. N. S. 75, 10 L. T. N. S. 163, 12 Week. Rep. 889.

Should be clear, strong, and irrefragable, free from suspicion or doubt in its sources, exact and certain in its conclusions. *Podmore v. Wharton*, 3 Swab. & T. 449, 33 L. J. Prob. N. S. 143, 10 Jur. N. S. 756, 10 L. T. N. S. 754.

Should be of the most cogent and irrefragable character, free from suspicion in its sources, and exact and certain in its conclusions. *Fitzgerald v. Wynne*, 1 App. D. C. 107.

Should be the fullest and most satisfactory proof of the contents, and the last trace of reasonable doubt and suspicion should be dispelled by trustworthy evidence. *Moore v. Whitehouse*, 3 Swab. & T. 567, 34 L. J. Prob. N. S. 31, 11 L. T. N. S. 458.

Should be so strong that the last trace of reasonable doubt or suspicion should be dispelled by trustworthy evidence. *Moore v. Whitehouse*, 11 L. T. N. S. 458, 3 Swab. & T. 567, 34 L. J. Prob. N. S. 31.

In *Clark v. Wright*, 3 Pick. 67, it was held that parol evidence was sufficient to probate a codicil which had been lost or destroyed.

In *Burks v. Burks*, 86 L. J. Prob. N. S. 125, L. R. 1 Prob. & Div. 472, 16 L. T. N. S. 677, 15 Week. Rep. 180, it was said that in ascertaining the contents of a lost will "the court must, so far as regards the sources from which the testimony is sought, proceed in the same way as if it were dealing with any other paper, the contents of which are to be proved by secondary evidence."

All that could reasonably be required of a party seeking to establish a will would be to show in general terms the disposition which the testator made of his property by the instrument, and that it purported to be his will, and that it was duly attested by the requisite number of witnesses, where such instrument was destroyed after the testator's death by another heir without the fault of complainant, and there was no copy shown to be in existence. *Anderson v. Irwin*, 101 Ill. 411.

And proof was sufficient where the contents were clearly and distinctly proved. *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88.

And where the contents were clearly and fully proved. *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340.

And a lost will was established on satisfactory proof of destruction and contents. *Trevelyan v. Trevelyan*, 1 Phillim. Eccl. Rep. 149; *Bowen v. Idley*, 1 Edw. Ch. 148; *Idley v. Bowen*, 11 Wend. 227.

Any evidence admissible under the rules of law to establish the existence of a lost will and its contents can be received, although the statute provides for proving a will by a certified copy from the record of the county court. *McNeely v. Pearson* (Tenn. Ch.) 42 S. W. 165, Affirmed by supreme court.

And in an action for partition the evidence was sufficient where the contents were proved distinctly by one witness who was corroborated by

Rootham "to give my valise key to Mr. William Clark, who can take the note case, which contains all valuable papers, also any money in my old book, and the key of the house to my son R. Morris Turner." Mr. Clark was, unfortunately, absent from Lincoln at the time of Dr. Turner's death. Immediately after his funeral the two sons of Dr. Turner found Miss Rootham in possession of the valise. At their solicitation, she exhibiting some reluctance, she delivered the valise to William J. Turner, both sons giving her a written receipt therefor. The valise was placed in William J. Turner's house. Early in May it was announced that

this house had been entered by burglars, and a number of articles abstracted. The account of this affair, as given by William J. Turner, and corroborated in most particulars by his wife and brother, is that, with his family, he made an evening call upon his brother, and returned home about half past 10. During his absence the house had been entered through a basement window. Some jewels had been stolen. This valise had been cut open, and papers, evidently abstracted therefrom, were found scattered about the floor. No will was found among these papers. From the foregoing facts we think the proponents raised a

other evidence under 2 N. Y. Rev. Stat. 8d ed. p. 182, §§ 85, 89, providing that the contents shall be clearly and distinctly proved by at least two credible witnesses and the plaintiffs were not concluded by the dismissal of a suit in which they had sought to probate the will. *Harris v. Harris*, 26 N. Y. 433, Reversing 36 Barb. 88.

In *Timon v. Claffy*, 45 Barb. 433, it was said that in *Harris v. Harris*, 36 Barb. 88, the complaint was dismissed because the contents were not proved by two witnesses, and that in an action at law the judgment was held conclusive on the parties. But *Harris v. Harris*, 26 N. Y. 433, says: "The single purpose of the former one was to make proof of a will alleged to have been lost or destroyed. And the judgment in legal effect was, that there was not sufficient proof to establish the will as a record according to the provisions of the statute in relation to the probate of wills. To this extent it was conclusive. But the action did not directly involve the validity of the will, as a will or devise of real estate, and no such judgment was authorized. No such judgment in terms reaching that question was given. On the contrary, the record distinctly shows that the exclusive ground on which the judgment refusing probate proceeded was, that there was a failure of statute evidence as to the contents of the will, which the court found had been made and published in due form of law to pass real and personal estate, and was fraudulently destroyed by the plaintiff in this action."

And the evidence was sufficient where the proof of contents was clear and explicit, and the evidence showed beyond doubt that the will had been surreptitiously destroyed. *Buchanan v. Matlock*, 8 Humph. 399, 47 Am. Dec. 622.

And it was held that N. Y. Code Civ. Proc. § 1865, requiring that the provisions of the will be clearly and distinctly proved by at least two credible witnesses, "a correct copy or draft being equivalent to one witness," was to be liberally construed. *Re De Groot*, 18 N. Y. Civ. Proc. Rep. 102.

And in an action of partition, the attorney who drew the will and subscribed it as a witness also proved its contents. *Dan v. Brown*, 4 Cow. 453, 15 Am. Dec. 366.

Where it is sought to establish a lost will it was error to instruct the jury that "everything may be presumed against the destroyer of the will." The court said: "The doctrine is, that unfavorable presumption and intentment shall be against the party who has destroyed the instrument which is the subject of inquiry, in order that he may not gain by his wrong. But where there is express and positive evidence, there is no place for presumption or inference. It is only in reference to the contents of a paper destroyed or withheld that the maxim can have application; and where the contents are proved, there is no occasion for resort to the maxim." *Bott v. Wood*, 56 Miss. 186.

In an action of ejectment where a party claimed through a will which could not be found, and it was proved that land was devised to three children and the wife in fee and that two of them

had sold their part and had acted upon and submitted to the will as validly devising the land purporting to be theirs by devise, it was held that the existence of the will was established by the evidence of one of the heirs "that she saw the will and her explicit statement of what it contained, and the fact that the devisee and the heir at law being one, all submitted to and acted upon the will as she described." *Brown v. Morrow*, 43 U. C. Q. B. 436.

In an action of ejectment where the second will was traced to the testator's possession and could not be found after his death, parol evidence of its contents was proved by one witness and established the revocation of the former will, and the presumption of revocation by the testator was not overcome. It was held that the testator died intestate. *Brown v. Brown*, 27 L. J. Q. B. N. S. 173, 8 El. & Bl. 876, 4 Jur. N. S. 163.

And parol evidence of the contents of a will was admissible where the same had been recorded and the record and the original destroyed by fire; but the evidence was insufficient where the witness was eighty-five years old, and testified to hearing the will read sixty-five years previously, stating the testamentary disposition of the testator's property. *Apperson v. Dowdy*, 82 Va. 776.

In *Woodroff v. Burton* (Feb. 1719), 1 P. Wms. 734 where the devisee brought a bill against the heir and it was shown that there was such a will as the plaintiff suggested and that the defendant had destroyed it, it was decreed that the defendant convey the premises to the plaintiff in fee.

In *Hampden v. Hampden*, 3 Bro. P. C. 550, where the plaintiff claimed as devisee under the defendant's father's will, and the defendant had suppressed the will, it was held that although the contents were not proved exactly, yet the defendant might have cleared this by producing the will, therefore it was decreed that the plaintiff, the devisee, should hold and enjoy until the defendant produced the will.

In *Campbell v. West*, 3 B. Mon. 242, where the question was as to the jurisdiction of a court of equity, it is said: "We are of the opinion that there being no difficulty in proving the publication and contents of the will in the county court, and there being no proof of a fraudulent suppression or spoliation by any one of the appellants, a court of equity ought not, now especially, to assume jurisdiction to decide on the ultimate rights of the parties."

An instruction: "Unless the evidence of the contents of the alleged will is clear and positive,—not vague or uncertain recollections,—and of such a character as to leave no reasonable doubt as to any of the substantial parts of the paper, the jury should find for the contestants,"—was properly refused because the rule laid down was too strict. *Skogg v. Horton*, 82 Ala. 352.

But in an action of reversion, persons claiming to be instituted heirs under a will alleged to be lost or destroyed were not allowed to prove its existence, loss, and contents in the district court, when it had never been admitted to probate by

strong presumption, if they did not make conclusive proof, that a will by Dr. Turner had been executed, that it was placed in the valise, and that it was there at the time of his death. Without desiring to cast any unfavorable reflection upon any of the parties concerned, we may be, perhaps, permitted the remark that the unusual conduct of the burglar in seeking out this valise from an upstairs closet, cutting it open, and scattering its contents over the floor, does not tend in our minds to raise any inference that no will was among the papers so abstracted, although it does not appear that any paper belonging to Dr. Turner, and known to be in existence, was actually carried away

by the felon. In addition to the foregoing there appeared certain declarations of Dr. Turner, extending to a short time before his death, from which it would appear that the will had not been revoked. Such declarations we think admissible for this purpose, as will be hereinafter indicated.

The difficulty lies in the proof which was offered as to the contents of the will. It does not appear that any person ever read the will, or was aware of any portion of its contents, except through statements made by Dr. Turner. The strongest evidence is that of Capt. Scott, to the effect that Dr. Turner came to his office declaring that he had made his will, and

the court of probate. *Clappier v. Banks*, 11 La. 503.

A will claimed to have been fraudulently suppressed after the death of the testatrix was not established on account of insufficiency of proof, and it was held that it would require the most stringent evidence to establish the paper. *Huble v. Clark*, 1 Hagg. Eccl. Rep. 115.

Where the question of title between vendor and vendee depended upon a will which had been proved in New York, but which had never been registered or proved in Ontario, the affidavit of the loss of the will was held to be insufficient evidence to establish the same where there was some reason to apprehend that there existed no legal means of proof of the will by the purchaser if he was compelled to accept the title. *Brady v. Walls*, 17 Grant, Ch. (U. C.) 699.

And the contents of a lost will could not be proved on motion without the consent of the next of kin. *Re Pearson* [1896] P. 239.

A party could not intervene in proceedings for the probate of a will, where he claimed that a prior will was in existence at the testator's death in which he was named as legatee or devisee, and which was still in existence or had been fraudulently destroyed, where he did not show that he was a legatee or devisee or establish the provisions of the prior will as required by N. Y. Code Civ. Proc. § 1865. *Re Hammersly*, 7 N. Y. S. R. 232.

2. Wills torn in pieces.

Where a will has been torn in pieces without the consent of the testator, it may be established by proving the missing parts.

So, a will and codicil which were torn in pieces by the testator's son after the death of the testator were probated, where some of the pieces were saved and by oral evidence the court arrived at the substance of the instruments. *Foster v. Foster*, 1 Add. Eccl. Rep. 462.

So, a will was established where a younger brother of the heir at law snatched the will out of the hands of the executor and tore it up in many small pieces, and most of them, particularly such parts wherein it was the devise of the land, were picked up and stitched together again. *Haines v. Haines*, 2 Vern. 441.

And the probate of a will was allowed where the will after the testator's death was torn in pieces by one of his sons while a copy was being made by the executor, and a copy supplied some blanks where the pieces were not found. The court said: "If you can supply the whole of a lost will by evidence from memory why should you not supply part of an incomplete will which has been partly destroyed when you have evidence in the form of a copy which has been made at the time?" *Goods of Leigh* [1892] P. 82.

So, where a will was torn in pieces after the death of the testator, the court ordered that the will be pasted together and decreed probate. *Knight v. Cook*, 1 Lee, Eccl. Rep. 413.

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"In an eject 'firm' upon a trial at the bar the evidence was that one Warner by his will in writing devised the lands in question to Henry Etheringham, and the heirs males of his body, and bailed the writing to the scrivener to keep, and four years after died, and about a fortnight after his death this writing was found in the scrivener's study, gnawn all to pieces with rats, yet he with the help of the pieces, and of his memory and other witnesses, caused it to be proved in the ecclesiastical court, and now the court demanded of the witnesses, whether a stranger that knew not the contents of the will before, by joining of the pieces together could tell that the devise of the lands in question was to Etheringham, and the heirs males of his body; for they did agree that if this clause could be made out, though by joining of the pieces, it were a good will, for all that. But the witnesses said that a stranger could not make out that clause. Whereupon the court directed the jury, that if they found that the will was gnawn before the death of the deviser, then 'twas for the plaintiff, if after, for the defendant, and the jury found for the defendant in favor of the will." *Etheringham v. Etheringham*, Aleyn, 2.

3. Proof by copy.

Where it is proved that a will has been duly executed, and that it has been lost or destroyed without the knowledge or consent of the testator, the best evidence of its contents is a copy or draft of the will if it can be obtained, and this is sufficient when satisfactorily proved. *Burl v. Burl*, 36 L. J. Prob. N. S. 125, L. R. 1 Prob. & Div. 472, 16 L. T. N. S. 677, 15 Week. Rep. 1090; *Graham v. O'Fallon*, 8 Mo. 507; *Hildreth v. Schillenger*, 10 N. J. Eq. 196; *James v. James*, 3 Hagg. Eccl. Rep. 184, note; *Happy's Will*, 4 Bibb, 553; *Goods of Cousins*, 1 Notes of Cases, 236; *Goods of Peobell*, 6 Jur. N. S. 406; *Podmore v. Whotton*, 33 L. J. Prob. N. S. 143, 38 Swab. & T. 449, 10 Jur. N. S. 750, 10 L. T. N. S. 754; *Lane's Will*, 2 Dana, 108; *Martin v. Luking*, 1 Hagg. Eccl. Rep. 244; *Sly v. Sly*, 46 L. J. Prob. N. S. 61, L. R. 2 Prob. Div. 91, 25 Week. Rep. 463; *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504; *Goods of Barber*, 36 L. J. Prob. N. S. 19, L. R. 1 Prob. & Div. 267, 15 L. T. N. S. 192, 15 Week. Rep. 231; *Payne's Will*, 4 T. B. Mon. 423; *Hamilton v. Lighbody*, 21 U. C. C. P. 123; *Jackson, Schuyler, v. Russell*, 4 Wend. 543; *Forbuz v. Weber*, 99 Ind. 589; *Re Coghlan*, 4 L. T. N. S. 839.

So, the probate of a lost will was allowed where the contents of the will were proved by a draft, and the witnesses agreed in all the substantial matters contained in the chief part of the draft, and its due execution was proved. *Burl v. Burl*, 36 L. J. Prob. N. S. 135, L. R. 1 Prob. & Div. 472, 16 L. T. N. S. 677, 15 Week. Rep. 1090.

So, a probate was granted on a copy, where it was proved that the original will was duly executed, and was destroyed or lost after the death of the testator. *Graham v. O'Fallon*, 8 Mo. 507.

then read it to Capt. Scott, asking him whether it was in legal form. Capt. Scott was blind, and therefore did not see the will himself, so that his testimony amounts to nothing more than a repetition of Dr. Turner's declarations as to its contents. In addition to this there is evidence of a few declarations, made to others, subsequently, as to the effect of different provisions contained in the will. Dr. Turner told Mr. Clark that he and Capt. Scott were named as executors. He told Keren Rootham that he had provided for her. He told his pastor, Dr. Curtis, something in regard to the bequest to the two missionary boards. Beyond this there is no evidence as to the contents of the

will. Mr. Clark had, about the time the will was executed, obtained copies of the two notes referred to. Just before the will was propounded for probate, he obtained from the records a description of the property covered by the Morris Turner mortgage. The copy propounded was made up by Capt. Scott's dictating to Mr. Clark from recollection of Dr. Turner's declarations, and Mr. Clark's filling in the description of the notes and mortgage from the memoranda in his possession. The attestation clause was copied from a form book. We do not think that this was sufficient evidence of the contents of the will, and from this it follows that the verdict was the only

So, where a copy was proved by the scrivener who drew the will. *Hilbreth v. Schillenger*, 10 N. J. Eq. 196.

An executed fair copy of a will was probated where the facts proving adherence to the last moment of the testator's life were quite irresistible. *James v. James*, 3 Hagg. Eccl. Rep. 184, note.

The probate of a will was allowed on proof of a copy where it was in existence up to near the time of his death, and declarations of the testator showed that he had such will, and the testator's son acted suspiciously at the time of his death and claimed there was no will. *Finch v. Finch*, 36 L. J. Prob. N. S. 78, L. R. 1 Prob. & Div. 371, 16 L. T. N. S. 268, 15 Week. Rep. 797.

And where the original will was lost or mislaid, it was held that the next best evidence was a copy of the same, and this should be admitted to probate when properly proved. *Happy's Will*, 4 Bibb, 558.

So, a probate was granted to a copy of the will where the affidavit of the attesting witness proved its due execution, and the will was given to a solicitor after the testator's death to make a copy, and the will was stolen from his office. *Goods of Cousins*, 1 Notes of Cases, 236.

And the probate of a copy retained by the testator was allowed where his solicitor kept the original, which could not be found after the testator's death. *Goods of Peebell*, 6 Jur. N. S. 406.

So, where the will was proved to have been in existence at the death of the testatrix, or that it had been apollated or destroyed by the next of kin who opposed the application for probate, the probate of a draft was allowed. *Podmore v. Wharton*, 38 L. J. Prob. N. S. 143, 38 Sab. & T. 449, 10 Jur. N. S. 756, 10 L. T. N. S. 754.

And a sworn copy of a will was properly admitted to probate where the original will was lost, and the executors named, and the clerk of the court where the original should be kept testified that they did not know what had become of it, and the due execution of the original was proved. *Lane's Will*, 2 Dana, 106.

So, a will was established where it was destroyed after the testator's death, and its contents were proved by a draft of the same. In this case the contestant admitted that the proof established that the draft was entitled to probate. *Martin v. Luking*, 1 Hagg. Eccl. Rep. 244.

And a will was probated on proof of a copy found among the papers of the solicitor of one of the executors, which copy was in the handwriting of the solicitor's clerk whose name appeared as one of the attesting witnesses, the attorney and his clerk both being dead and fifty years having elapsed. The copy was corroborated by the declarations of a deceased person who claimed a limited interest under the will. *Sly v. Sly*, 46 L. J. Prob. N. S. 63, L. R. 2 Prob. Div. 91, 25 Week. Rep. 463.

A will which the testator had destroyed through duress was admitted to probate on the evidence of two witnesses, one of whom had transcribed the same and the other a subscribing witness who identified a copy as substantially the same as the destroyed will, and two other subscribing witnesses who proved that the testator was in his right mind at the time of the execution of the will. *Batton v. Watson*, 13 Ga. 68, 58 Am. Dec. 504.

And a copy of a destroyed will was probated where the copy was proved by persons who heard the will read, and the persons entitled in distribution filed a proxy of consent for the probate of the draft. *Goods of Barber*, 36 L. J. Prob. N. S. 12.

So, a will was admitted to probate where a subscribing witness proved the same by a substantial copy, and the contestant refused to produce a literal copy made for him by such witness while the original was in his possession, and the due publication was proved by the attesting witness, and the will had been secretly taken from the possession of the witness with whom it had been left for safe-keeping and could not be found. *Payne's Will*, 4 T. R. Mon. 423.

In ejectment where it was proved that the defendant had the will upon which plaintiff's title depended, and refused to produce it on *subpoena duces tecum*, the evidence was sufficient where the will was proved by one of the subscribing witnesses, and who also corroborated a true copy of the will produced on the trial. *Hamilton v. Lightbody*, 21 U. C. C. P. 126.

So, in an action of ejectment an exemplified copy of an ancient will was admissible in evidence, where a witness testified that he had examined all the bundles of wills given him by the surrogate which should have contained the will in question if it was in the surrogate's office. It was held that the evidence of this witness was as satisfactory as that of the surrogate provided he had equal opportunity to ascertain the fact. *Jackson, Schuyler, v. Russell*, 4 Wend. 543.

And under Ind. Rev. Stat. 1831, § 2009, a will destroyed by a testator in a temporary fit of insanity was properly probated by evidence of a copy recorded by the recorder at the instance of the testator in the books of record, sustained by evidence of the deputy recorder, and by a witness who went to his office with the testator, and by a witness as to its being a true copy, and declarations of the testator as to depositing for record, and evidence of the testator taking the original from the office after record. It was held that after a true copy was shown it was not necessary to prove the exact contents by another witness, but it would be sufficient if it was proved in general terms. *Forbing v. Weber*, 99 Ind. 580.

In *Goods of Coghlan*, 4 L. T. N. S. 839, it was held that where an original will was lost and a pencil draft was attempted to be probated, the affidavit to support the motion should state *in hac verba* the contents of the lost will.

But where a will was executed and there was not room enough for the signatures, which were attached on another piece of paper, and the scrivener attempted to replace it by a copy which he produced to the testator who signed it without reading

one which could properly be returned upon the evidence. It becomes, therefore, unnecessary for us to consider any special assignments of error relating to other branches of the case.

The precise question does not seem to have often arisen. We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will, and in proof of issues relating to the testator's competency or to undue influence; but it has been doubted whether such declarations may be received to establish a revocation. It follows that, in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must

necessarily be established by some such indirect method. The declarations having been admitted for that purpose, their sufficiency to establish the contents of the will is another question. In England, prior to the leading case of *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, it was considered that the declarations were not admissible as tending to prove the contents. *Doe, Shallcross, v. Palmer*, 16 Q. B. 747, turned upon the question whether an interlineation had been made before or after the execution of the will, and it was held that the testator's declarations as to his intentions made before the execution of the will were admissible, but the declara-

the same or having it read to him, and the former one was destroyed, the probate of both was refused, where it was not shown that the substituted will was a copy of the previous one. *Day v. Day*, 8 N. J. Eq. 548.

And where the draft of a will was offered for probate, and the will had been destroyed by the widow inadvertently burning it with some old papers, thinking it was of no value, the court said: "People are constantly destroying wills, and the very persons who have destroyed them afterwards ask for probate of them. This is not one case, but one out of a hundred. I wish I had power to punish a person who destroys a will, but I have not. This, however, I always have done and I always will do, I will have the will propounded before I admit it to probate; I will give no assistance whatever to a person who has destroyed a will." *Goods of Body*, 84 L. J. Prob. N. S. 55, 4 Swab. & T. 2.

4. Number of witnesses.

In regard to the number of witnesses necessary to establish the contents of a lost or destroyed will, the weight of authority is that in the absence of a statute the contents of a lost will may be established by the evidence of one witness, but there are some cases which hold that two witnesses are necessary. In some states the statute is mandatory. In the following cases one witness was held to be sufficient for that purpose: *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 300, 24 Week. Rep. 479, 17 Moak. Eng. Rep. 453; *Colligan's Estate*, 5 N. Y. Civ. Proc. Rep. 198; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 396; *Jackson, Brown, v. Betts*, 6 Cow. 377; *Dickey v. Malechli*, 6 Mo. 177, 34 Am. Dec. 130; *Kearns v. Kearns*, 4 Harr. (Del.) 83; *Baker v. Dohyans*, 4 Dana, 221; *Graham v. O'Fallon*, 4 Mo. 601; *Wyckoff v. Wickoff*, 16 N. J. Eq. 401; *Lewis v. Lewis*, 6 Serg. & R. 489.

In *Graham v. O'Fallon*, 4 Mo. 601, it was held that the contents of a lost will could be proved by one witness. It was said that the rule that the contents should be proved by two witnesses, stated in *Graham v. O'Fallon*, 3 Mo. 511, was not a decision upon that question; but the question was, Could a will lost or destroyed be set up at all by proving the contents? and the case in *Toller on Executors*, 71, never was cited by this court, "nor does the author even affirm the law was so, but it had been done."

And a will was admitted to probate where its contents were proved by one witness who had destroyed the will under a mistake, and his testimony was above reproach and he could gain nothing by the intestacy of the deceased. It was held that the proof of its destruction and of its contents or substance, whether by one witness or by many, must be clear, satisfactory, and convincing. *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

In *Beall v. Cunningham*, 1 B. Mon. 399, 39 Am. Dec. 469, it was said in regard to a subsequent will, which was not probated, that C, being a nominated

executor in that will and charged by the testator's dying injunction with the immediate execution of it, his testimony might be sufficient in the absence of any countervailing facts to authorize extraneous proof as to its contents, where it was lost.

And in *Brown v. Brown*, 8 El. & Bl. 876, 27 L. J. Q. B. N. S. 173, 4 Jur. N. S. 163, a subsequent will which was lost was established by one witness to show a revocatory clause.

And in *Helyar v. Helyar*, 1 Lee, Eocl. Rep. 472, the contents of the second will which was lost was proved by one witness corroborated by declarations of the testator, to show that the second will was of a different purport from the former will, and the second will was held to be a revocation of the first.

But in *Hunter v. Gardenhire*, 13 Lea, 753, it was held that in order to establish a lost will as to realty, the proof should be the clearest and most stringent evidence of two unexceptionable witnesses who saw and read the will and remembered the contracts thereof.

And where two witnesses proved the contents of the will, and that it was witnessed about five days before the testator's death, and it could not be found, and the answer of his daughter admitted that she knew of the will, that its contents were such as stated in the bill, and that she made an admission the morning after his death that the will was in the house and tried to explain such admission in an absurd way, and it was shown that the testator had an aversion for her husband, who was a profligate drunkard, and the daughter obtained the keys to his papers the evening before he died, the will was admitted to probate. *Brown v. Brown*, 10 Yerg. 84.

So, under N. Y. Code Civ. Proc. § 1865, providing that a lost or destroyed will should be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, it was held that these provisions should be liberally construed, and a destroyed will was proved where the scrivener retained the draft and verified it with another person before it was executed, and the draft was identified by the scrivener and the party who verified the same. *Re De Groot*, 18 N. Y. Civ. Proc. Rep. 102.

And under this section it was held that a stipulation by counsel in regard to the contents of a will was not sufficient to admit the same to probate. *Re Ruser*, 6 Dem. 31.

On the ground that a finding is presumed to be based on the required proof, it is held not necessary for a special finding in an action to probate a lost will to show that proof has been or has not been made by the number of witnesses required by Ind. Rev. 1881, § 2009, providing that "no will of any testator shall be allowed to be proved and established as lost or destroyed, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been destroyed in the lifetime of the testator without his consent,

tions made after its execution were not. *Quick v. Quick*, 3 Swab. & T. 442, was a case startlingly like that at bar in some points. The sole evidence of the contents of the will was the testator's declaration. There was the same fact of the will being kept in a bag, and of its being taken by burglars. The court held that there was a failure of proof, holding, also, that the declarations were incompetent. The court of appeals, however, in *Sugden v. Lord St. Leonards*, overruled *Quick v. Quick*, and distinctly held such declarations admissible. The will in question was, however, proved by much other evidence. Miss Sugden, the testator's daughter, had not only heard the will

read, but she had herself read it a number of times, and was able to testify in much detail as to its contents from such personal inspection. Moreover, not less than eight codicils were found, the terms of these all tending to corroborate her as to the contents of the original will. In addition to this proof, there was the evidence of the testator's declarations as to the will's contents. The long and exhaustive opinions are directed only incidentally to the admissibility of the declarations. The crucial question having been whether all the evidence was sufficient to establish the will, the case, therefore, falls far short of holding that the contents of a lost will may be proved

or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proved by two witnesses, or by a correct copy and the testimony of one witness." It was further held that it was not necessary that some two witnesses should concur in their evidence of the entire contents of the alleged will so that the instrument could be reproduced at full length, and it was only necessary that the substantial contents of the will should be proved. And the probate of a will was proper where the provisions of the will as probated had the united support of two witnesses, although of the three witnesses all did not concur as to each provision. *Jones v. Casler*, 139 Ind. 382.

A will was probated where it did not appear that all the contents of the will as sworn to by one witness were also sworn to by the other, although the testimony of the latter did not contradict that of the former, but confirmed it; yet his testimony did not relate to any portions of the will except such as relate to its form. The institution of his daughter as universal legatee, and the appointment of executors, and the examination of witnesses, did not appear to have been conducted with any reference to a detailed description of the will, and it was held that the universal legacy being established beyond question, the particular legacies which tended to diminish the estate were sufficiently proved on general principles against such legatee by a single witness, because those legacies were set up in the petition of the party who was to be charged with them, and she could not afterwards deny what she stated in her pleadings. *Clark's Succession*, 11 La. Ann. 124.

In *Fuentes v. Gaines*, 25 La. Ann. 85, the probate was set aside on the ground that the evidence was by witnesses who derived their knowledge of the contents from the verbal declarations of the testator. But this case was reversed in 22 U. S. 10, 23 L. ed. 524, on account of the failure of the state court to transfer the case to the Federal court.

On the trial in the United States circuit court the contents of a will were duly proved by two witnesses who had read the will. *Gaines v. Lizardi*, 3 Woods. 77.

Different phases of subsequent proceedings in this celebrated case are found in 33 U. S. 13 Pet. 404, 10 L. ed. 221; 40 U. S. 15 Pet. 9, 10 L. ed. 642; 43 U. S. 2 How. 619, 11 L. ed. 402; 47 U. S. 6 How. 550, 12 L. ed. 553; 82 U. S. 15 Wall. 624, 21 L. ed. 215; 17 Fed. Rep. 16; 1 Woods, 118.

Where a will was destroyed, and as the proponents were unable to prove its contents by two witnesses as required by Cal. Code Civ. Proc. § 1339, and had no standing in the probate court, and it was claimed the court of chancery should take jurisdiction, it was said: "We are not prepared to say the rule of evidence would not be the same, for if it were otherwise the safeguard thrown around the rights of heirs would be lost and the statute rendered entirely nugatory." *McDaniel v. Patterson*, 98 Cal. 86.

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In an action by slaves emancipated under a will which was suppressed, it was held that the suppressed will was sufficiently proved where the two subscribing witnesses, both of whom read or heard the will read, testified as to the capacity of the testator, and that the will they attested contained provisions essentially different from the pretended recital in the ostensible bond which was tendered by the defendants proposing to carry out provisions of the will which they alleged to be different. The slaves were entitled to be free, where the evidence showed that the will had been confided to the custody of one of the witnesses by the testator, and he delivered it only a day or two after his death to two of the heirs who were nominated as executors, and the only countervailing evidence was that of one of the appellants who affirmed that the paper described as a bond recited the will. *White v. Willis*, 1 B. Mon. 180.

Under Ga. Code, § 2308, providing that if a will be lost or destroyed subsequent to the death or without the consent of the testator, a copy of the same clearly proved to be such by the subscribing witnesses and other evidence may be admitted to probate, but in every such case the presumption is of revocation by the testator and that presumption must be rebutted by proof,—it was held that it was not necessary that the contents of the will should be proved by three subscribing witnesses, and that the presumption of revocation must be rebutted by three witnesses; but the destruction or loss of the will could be proved by such other evidence as satisfied the conscience of the jury, that the will so executed as testified to by the subscribing witnesses was lost or destroyed since the death of the testator or without his consent before his death, and it was held the evidence of the contents should be such as to satisfy the conscience of the jury, and should be very clear and strong. *Kitchens v. Kitchens*, 39 Ga. 168, 90 Am. Dec. 453.

Under Wash. Code Civ. Proc. § 679, providing that no will shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a will could not be proved where there was only one witness in the case who saw the will and he testified that he never saw it after he signed it as a witness and did not read it at that time, and had no knowledge of the contents except what he subsequently learned from conversations with the decedent, and from an examination of the recorded instrument. *Harris v. Harris*, 10 Wash. 555.

And the probate of a lost or destroyed will was denied where but a single witness was offered whose character was irreproachable, and his ability to express clearly the meaning of the will was unquestionable, and his testimony direct and positive as to all parts of the will, but the witness had not

solely by the declarations of the testator. Its effect is merely that such declarations are admissible to corroborate more direct evidence. This is the construction given the case by the House of Lords in *Woodward v. Goulstone*, L. R. 11 App. Cas. 469, where the declarations of the testator were held insufficient alone to establish the will. An intimation was given that *Sugden v. Lord St. Leonards* was not considered free from doubt, and the question there presented left open. The importance of interests involved in probate cases in England is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English

cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.

The American cases relied on to support proponent's theory are, when examined, in strict accordance with the English rule. *Re Page*, 118 Ill. 576, 59 Am. Rep. 395, expressly follows *Sugden v. Lord St. Leonards*, and comes within the true doctrine of that case, because the declarations in that case merely went to corroborate the testimony of the lawyer who drew the will, and who produced a copy thereof. *Southworth v. Adams*, 11 Biss.

seen the will or conversed concerning it for a period of more than eighteen months, had no copy or memoranda to refresh his recollection, and the will was a long one, requiring over three hours in its preparation, contained quite a number of legacies, varying from \$300 to \$50,000, creating life estates with remainders and trusts. It was held that the contents of this will were not proved with that degree of certainty required by law. *Re Johnson*, 40 Conn. 587.

And where a will was probated and the only witness was allowed to refresh his memory by inspecting a copy of the will, and no evidence was offered to show by whom a copy was made or from whom it was procured, the judgment of probate was set aside. It was said that the testimony of a single witness who has read and remembers the contents of a will might be sufficient, but such evidence should be so clear and positive as to leave no reasonable doubt as to the substantial parts of the paper. *Jaques v. Horton*, 76 Ala. 238.

In *Jaques v. Horton*, 76 Ala. 238, it was said: "We can conceive no valid reason why there should be any difference in the quantum of proof necessary to establish the contents of a lost will, and the contents of a lost deed, or other written instrument. In either case, the proof must be satisfactory, and probably more caution should be observed in the case of a lost will, as the testator cannot be heard in respect to the disposition he has made of his estate, and as a will is required to be attested by two witnesses."

The evidence was not sufficient to establish a destroyed will where one of the attesting witnesses testified to a draft of the will which was also substantiated by another witness, but who did not know of the execution and had no personal knowledge of what the will contained after its execution. It was held that in the absence of a correct copy or draft of a will it must be proved by at least two credible witnesses, under N. Y. Code Civ. Proc. § 1865, requiring that the provisions of a lost or destroyed will should be clearly and distinctly proved by at least two credible witnesses before it can be admitted to probate. The two credible witnesses need not have been witnesses to the execution of the will, but they must both be able to speak of an actual will from knowledge, and not of a possible will. *Re Waldron*, 19 Misc. 338.

In order to establish a lost or destroyed will the contents must be proved by two witnesses, and each witness must testify to every fact essential to the establishment of the instrument. *Buechle's Estate*, 5 Pa. Dist. R. 127.

The contents of an alleged lost will could not be proved by the evidence of the sole beneficiary and another person, under New York statutes requiring the contents to be proved by two credible persons. *Keasy v. Dimon*, 91 Hun. 642.

5. Proving part of the contents.

The weight of authority is that the whole contents of a will must be substantially proved, al-
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though there are some cases which establish so much of a lost will as was clearly proved. The following cases require proof of the whole of a will.

So, it was held that the evidence must be of the whole contents without exception or omission. *Davis v. Sigourney*, 8 Met. 487.

So, where a will had been destroyed by the testator when he was of unsound mind, its probate was refused where there were four or five witnesses, no two of whom agreed as to the entire contents of the will, and all or nearly all affirmed their recollection to be indistinct and imperfect. It was held that in order to probate a lost will the proof of the entire contents should be conclusive and satisfactory. *Rhodes v. Vinson*, 9 Gill, 169, 52 Am. Dec. 685.

And the probate of a will which had been destroyed was refused, where the scrivener who testified as to its contents could not swear positively that every provision of the original was contained in the copy. *Durfee v. Durfee*, 8 Met. 490, note.

And where a will was lost or destroyed after the testator's death, the probate was refused where the witness did not pretend to prove the contents of the will, nor even the language of the testator in the particular devise which was attempted to be established, and it was held that proving part only of the contents of a will which was lost or destroyed was not sufficient to establish it even as to the part proved, unless it satisfactorily appeared that there was nothing else in the will which would qualify, change, or alter the particular devise proved. *Butler v. Butler*, 5 Harr. (Del.) 178.

And under Colo. Gen. Stat. chap. 115, § 21, providing that whenever any will shall have been lost or destroyed and the fact of the execution can be established, and the contents are shown by the testimony of two or more witnesses, providing the order admitting to probate shall set forth the contents of the will at length and the names of the witnesses, and providing no will shall be admitted to probate upon proof of the contents, unless it shall be proved that the same was in existence at the time of the death of the testator,—evidence was insufficient to establish the contents of a lost will where there were three or four witnesses sworn, no two of whom agreed as to all the devisees nor as to who were the executors. *Todd v. Renick*, 18 Colo. 544.

And under the New York statute requiring that the provisions of a will lost or destroyed shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness, the probate of a will was refused where the statute was not fully complied with and the witnesses sufficiently concurred as to some of the provisions of the will, but as to other of its provisions there was a discrepancy and the witnesses did not agree in reference to the amounts of the gifts. *Sheridan v. Houghton*, 6 Abb. N. C. 234.

And under Mass. Gen. Stat. chap. 92, § 11, providing that no will can be revoked by any subsequent

256; *Re Hope*, 43 Mich. 518, and *Re Lambie*, 97 Mich. 49, are cases of the same character, the declarations being corroborative merely, and not relied on in themselves to establish the will. In *Colligan v. McKernan*, 2 Dem. 481, a will had been propounded for probate. It was contended that there was a subsequent will revoking the former one, but the subsequent will was lost. The evidence offered to establish the second will consisted in the testimony of a clerk in the lawyer's office who heard the scrivener read it in the presence of the testator at the time of its execution. The court distinctly held that this testimony was merely hearsay, relating, in fact, to the scriv-

ener's declarations, and was not equivalent to testimony by one who had himself read the will. In *Clark v. Morton*, 5 Rawle, 235, 28 Am. Dec. 667, the supreme court of Pennsylvania held that the contents of a will cannot be established by declarations of the testator, in the absence of the *corpus* of the will, and of all evidence that the witness had himself seen it. The court said that to permit a will to be so established would defeat the object of the statutes requiring wills to be written. In *Chisholm v. Ben*, 7 B. Mon. 408, the testimony was of the same character as in this case. The will had been read by the testator to the witness, and there were subsequent declarations

instrument other than a will or codicil or writing, signed, attested, and subscribed in the manner provided for making a will, where a codicil was lost, it was held that it could not be admitted to probate without clear and satisfactory proof of its whole contents, but it might be made available to prove a revocation of a former will. *Wallis v. Wallis*, 114 Mass. 610.

So, under N. Y. Code Civ. Proc. §§ 1895, 2021, the provisions of a lost or destroyed will should be clearly proved by two credible witnesses, and it was held that it was not necessary that the witnesses should remember the exact language used, but they should be able to testify at least to the substance of the whole will so that it could be incorporated in the decree. *McNally v. Brown*, 5 Redf. 372.

So, where a will was lost it was held that it would not be sufficient that some of the provisions were proved by two or more witnesses, and another provision in the same way by others, but each of the witnesses must be able to testify as to all the disposing parts of the will under N. Y. Code Civ. Proc. § 1895. *Re Ruser*, 6 Dem. 31.

And in an action for the execution of a power and partition where it was necessary to establish a lost will, and one witness testified that she read the will, and another that she either read it or heard it read and that the property was given to K., but the evidence was indefinite as to how the property was given, and the statements of the witnesses were nothing more than their conclusions as to the construction of the paper and did not give the particular terms of the will or even the substance, the evidence was insufficient. *Fitzgerald v. Wynne*, 1 App. D. C. 107.

In *Woodward v. Goulstone*, 35 Week. Rep. 837, L. R. 11 App. Cas. 469, 55 L. J. Prob. N. S. 1, 55 L. T. N. S. 700, 51 J. P. 307, the probate of a will was refused where evidence of its contents was insufficient, and much of the evidence consisted of declarations by the alleged testator as to the contents of the will after its execution. It was said, distinguishing "*Sugden v. Lord St. Leonards*", the facts were very different from the facts here. The evidence, it is true, was the evidence of a person much interested in establishing the will, but it was the evidence, to begin with, of a person who had seen the will, and was giving a recollection of its contents. In the next place, that evidence was corroborated in the strongest possible way and in the most material particulars by written documents, about which there could be no question. Moreover, the court were satisfied that although there might be some few legacies which were omitted in the recital of the legacies by Miss Sugden, yet they could not be many, but must be few, and that they could not be of any material consequence. The court was satisfied that they had the substantial testamentary dispositions brought to their minds."

But some cases held that probate might be made of so much as might be satisfactorily established. *Jackson v. Jackson*, 4 Mo. 210.

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So, in *Dickey v. Maleochi*, 6 Mo. 177, 34 Am. Dec. 130, it was held that where a will was lost or destroyed and the whole provisions of the will could not be established, the will was probated as to such parts as were established.

And a lost will was sufficiently proved where one of the subscribing witnesses and the person who last had the will in his possession agreed that all the testator's property was devised and bequeathed to his widow, but did not agree whether or not an executor was appointed. *Early v. Early*, 5 Redf. 376.

In *Steele v. Price*, 5 B. Mon. 58, it was held that "as the principal devisees, those in which the testator took deepest interest, and about which he showed most solicitude, are sufficiently proved, the failure of proof as to the minor provisions of the will, should not defeat the whole by preventing the admission to record, of that which is proved; and especially as it does not appear that the establishment of the devise as proved, though it would greatly reduce the fund to be distributed, will affect the relative proportions which the heirs will receive" where a lost will is probated.

And where the contents of a lost will were not completely proved it was probated to the extent to which they were proved. *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 209, 24 Week. Rep. 479, 17 Moak, Eng. Rep. 463.

In *Tucker v. Phipps*, 3 Atk. 360, where the question was as to the jurisdiction in the case of destroyed will, it was said: "I think in such cases of malicious and fraudulent spoliation, the court will not put the plaintiff under the difficulty of going into the ecclesiastical court, where he must meet with much more difficulty than proving the contents of a deed at law, which has been lost or sequestered. For in the spiritual court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, which will be a difficulty almost insuperable, and which courts of law do not put a person upon doing; the plaintiff must also prove the whole will, though the remainder of it does not at all belong to or regard his legacy."

b. Declarations.

The case of *CLARK v. TURNER* holds that the contents of a lost will cannot be proved solely by the declarations of the testator, and the probate was refused where the testimony of a witness as to the contents of a will was given from knowledge derived from the testator's reading the will to him and not from having inspected it himself. This is in accord with the authorities.

In *CLARK v. TURNER* it was also said that the declarations of the testator could be received in evidence to prove the existence of a will, and any proof relating to the testator's competency or undue influence, but the sufficiency to establish the contents of the will was another question; and it was said that the result of the English cases is that

by him as to its contents. The court rejected this evidence as insufficient. *Mercer v. Mackin*, 14 Bush, 434, reaffirms *Chisholm v. Ben*.

The argument has been frequently advanced that such declarations are, admissible as self-serving declarations of a decedent. *Mercer v. Mackin* and *Clark v. Morton* discuss this proposition, but demonstrate that such declarations are not admissible on that ground. *Chisholm v. Ben*, 7 B. Mon. 408, intimated that on adequate proof that the will had been fraudulently suppressed by the heirs, the evidence offered might be sufficient by virtue of

the maxim, *Omnia præsuntur contra spoliatores*. This maxim is not easy to apply. It has sometimes been held to justify the production of slighter proof than would otherwise be required. Its most frequent application is for the purpose of allowing secondary evidence. It would certainly be very dangerous to extend it so far as to relieve a party charged with proving the contents of a written instrument from all obligation to produce some evidence of a competent character; but this phase of the case was not submitted to the jury by any instruction given or asked, at least so far as the

the contents of a lost will could not be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration. This is in accord with the authorities on this question.

So, the probate of a will was refused where the deceased sent a copy of the will from India to England in a letter to his solicitor, stating that he had made the will but there was no proof of the execution of the original except the statements of the deceased. *Goods of Ripley*, 1 Swab. & T. 68, 4 Jur. N. S. 842.

In an action to probate a lost will it was held that the declarations of the deceased made in the presence of a witness, that a paper on the table was his will, which was signed by the testator, were insufficient to establish the same, where the witness could not testify as to the witnesses to the same. *Re Russell*, 88 Hun, 271.

In *Quick v. Quick*, 33 L. J. Prob. N. S. 146, 88 Swab. & T. 444, 10 Jur. N. S. 682, 10 L. T. N. S. 619, 12 Week. Rep. 1119, it was held that the declarations of the testator, made after the execution of a will, were not admissible as evidence of its contents, where no draft or copy of the will or any document throwing any light upon it was in existence. But this case was overruled in *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 809, 24 Week. Rep. 479, and declarations were held admissible in that case. In *Sugden v. Lord St. Leonards* there were many corroborating circumstances.

In *Quick v. Quick*, 3 Swab. & T. 443, 33 L. J. Prob. N. S. 146, 10 Jur. N. S. 682, 10 L. T. N. S. 619, 12 Week. Rep. 1119, it was said that in *Goods of Ripley*, 1 Swab. & T. 68, 4 Jur. N. S. 842; and *Doe, Shallocross v. Palmer*, 15 Q. B. 747, 30 L. J. Q. B. N. S. 367, 15 Jur. 836, declarations of the testator were refused to prove that a will had been duly executed.

And a lost will could not be established where the only evidence of its contents was declarations of the testator. *Woodward v. Goulstone*, L. R. 11 App. Cas. 469, 35 Week. Rep. 337, 55 L. J. Prob. N. S. 1, 65 L. T. N. S. 790, 51 J. P. 307.

And in *Chisholm v. Ben*, 7 B. Mon. 408, it was said that no case holds that contents of a lost will can be established solely by proof of declarations of the testator.

The probate of a destroyed will was refused where the evidence of one of the witnesses had many discrepancies rendering her unworthy of belief, and there was only one other witness who pretended to any knowledge of the actual contents of the will and claimed to be a subscribing witness, and who claimed that the testator read the will to him, but whose character was not above reproach, and there were some discrepancies in his testimony which weakened his claims to absolute credence. It was further held that, conceding the evidence of such witness to be worthy of belief, it was insufficient to establish the contents of the will, where his testimony amounted to nothing more than a detail of what the testator told him was in the will, or of what he supposed the testator was reading from the will, as represents

tions or statements made by the testator were not sufficient of themselves to establish the contents of a will in the court of probate. *Chisholm v. Ben*, 7 B. Mon. 412.

Declarations of the decedent as to the contents and substance of the will were not available to establish its contents, where there was only one witness who verified the draft made by him but he could not testify as to any subscribing witnesses, under N. Y. Code Civ. Proc. § 1865, providing that a lost or destroyed will shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. *Collyer v. Collyer*, 17 Abb. N. C. 323.

And a lost will was not established where the statute required two witnesses to the handwriting of the subscribing witness on the probate of a will, and there was but one witness to the handwriting of one attesting witness and the declarations of the supposed testator. It was held that to establish the validity of a lost will it was necessary to prove its execution with the formalities and solemnities prescribed by the statute, and "It should be done by direct testimony or legally deducible from such facts as are directly established." *Tynan v. Paschal*, 37 Tex. 286, 84 Am. Dec. 619.

And the declarations of the testator were held not to be sufficient of themselves to establish a will, under N. Y. Code Civ. Proc. § 1865, although substantiated by two witnesses who saw the will at the scrivener's office, and the testator stated to them at that time the contents of the will. *Hatch v. Sigman*, 1 Dem. 519.

And the declarations of the contents of a will made by the testator were held to be of no weight in establishing a lost will. *Re Ruser*, 6 Dem. 31.

And under Pa. act 1705, providing that a will in order to convey lands must be in writing and proved by two or more credible witnesses, the making of a will and its contents could not be established by evidence of the verbal declarations of the deceased in the absence of the *corpus* of the will and of all evidence that it had been seen by the witness. *Clark v. Morton*, 5 Rawls, 235, 28 Am. Dec. 667.

But evidence of declarations of the testator were held competent as some evidence of his intent at the time they were made to show that a will was duly executed. Such evidence should be carefully scrutinized and cautiously weighed. *Re Marsh*, 45 Hun, 107.

And secondary evidence was admissible to prove the existence and contents of a lost will, and declarations of the testator were properly received in evidence. *Southworth v. Adams*, 11 Biss. 256.

And declarations of the testator made before and after the execution of his will were admissible as secondary evidence of its contents where it was lost. *Sugden v. Lord St. Leonards*, L. R. 1 Prob. Div. 154, 45 L. J. Prob. N. S. 49, 34 L. T. N. S. 809, 24 Week. Rep. 479, 17 Mosk. Eng. Rep. 453, Overruling *Quick v. Quick*, 3 Swab. & T. 443, 33 L. J. Prob. N. S. 146, 10 Jur. N. S. 682, 10 L. T. N. S. 619, 12 Week. Rep. 1119.

And in *Sugden v. Lord St. Leonards* it was said

contents of the will are concerned. The general verdict for the contestants precludes us from examining the evidence on this point on the theory that spoliation by the contestants was established. The policy of the statute of wills, like the statute of frauds, is that it is better that occasional injustice should be done in exceptional cases, through a failure of legal proof, than that transactions within the statutes should in all cases be left to the uncertainties of parol evidence. So the courts, in giving effect to the statutes, should pursue the same policy, and should avoid meeting hard

cases by adopting rules which, generally applied, would defeat the object of the legislature. On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in the case of wills, and, while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear, and convincing. As said by the Supreme Court of the United States in *Lea v. Polk County Copper Co.* 63 U. S. 21 How. 493, 16 L. ed. 203, "Courts of justice lend a very unwilling ear to statements of what dead

that the decision in *Doe, Shallcross, v. Palmer*, 16 Q. B. 747, 20 L. J. Q. B. N. S. 307, 15 Jur. 836, as to the admissibility of the declarations of the testator made after the will was an *obiter dictum*, as the declarations of the testator given in evidence there had been made prior to the execution of the will.

In *Re Hope*, 48 Mich. 518, where the contestants of a will claimed that a later will was made, which could not be found, it was held that the proponents of the first could not object to parol evidence of the contents of this document because not the best evidence, as they had taken the position that there was no such document in existence. It was further held that declarations of the testator as to the disposition of his property confirmatory of the witnesses who endeavored to establish the contents of the lost will should have been received.

And statements of the testatrix were admissible to show the contents of a will after proof tending to show its existence was adduced. It was held that the declarations of the person who alone profited by the nonexistence of such will should also be received. It was further held, under *How*, (Mich.) Stat. § 5798, providing that "no will, or any part thereof, shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other writing, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will," where the evidence indicated that the will was suppressed, that if the jury found the paper was destroyed, the law permitted the presumption that it was legally drawn and executed notwithstanding the terms of the statute, which required the revoking instrument to be formally executed; and, "if necessary, the law will prevent the perpetration of a fraud by permitting a presumption to supply the suppressed proof." *Re Lambie*, 97 Mich. 48.

And under Ill. Rev. Stat. 1874, p. 1101, § 6, providing that in all cases where one or more of the witnesses to any will shall die, it shall be lawful for the county court to admit proof of the handwriting of any such deceased or absent witness, and such other secondary evidence as is admissible in similar cases, and it may thereupon proceed to record the same, the contents of a lost or destroyed will were allowed to be proved by the testimony of a single witness where the other attesting witness was dead. It was further held that declarations made by the testator after the execution of his will were admissible in the event of its loss, not only to prove that it had not been canceled, but also as secondary evidence of its contents. (Denying the rule to the contrary in New York.) *Re Page*, 118 Ill. 576, 59 Am. Rep. 395.

And in the absence of statutory requirement a will was admitted to probate on the evidence of one witness who testified to having read the will and detailed its contents, but could not give the name of the legatee to whom \$500 had been left, and such witness was corroborated by some evidence of con-

versations with and admissions made by the decedent. *Skaggs v. Horton*, 82 Ala. 352.

So, in *Trevalyan v. Trevalyan*, 1 Phillim. Eccl. Rep. 149, a will was established upon the testimony of one witness and proof of what the testator said he had done.

In *Scoggins v. Turner*, 98 N. C. 135, it was held that if a will was abstracted or destroyed without the testator's concurrence it will remain in force still and be susceptible of restoration upon parol proof of its contents and the inference of *animus revocandi* would be overcome; and a lost will was established upon parol proof of its contents in showing the declaration of the intention of the testatrix as to the disposition of her property, and a declaration that it would be time to have it recorded after her death, and evidence that the testatrix was too sick and helpless to obtain possession of the paper before she died. In this case her granddaughter remained with her up to the time of her death, and the bag containing her valuable papers was found the morning after her death open on the floor and several persons were present that night, among them a person to whose wife the land was given in a former will, and this party had declared before and after her death his determination to have the land if he spent everything he had in getting it.

Where a will was lost it was necessary to establish to the satisfaction of the jury the fact that a valid will was made and executed in accordance with law; second, the substance or contents of said will; third, that the will had not been revoked and that it was lost or destroyed and could not be found after due and proper search; and it was further held that the complainants must introduce evidence clear, full, and satisfactory to establish the facts in their favor, and two witnesses were required to the *factum* of the will, but that two witnesses were not required to each particular fact. It was held that one fact might be proved by one witness and other facts and corroborating circumstances might be proved by other witnesses. In this case both of the subscribing witnesses were dead and proof of the contents rested upon testimony of the witnesses, who repeated its contents from having heard it read by others, the witnesses themselves being held illiterate, and this proof was corroborated by the declarations of the testator and other circumstances. *Morris v. Swaney*, 7 Helsk. 501.

And a codicil relating solely to matters of account between the testator and his partner, made two days before the testator's death, with declarations that he had made a will, was probated although no will could be found. *Goods of Halliwell*, 4 Notes of Cases, 400.

And a codicil was established where it could not be found after the death of the testator, and there was some evidence to show that it was not intentionally destroyed by him, and the contents were proved by a witness who read it and by the probability of the disposition of the property and by the declarations of the testator. *Davis v. Davis*, 3 Add. Eccl. Rep. 223.

men have said." Such evidence is always considered dangerous, and subject to the closest scrutiny. We think it would be in the highest degree dangerous, and would be violative of the object and spirit of the statute, should we hold that the existence and contents of an alleged will might be established solely by testimony of the testator's declarations. Notwithstanding *Syden v. Lord St. Leonards*, and the other cases in that line, we believe the language of the court of appeals of Kentucky in *Chisholm v. Ben* remains true: "The books of reports contain many cases in which wills lost or destroyed have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established. But in an examination of these cases as extensive as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known, the contents of the will from their own

inspection; none in which the declarations, or even professed reading, of the decedent have been held to be alone sufficient on this point; and none which would sanction their admission upon the question of the contents of the will, with any other effect than as merely corroborative of the more direct evidence." As already indicated, this view leads to affirmation of the judgment, because the verdict was the only one warranted by the evidence.

An application was made for the allowance of attorney's fees to the proponents. This application the district court denied, and the ruling is assigned as error. In two cases such an allowance has been made on behalf of defeated contestants when the will was admitted to probate. In *Seebrook v. Pedawa*, 38 Neb. 418, the allowance seems to have been made on the ground that there were reasonable grounds for contesting the will. In *Mathis v. Pitman*, 33 Neb. 191, the allowance was based on the construction of §§ 42, 44, chap. 20, Comp. Stat.:

And a will was probated where it was lost or could not be found after the testator's death, and was proved by a memorandum made by a party who had examined the will at the time of its execution, and by declarations of the testator. *Bessey v. Bostwick*, 13 Grant, Ch. (U. C.) 279.

Probate was allowed of a will which could not be found after the testator's death, and the contents of the will were shown by the draft, and by declarations of the testator made at the time the will was made, and continuing up to within three weeks of his death, and the only person interested in intestacy had access to the place where the will should have been found, before any other person searched for the will. *Finch v. Finch*, L. R. 1 Prob. & Div. 871, 38 L. J. Prob. N. S. 78, 16 L. T. N. S. 268, 15 Week. Rep. 797.

And a will was probated where it was lost after the testator's death by a party to whom he had intrusted it for preparing a better copy, and the contents were fully proved by a draft and a copy made from recollection, and a letter from deceased in reference to the draft. *Goods of Hilliard*, 26 L. T. 228.

And a draft of a lost will made by testatrix's solicitor was admitted to probate, where the draft was found among the solicitor's papers after his death, and entries on his books against his interest showed that he had attested the execution and had been paid his charges, and the testatrix had made declarations to her husband of a desire to execute the will, and he had taken her to the solicitor's office and after its execution had left the will with the solicitor. *Goods of Thomas*, 20 Week. Rep. 149, 41 L. J. Prob. N. S. 32, 25 L. T. N. S. 509.

So, a will which could not be found after the testator's death was probated by proof of a copy made by the testator, and by oral and written declarations of the testator as to its contents. *Johnson v. Lyford*, L. R. 1 Prob. & Div. 546.

And a lost will was established where the evidence showed that the testator had the will a short time before his death, and checked his trunk and died on the trip, and he had made declarations that the will was in his trunk but it was not found therein, and its contents were proved by the scrivener who refreshed his memory by a form book and also by pencil memorandum in the testator's handwriting, and it was corroborated by the attesting witnesses and declarations of the testator. *Southworth v. Adams*, 11 Biss. 253.

And in an action of ejectment a will was established by proof of a draft of the will which could not be found after the testator's death, and proof of declarations made by the testator some years

before his death, and by others within a week of that event. *Whiteley v. King*, 10 Jur. N. S. 1079, 17 C. B. N. S. 755, 11 L. T. N. S. 842, 13 Week. Rep. 82.

And a lost will was established where its execution was proved by one attesting witness where the other was out of the state, and another witness was present who saw the will executed and heard it read, and a copy was found in the handwriting of the scrivener with his papers, and the scrivener was dead, and declarations of the testator substantiated the will. *Bailey v. Sillea*, 2 N. J. Eq. 220.

c. Loss after probating or filing for record.

Secondary evidence of the contents of a will is admissible, where the will has been lost after probate or where the records with the will have been burned. But the evidence must be as conclusive as in cases of other instruments.

So, where a will was regularly proved and afterwards destroyed by the public enemy, together with the records, parol evidence of its contents was admissible in an action of ejectment. *Smith v. Carter*, 3 Rand. (Va.) 167.

And where a will was lost after probate, a copy of the record of the same was admissible in evidence in an action of ejectment. *Jackson, Donaldson, v. Lucett*, 2 Cal. 363.

But a statute allowing proof of the will by a certified copy of the record does not preclude proof by other competent evidence. *McNeely v. Pearson* (Tenn. Ct.) 42 S. W. 165. Affirmed by supreme court.

And under Ill. act of February 1, 1843, providing for the restoration of records destroyed by fire, and providing for the appointment of a commission, a copy of a will probated by such board of commissioners was admissible in evidence although the record showed only one attesting witness to the copy, as it was presumed that the court in admitting this copy to probate, and the board of commissioners, proceeded according to law and acted upon proper and sufficient evidence; and because that evidence was not preserved this presumption was not overcome. And it was further held that had the county court erred in admitting the will to probate on insufficient evidence, the judgment would stand until set aside by a proper proceeding. *Grand Tower Min. Mig. & Transp. Co. v. Gill*, 111 Ill. 541.

And a certified copy of a will was admissible in evidence in a suit by a legatee for an accounting where the public office containing the original and the records were burnt and the copy was in the possession of one of the executors and had been acted upon for about thirty years, and the law required that probate should be made in open court

the latter section providing that, in appeals in probate matters, if it shall appear that the appeal was taken vexatiously or for delay, the court shall adjudge the appellants to pay the costs, including an attorney's fee to the adverse party. It seems to have been the opinion of the court that this language involved the alternative that, if the appeal be not taken vexatiously or for delay, the costs shall be taxed to the estate. The record before us does not show which party appealed to the district court. In *McClary v. Stull*, 44 Neb. 175, such an application was denied, the court remarking, however, that "courts of equity have frequently assumed, when dealing with funds brought directly within their control, to order payment therefrom of fees to counsel for the adverse party." Both in *Mathis v. Pitman* and in *Seebrock v. Pedraza* the will, as a result of the proceeding, was admitted to probate, and administration established, the parties charged with administering the estate being before the

court, so that the fund may be said to have been "brought directly within the control" of the court, according to the statement in *McClary v. Stull*. This feature appears in all the cases from other states cited by the proponents. Thus, *Henderson v. Simmons*, 83 Ala. 291, 70 Am. Div. 590, was decided on the final accounting of an administrator, the question arising in the administration of the estate, and not in the proceeding leading to the probate of the will. In *Compton v. Barnes*, 4 Gill, 55, 45 Am. Dec. 115, the will had been probated, and letters testamentary granted to the executors. The contest was by means of a caveat thereafter filed, and the holding of the court was that, the will having been probated and letters testamentary granted, it became the duty of the executors to defend the will under which they were already acting, and that they were therefore entitled to compensation. In *Bradford v. Boudinot*, 8 Wash. C. C. 122, the facts were the same, and the proceeding was by

and the original deposited with the officer for safe-keeping and a certified copy delivered to the executor, and the copy showed that the original had been proved in open court by one of the subscribing witnesses. *Franklin v. Creyon*, Harp. Eq. 243.

And in *Smith v. Steele*, 1 Harr. & M' H. 419, which was an action of ejectment, and an original will could not be found, evidence was allowed to go to the jury of a writing purporting to be a copy of the will with letters testamentary on the said will, under the hand and seal of the deputy commissary of Dorchester county which were annexed to the said copy of the will, with proof also of the deputy's handwriting.

In *Nelson v. Whitfield*, 82 N. C. 46, it was said that *Chisholm v. Ben*, 7 B. Mon. 403, and *Davis v. St. Journey*, 8 Met. 497, where it was held that secondary evidence must be strong, positive, and free from all doubt, were cases where lost wills were propounded for probate or said to be established in chancery, and the strictness of this action did not apply in an action for partition where the original will and court records were destroyed by fire. Evidence that a will was found in a book kept by the clerk of the court of pleas and the quarter sessions, as required by law, was proper to show the execution of a will and its due probate and registration, and it was competent to show that a paper purporting to be a will was publicly read at the funeral in the presence of the heirs at law, who asserted that their ancestor died intestate.

In an action of ejectment, the presumption that the ordinary received proof of a will by allowing the executors to make returns was a sufficient substitute for evidence of the probate of the lost will so as to admit the evidence of the contents thereof, where a will was destroyed after it was claimed to have been probated. *Couns v. Wilson*, 45 S. C. 571.

In an action of ejectment where a will had been burned by the destruction of a court-house, and a copy of the will which belonged to one of the executors and was in the possession of the surviving executor was admitted in evidence, it was held that it was a question for the jury where the executors had placed the will in the hands of the ordinary, and made returns and done various other things indicating that it had been probated. *Couns v. Wilson*, 45 S. C. 571.

Under Va. Code 1873, chap. 172, § 5, providing that a copy of any paper recorded in certain named offices shall be evidence in lieu of the original, and § 12, providing that where a book containing the record of wills is lost an attested copy may be received in lieu thereof, where a will and the will

book were destroyed during the war, and a copy of the will filed in an injunction suit was recorded, a copy of such copy was held to be a true copy in a suit to construe the will. *Efinger v. Hall*, 81 Va. 94.

But where a suit was instituted to enforce a will which had been recorded and destroyed some thirty years previously in the destruction of a court-house, it was held that the evidence was not sufficiently certain to establish the contents of the will, the witnesses differing as to the terms and the parties described therein, and the bill of complaint was dismissed. *Todd v. Wickliffe*, 12 B. Mon. 289.

And where a will was destroyed in the Chicago fire, and there was an exhibit attached to the bill, which a witness, the executor, stated that he thought was a substantially correct abstract of the will, such evidence was inadmissible where it was shown that a copy of the will was sent by mail to complainant, and circumstances were proved which rendered it probable the copy was received, and there was no evidence accounting for the non-production of the copy or showing its nonreceipt. *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315.

And where a will has been burnt after its probate which it was contended gave an estate to a devisee until the youngest child was thirteen years of age, and such devisee kept possession of the property for ten years longer and made a will as though she owned the fee in which all acquiesced, it was held that the former will could not be established by the testimony of a single witness, a boy of sixteen or seventeen years, when his father died, taken more than a half a century afterwards, when he had permitted his own rights to be bound by it. *Newell v. Newell*, 9 Smedes & M. 56.

A record of court made many years before, reciting that a will was presented in open court for probate and stating the testimony of two witnesses, which was sufficient for the probate, also stating the appointment of administrators with the will annexed and giving a copy of the will, but without any signature or attesting clause appearing thereon, is amply sufficient after a long lapse of time to establish the contents of the will, where property has been held under it. *McNeely v. Pearson* (Tenn. Ch.) 42 S. W. 165, Affirmed by supreme court.

A certified copy of a will taken from the certified copy in a court record, although not admissible as evidence, can be used to refresh the memory of a witness as to the contents of the will. *McNeely v. Pearson* (Tenn. Ch.) 42 S. W. 165, Affirmed by supreme court.

I. T.

original bill, after the will had been defeated, for an accounting against the executor who had qualified in pursuance of its probate. The court held that he was not an executor *de son tort*, and was consequently entitled to reimbursement for his expenses in defending the will. We can find no instance where no administration has been granted, and unsuccessful proponents of a will have been allowed counsel fees out of the estate in the contest proceedings. Inasmuch as the statute (Comp. Stat. chap. 23, §§ 137, 138) makes it the duty of persons named as executors to propound the will for probate, and provides a penalty for neglecting to do so, it seems reasonable that

they should not be compelled to perform this duty at the peril of incurring the expense thereof against themselves should probate be denied, at least where they have acted in good faith. But we are satisfied that in this case no allowance can be made. The judgment simply denies probate. No administration is granted, and we have not before us any person now charged with the duties or powers of a personal representative of the deceased, nor has by this proceeding the estate itself been impounded. If such application be proper, it should be made in the county court, after administration shall have been granted.
Judgment affirmed.

ALABAMA SUPREME COURT.

Johnson JEFFERSON, by Next Friend,
Appl.,
v.
BIRMINGHAM RAILWAY & ELECTRIC
COMPANY.

(.....Ala.....)

1. Operating small cars by a dummy engine in a street at a low rate of speed with occasional stops, without precautions to prevent children getting upon them, does not create a liability for the death of a child that got upon the cars and was thrown or fell from them.
2. An allegation that the defendant's servants recklessly and wantonly or intentionally caused a child to leave cars of a dummy line in a street while they were in motion is not sufficient to show negligence without anything to show that there were not proper conditions for the child to get off.

(June 17, 1897.)

APPEAL by plaintiff from a judgment of the City Court of Birmingham in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. C. P. Beddow and Bowmare & Harsh* for appellant.

Messrs. Walker, Porter, & Walker, for appellee:

The first count alleges that while appellee was operating one of its trains in the streets of Bessemer this five-year-old boy got upon one of the cars of the train and was thrown or fell therefrom and was run over and injured. It also alleges that these trains run along slowly and stop often and are attractive to children, and were dangerous to young children that were too young to appreciate the danger,—that it was the duty of appellee to properly attend or guard said cars while they were be-

ing operated in said streets so that such children would not get hurt; and that the appellee negligently failed to have a conductor upon said cars.

The second count alleges the same facts as the first, and says that it was appellee's duty to use due care to prevent the boy from falling or being thrown off said car.

The third count alleges that appellee negligently allowed the boy to get upon one of said cars without any guardian or other proper attendant.

The fourth count alleges that appellee, through its servants, recklessly and wantonly or intentionally caused the boy to leave the car while it was in motion, and in consequence thereof he was injured.

The fifth count alleges the same facts as the first and second, and further alleges that the appellee had no one upon said train, and that the boy got upon one of said cars on a place thereon highly dangerous to him, without any attendant or guardian, and appellee knew, or could have known, by the exercise of due care, that he was on said car in a dangerous place; and appellee negligently failed to take any proper care or precaution to prevent injury to the boy.

Willfully making one leave a car is not willfully injuring him. The injury must be intentional. Here it is not so alleged, but simply that he was made to leave the car,—willfully made to leave the car,—in other words, that appellee or its servants saw the boy on the car and made him get off.

Haley v. Kansas City, M. & B. R. Co. 113 Ala. 640.

The duties of a railroad company when a young child is injured are the same as when an adult is injured, except in the matter of contributory negligence.

If such a child attempts to get upon the train from the side, and no employee of the railroad company knows of the peril of the child in time to prevent its becoming injured, there is no liability. While the child has not been guilty of contributory negligence, because it cannot be, the railroad company has not been guilty of even simple negligence.

NOTE.—As to negligence in getting off a moving train, see notes to *Carr v. Bel River & E. R. Co.* (Cal.) 21 L. R. A. 364; also *Mietler v. Long Island R. Co.* (N. Y.) 35 L. R. A. 762, and cases cited in footnote. 88 L. R. A.

Alabama G. S. R. Co. v. Dobbs, 101 Ala. 219; *Nave v. Alabama G. S. R. Co.* 96 Ala. 264.

There is negligence only in leaving exposed something dangerous and at the same time attractive to children that have not sufficient discretion to withstand the temptation to handle it—not something they might handle, some abnormal child, but something that would attract children generally.

Harriman v. Pittsburgh, C. & St. L. R. Co. 45 Ohio St. 11.

In the case at bar there was a railroad operating its train legitimately along a street, an engineer and fireman in charge, running slowly; a train that was not only dangerous if it ran over you, but which looks very dangerous to every child five years old unless that child is an exceedingly peculiar one. In the place where this accident happened the employees were required by law and common prudence to run slowly so as not to injure those who were crossing the street, not for the purpose of not injuring those who ran from the side of the train into it.

Western Railway of Ala. v. Mutch, 97 Ala. 194, 21 L. R. A. 816.

Haralson, J., delivered the opinion of the court:

The rule in respect to contributory negligence of children has been stated by this court to be that "a child between seven and fourteen years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity. . . . If the plaintiff is of such tender years that he is conclusively presumed incapable of judgment and discretion, and of owing a duty to another, neither contributory negligence on his part, nor that of his parent, can be set up to defeat a recovery." *Pratt Coal & I. Co. v. Brawley*, 83 Ala. 374; *Government Street R. Co. v. Hanlon*, 63 Ala. 70. See also 8 Elliott, Railroads, § 1261.

In speaking of the liability for injury to trespassing children, Elliott in his work on Railroads says: "In actions for injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty. . . . There is a sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees not invited or enticed by it than it is to keep them safe for adults." To sustain this doctrine he cites a long list of authorities from many courts. 8 Elliott, Railroads, § 1259.

In *Bishop v. Union R. Co.* 14 R. I. 814, 51 Am. Rep. 386, similar in principle to the one before us, and which, from the frequency of its citation as well as from its own inherent merits, seems to be a leading case on the subject, the supreme court of that state lays down the doctrine that the owner of property which has been trespassed upon is not liable to the

trespasser for an injury arising from the trespass merely because he might by care have guarded against it. Referring to the class of cases relied on by appellant in this case to sustain his complaint,—as where defendant's servant left his cart and horse in a public street, unattended, for half an hour, and a boy six years old, who had gotten into the cart and attempted to get out, was injured, after another boy had started the horse off (*Lynch v. Nurdin*, 1 Q. B. 29); or where a child six years old was injured while playing with a turntable of a railroad company (*Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745); or where defendant put a heavy gate on his own land, beside a passway which was used by children going to and from the public road, but left it so carelessly that it fell upon and injured a child between six and seven years old, who shook it in passing, in each of which cases, a verdict was sustained against the defendant therein,—the court said: "We know of no cases more favorable to the plaintiff than the three cases last cited, but in all three of them the object which caused the injury was a dangerous object left exposed, without guard or attendant, in a public place or common resort for children. An object so left is a standing temptation to the natural curiosity of a child to examine it, or to his instinctive propensity to meddle or play with it." The court added: "The case at bar differs very much from the three cases previously stated, for in the case at bar the cars, instead of being left unattended, were in the charge of the driver who was in the act of driving them, so that there was nothing done to encourage the trespass, which was merely the result of a momentary impulse. Ordinarily a man who is using his property in a public place is not obliged to employ a special guard to protect it from the intrusion of children, merely because an intruding child may be injured by it. We have all seen a boy climb up behind a chaise or other vehicle for the purpose of stealing a ride, sometimes incurring a good deal of risk. It has never been supposed that it is the duty of the owner of such vehicle to keep an outrider on purpose to drive such boys away, and that, if he does not, he is liable to any boy who is injured while thus secretly stealing a ride. In such a case, no duty of care is incurred." In support of the doctrine many cases are cited, to which may be added, as being in point, *Western Railway of Ala. v. Mutch*, 97 Ala. 194, 21 L. R. A. 816; *Cattlett v. St. Louis, I. M. & S. Co.* 57 Ark. 461; *S. C.* 54 Am. & Eng. R. Cas. 113; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 409; *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 82 Am. Rep. 472; *Rodgers v. Lee*, 140 Pa. 475, 12 L. R. A. 216; *Daniels v. New York & N. E. R. Co.* 154 Mass. 849, 13 L. R. A. 248; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Chicago & N. W. R. Co. v. Smith*, 46 Mich. 504, 41 Am. Rep. 177; *Patterson, Railway Accident Law*, § 75.

From what has been predicated it will appear that counts of the complaint, numbered 1, 2, 3, and 5 were insufficient as charges of negligence against defendant and were subject to the demurrer interposed to them.

The fourth count intended to set up that the servants of the defendant wilfully or intention-

ally caused the injury to the child. It not only fails in this respect, but does not even aver any actionable negligence. The defendant's servants had the right to cause the trespassing child to get off the train under proper conditions, and from aught appearing in the

count, the conditions were not improper. *Haley v. Kansas City, M. & B. R. Co.* 113 Ala. 640.

There was no error in sustaining the demurrer to the count.
Affirmed.

CALIFORNIA SUPREME COURT.

SAN DIEGO WATER COMPANY, *Resp't.*,

City of SAN DIEGO *et al.*, *Appts.*

(.....Cal.....)

1. The fixing of rates by legislative power, or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given, is reviewable by the courts, at least to the extent of ascertaining whether such rates will furnish some reward for the property used and services furnished.
2. A review by the court of the action of the common council in fixing water rates is not limited to a determination of the question on the same evidence that was produced before the council, where the hearing before the council was conducted without notice to the water company or the rate payers, and without any right on their part to intervene effectually.
3. A water company entering upon the business of furnishing a public water supply under a Constitution giving a tribunal the right to fix water rates is bound to submit to the conditions thereby imposed.
4. An ordinance fixing water rates so palpably unreasonable and unjust as to amount to a taking of the property of a water company without just compensation is not justified by Const. art. 14, § 1, providing for the establishment of such rates.
5. An appropriation of water and a water plant to public use by the state, for which just compensation must be made, is in effect made by Const. art. 14, § 1, which subjects to the control of the state every public water supply.
6. Water rates which will produce but little more than 3 1-3 per cent upon the actual cost of the waterworks after deducting current expenses do not constitute just compensation to the water company, where it is compelled to pay a much higher rate upon money which it appears to have fairly borrowed, when the rate paid does not appear to be above the lowest market rate, and the prudence and economy of the management are not successfully impeached.
7. Water rates which will produce some reward to the owner of the water plant may be, nevertheless, so grossly and palpably insufficient to afford just compensation to the owner as to give the court power to relieve against an ordinance establishing such rates.
8. The investment on which a water

company is entitled to base its compensation in determining the sufficiency of rates cannot include property not at present actually employed in collecting or distributing the water, however useful it may have been in the past or may yet be in the future.

9. The current expenses which may be allowed in determining the sufficiency of the income provided by water rates consist of the money which is reasonably and properly expended in each year in collecting and distributing the water.

10. Expenses of litigation contesting an ordinance fixing water rates cannot be considered as part of the expenses to be allowed, in determining the sufficiency of the income produced by the rates.

11. Testimony of expert witnesses as to the value of the property of a water company is not admissible, at least in favor of the company, as against the better evidence of its own books on the subject.

(*Beatty, Ch. J., dissents.*)

(October 9, 1897.)

A PPEAL by defendants from a judgment of the Superior Court for San Diego County in favor of plaintiff in an action brought to enjoin the enforcement of an ordinance fixing water rates. *Reversed.*

The facts are stated in the opinions.

Messrs. William H. Fuller and C. L. Barber for appellants.

Messrs. Works & Works for respondent.

Van Fleet, J., delivered the opinion of the court:

The plaintiff is a corporation engaged in the business of supplying water to the city of San Diego and its inhabitants. In February, 1890, the common council of the city passed an ordinance fixing the water rates for the year beginning July 1, 1890. In May, 1890, the plaintiff brought this action against the city, the common council, the mayor, and the individual members of the council, to annul this ordinance and enjoin its enforcement. The complaint alleged, in substance, that the entire revenue which plaintiff could receive during the year in question, under the rates so fixed, would be insufficient to pay its operating expenses and fixed charges for that year, and would therefore afford no reward whatever to plaintiff for furnishing the water, and that the ordinance would deprive plaintiff of its property without process of law, and without compensation. It was also alleged that, by reason of certain fraudulent practices on the part of the council, the plaintiff was de-

NOTE.—For legislative power to fix tolls, rates, or prices, see *note* to *Winchester & L. Turnp. Road Co. v. Oroxton (Ky.)* 88 L. R. A. 177.
88 L. R. A.

prived of a fair opportunity to be heard before the council, and prevented from properly presenting its side of the case. The action was tried after the expiration of the year in question, and a judgment was entered declaring the ordinance to be void, and setting the same aside. From this judgment, and from an order denying their motion for a new trial, the defendants appeal.

The findings of the court were, in substance, that the property and plant of the plaintiff necessary to supply water to the city and its inhabitants actually cost \$750,000; that the reasonable and necessary operating expenses of plaintiff for the year in question, and actually expended by it for that purpose, amounted to \$40,000; that plaintiff was indebted upon its bonds for money borrowed, amounting to the sum of \$1,000,000, bearing interest at the rate of 5 per cent per annum, of which amount \$750,000 had been necessarily and properly expended for the construction of the plant; that the total receipts of plaintiff for the year in question derived from the rates fixed by said ordinance could not be, and were not, greater than \$65,788.65; that the annual depreciation of the plant on account of natural decay and use amounted to $3\frac{1}{4}$ per cent of its value; that no dividends for the stockholders of plaintiff had been or could be earned from the rates fixed by said ordinance for said year; and that the rates so fixed were not just or reasonable. The court also found certain facts concerning the proceedings of the common council and its committee in investigating the subject-matter, which will be noticed hereafter. These findings are assailed as being in some particulars unsupported by the evidence; and many questions of law have been ably argued by numerous counsel. Some of these questions, though highly interesting and important, are not necessarily involved in this appeal, and we shall therefore not notice them, but we will, so far as space will permit, consider each of the other points made.

1. It is contended by defendants that, under article 14 of the Constitution of this state, a court has no power, in the absence of fraud, to hold such an ordinance invalid merely because the court finds the rates fixed thereby to be unjust and unreasonable. We shall not attempt in this opinion to review the many cases on this subject. It is sufficient to say that the Supreme Court of the United States (whose decisions on this matter are controlling) has repeatedly decided that the power of the state to fix and regulate the rates of compensation to be charged by persons and corporations in charge of certain public utilities is so limited by the Constitution of the United States that it cannot be exercised to such an extent as to require any such person or corporation to furnish its property or services without reward; and that if the rates are fixed by legislative power, or otherwise than by appropriate judicial proceedings, in which full notice and opportunity to appear and defend are given, it is within the province of the courts to review such action, to the extent, at least, of ascertaining whether the rates so fixed will furnish some reward for the property used and services furnished. To fix rates that will allow no such reward is to take property for

public use without just compensation. To this extent, at least, then, the court was entitled to go in this case.

But appellants contend that, in any event, the court could do no more in reviewing the action of the common council than to say whether there was or was not evidence produced before that body sufficient to sustain its conclusions; and that the court was not at liberty to determine the question upon other and perhaps new evidence not produced before the council, nor to substitute its judgment as to the reasonableness of the rates for the judgment of that body. In this contention we think that council entirely misconceives the nature of the functions respectively exercised under our Constitution by the rate fixing body and by the courts. Whether the fixing of rates by the council be called a legislative, a judicial, or an administrative act, it is certainly not an adversary judicial proceeding, such as under the Constitution will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without notice to them, and without any right on their part to effectually intervene. Such a proceeding cannot operate to deplete private rights; and, though the Supreme Court of the United States holds it to be a legitimate exercise of governmental powers, that court also holds that, when it is carried so far as to deprive anyone of his property without just compensation, it is an unlawful exercise of such power, and simply void. The function of the courts is merely to ascertain whether the power has been carried beyond the constitutional limits so fixed; and, if such be found to be the case, to declare the acts of the council void. They do not sit as appellate tribunals to review the correctness of the council's determination, nor need they know anything about the evidence on which that body has acted. All that they have to consider is whether in a given case the result of the council's action will be to take the property of the complaining party without just compensation. That is a mixed question of fact and law, to be decided by the court upon the evidence produced before it.

2. On the other hand, the plaintiff contends that § 1 of article 14 of the Constitution of this state is opposed to the Constitution of the United States, in that it operates to deprive the water company of its property without due process of law. It is argued that no provision for the fixing of water rates by the tribunal thereby created can be valid without notice to those whose rights are to be affected, and an opportunity being given to them to appear and defend, the right to which must be given by the Constitution itself. That no such notice or hearing is provided for must be admitted, but the consequence contended for does not follow. In the first place, there is nothing in the pleadings or evidence in this case to show that any water rights or property of plaintiff used in furnishing the water in question were acquired before the adoption of the present Constitution. On the contrary, we think it substantially appears that they were all acquired since that time. We are un-

able to perceive why the people of this state, in adopting that Constitution, had not the right to declare that all water not then reduced to private ownership should thereafter remain public, and that thereafter every person undertaking the business of supplying cities or towns or their inhabitants with water should do so upon the condition that the rates to be charged therefor should be conclusively fixed by the state. Such a business is so far public in its very nature that the state might lawfully forbid its exercise by any private individual, and *a fortiori* might impose such conditions and restrictions upon its exercise as might be thought proper. If, then, that section of the Constitution could be construed as rendering the decision of the council absolutely final and conclusive, plaintiff, at least, could not be heard to complain. If it chose, with that section in force, to enter upon that business, it was bound to submit to the conditions thereby imposed. But we think that the true construction of that section is such that it is not open to the constitutional objection urged, even if raised by one who, at the time of its adoption, was engaged in that business. It, obviously, was not the intention of the framers of that provision to make any distinction between rights then existing and those to be thereafter acquired; nor can we attribute to them any intention of confiscating private property. The meaning of the section is that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Waterworks v. San Francisco*, 82 Cal. 286, 6 L. R. A. 756, to which conclusion we adhere. Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations which perhaps may require modification, we are satisfied with the correctness of the conclusion there given to this section of the Constitution. According to this construction, the rules announced under the first head in this opinion are applicable. If the council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plaintiff's property without just compensation, it has so far exceeded the powers conferred upon it, and the court is competent to afford redress.

8. This brings us, then, to the question whether the findings support the judgment. They show that the total receipts of the plaintiff from the rates fixed by the council would be and were insufficient to pay plaintiff's actual and necessary operating expenses, together with the interest on so much of its bonded indebtedness as was necessarily and properly expended by it in the construction of its plant, necessarily and actually used for the supplying of the water here in question; indeed, would fall short more than \$11,000 of paying those charges. No circumstances requiring such a loss were found, and the find-

ings that these actual charges were necessarily and properly incurred in the legitimate exercise of the business of furnishing water to the city negative the existence of any such circumstances. It is clear that under the rule laid down by the Supreme Court of the United States in *Reagan v. Farmer's Loan & T. Co.* 154 U. S. 362, 412, 40 L. ed. 1014, 1039, that court would hold those rates to be so unreasonable and unjust as to require the court to set them aside. The decision in that case, however, is not in all respects satisfactory; and, after a careful examination of all the many cases on this subject, we are unable to discover that any consistent or adequate rules controlling the exercise of the governmental power of fixing rates have yet been judicially laid down. The subject is one of extreme complexity, and its inherent difficulties have been increased rather than diminished by the numerous decisions in which it has been discussed. We think, however, that a consideration of the real nature of the power conferred by our Constitution will afford a sufficient solution of the question.

It is apparent that the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water, in the same sense in which a man is said to own his house or his farm. By the very nature of the use to which it is applied, the company has devoted that property to a public use. Having once undertaken to perform that public duty, it must continue to perform it, and must carry on its business under the lawful regulations of the government. In effect, the state may be said to have appropriated the water and the plant to public use. For that appropriation it is bound to make just compensation, and it has provided for such compensation by requiring the municipal authorities to fix just and reasonable rates at which the water is to be furnished to and received by the consumers. Since the state has "taken" the use of this property, it is bound to provide a just compensation for that use, and article 14 of the Constitution must be construed as providing for that just compensation.

The question of what is just compensation in such a case is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain; and it may be reduced to the formula that the public must pay the actual value of that which it appropriates to the public use. In determining such value, three, and, we believe, only three, methods are possible: (1) Either by ascertaining what the property could be sold for (its market value); or (2) by ascertaining what it would cost to replace it; or (3) by ascertaining the revenue it is capable of producing. In cases like the present, however, neither the first nor the second method can be resorted to. The judicial test of market value depends upon the fact that the property in question is marketable at a given price, which, in turn, depends upon the fact that sales of similar property have been and are being made at ascertainable prices. But such property as this is not so sold, at least not often enough to furnish a fair criterion; and the very fact of governmental regulation would neces-

sarily control the price. Until the rates are fixed, no one can say how much the property would sell for, and therefore that price cannot be ascertained as a basis for fixing those rates.

The second method is entirely inapplicable to property of this kind. The construction of municipal waterworks is a matter of growth. It is necessary in common prudence, on the one hand, to construct the works of such capacity as to satisfy the needs of the growing city, not only at the moment, but within the near future, and, on the other hand, not to extend them so much as to cast an unnecessary burden on the stockholders or the present consumers. As such works are a necessity to the city, they must keep pace with, and to some extent anticipate, its growth. When constructed, they stimulate to that extent the progress of the city, and tend, like all conveniences, to lower the general cost of production of all things. It results that, at least, the first water system in any city occupies the position of a pioneer. At any expense the works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the meantime, as the city grows, in part by reason of this very supply of water, the facility of constructing works of all kinds is increased, and the cost of such construction diminished. It would therefore be highly unjust to permit the consumers to avail themselves of the plea that, at the present time, similar works could be constructed at a less cost, as a pretext for reducing the rates to be paid for the water. The reduced expense, if it be reduced, is due, in part at least, to the very fact that the city has been provided, at the cost of the water company, with increased facilities for doing business. But it is said that those who enter upon any business enterprise undertake the risk of being undersold by those who, coming later into the field, have the advantage of a cheapening of construction. But this is not an ordinary business enterprise. Those who engage in it put their property entirely into the hands of the public. Having once embarked, it is beyond their power to draw back. They must always be ready to supply the public demand, and must take the risk of any falling off in that demand. They cannot convert their property to any other use, however unprofitable the public use may become. They have expended their money for the benefit of others, and subjected it to the control of others. That money has, in effect, been taken by the public; and the public, while refusing to return that money, cannot be heard to say that it no longer has need for all of it. Nor would it, on the other hand, be just to the consumers to require them to pay an enhanced price for the water, on the ground that it would now cost more to construct similar works. Such a contingency may well happen; but to allow an increase of rates for such reason would be to allow the water company to make a profit, not as a reward for its expenditures and services, but for the fortuitous occurrence of a rise in the price of materials or labor. The law does not intend that this business shall be a speculation in which the water company or the consumers shall respectively win or lose upon the casting of a die, or upon the equally unpredictable fluctuations

of the markets. For the money which the company has expended for the public benefit, it is to receive a reasonable, and no more than a reasonable, reward. It is to be paid according to what it has done, and not according to what others might conceivably do. In effect, the bargain between the company and the public was made when the works were constructed; and this matter is to be determined according to the state of things at that time.

We must, then, have recourse to the third standard of value,—the revenue which the property is capable of producing. At the first blush there might seem to be a difficulty in applying this standard, for the revenue received by the company will be absolutely controlled by the rates fixed, and no revenue can be collected except upon rates so fixed. This difficulty has led one of the counsel in this case, in a singularly able and ingenious argument, to contend that the rates must be so fixed as to enable the company to obtain precisely the revenue which it would realize if the rates were not regulated by the public at all. To this proposition we cannot assent. The whole history of municipal regulation conclusively shows that its principal purpose was always to diminish what were rightly or wrongly believed to be exorbitant charges. The theory of its application has always been that it is necessary to restrain the proprietors of what have been called "virtual monopolies" from imposing extravagant and unreasonable tariffs for the use of their facilities. Whether the system be well conceived or not, whether it accords with the theory of free government, are not questions with which we have to do. It is sufficient that the law recognizes that there is a standard by which just compensation may be measured, and that it is intended to prevent that measure from being exceeded. What that standard is, as applied to the present case, we think not difficult of ascertainment. As we have said, it is not the water or the distributing works which the company may be said to own, and the value of which is to be ascertained. They were acquired and contributed for the use of the public. The public may be said to be the real owner, and the company only the agent of the public to administer their use. What the company has parted with—what the public has acquired—is the money reasonably and properly expended by the company in acquiring its property and constructing its works. The state has taken the use of that money, and it is for that use that it must provide just compensation. What revenue money is capable of producing is a question of fact, and, theoretically at least, susceptible of more or less exact ascertainment. Regard must be had to the nature of the investment, the risk attendant upon it, and the public demand for the product of the enterprise. It would not, of course, be reasonable to allow the company a profit equal to the greatest rate of interest realized upon any kind of investment, nor, on the other hand, to compel it to accept the lowest rate of remuneration which capital ever obtains. Comparison must be made between this business and other kinds of business involving a similar degree of risk, and all the surrounding circumstances must be considered. An important circumstance will

always be the rate of interest at which money can be borrowed for investment in such a business; and, where the business appears to be honestly and prudently conducted, the rate which the company would be compelled to pay for borrowed money will furnish a safe, though not always conclusive, criterion of the rate of profit which will be deemed reasonable. In ordinary cases, where the management is fair and economical, it would be unreasonable to fix the rates so low as to prevent the company from paying interest on borrowed money at the lowest market rate obtainable; and even then some allowance or margin should be made for any risk to which the company may be exposed, over and above the risk taken by a lender. This being so, the existence of the bonded indebtedness, on which so much stress has been laid, and which has seemed to present so difficult a problem in some of the cases, must be disregarded. That fact, indeed, it seems to us, can never be important, except as entitling the holders of the bonds, as parties in interest, to be heard in actions like the present. Evidently no distinction can be made between those who construct the works with their own money and those who do so with money borrowed from others. In either case the money actually invested is the basic criterion of the revenue to be allowed. It follows that we cannot say that the finding of the court below that the rates fixed by the city council were less than what was reasonable is unsupported by the evidence. After deducting current expenses for the year (\$40,000) from the revenue received (\$65,788.65), there would be left but \$25,788.65, or but little more than 84 per cent upon \$750,000, the actual cost of the works; while the evidence shows that the company was compelled to pay a much higher rate upon money which it appears to have fairly borrowed. It is true that the evidence is not as full and satisfactory on this question as it should be, doubtless owing to the fact that the rules governing this inquiry were not clearly apprehended by the counsel who tried the case. But as no attempt was made to show that the rate of interest paid by the company was above the lowest market rate, and as the prudence and economy of the management were not successfully impeached, we cannot say that the court below was not justified in the conclusion to which it arrived on this question.

But it is contended that the power of the court is, at most, to inquire whether some reward will be provided by the rates fixed, and that if some reward, however small, is so provided, the court cannot interfere. We have been referred to *dicta* in some of the cases which do support that contention, but we are unable to agree with that conclusion. It is an elementary doctrine of constitutional law that the question of just compensation is a judicial question, to be determined in the ordinary course of judicial proceedings; and, construing article 14 of our Constitution with § 14 of article 1 (as we think we are bound to do), we find no difficulty in holding that, whenever the rates fixed by the council are grossly and palpably insufficient to furnish such a revenue as will afford just compensation within the rules above declared, redress may be had in the courts. Of course, every slight or conjectural

deficiency will not justify an appeal to the courts; nor, if the question be doubtful, will the court, in the absence of fraud or other special ground of equitable interference, substitute its judgment for that of the municipal body. But, whenever it is clear and beyond question that the revenue which the company can possibly receive under the rates fixed will be wholly insufficient to allow it the compensation to which it is legally entitled, it is the duty of the court to declare the ordinance void. Such is the case under the findings here, and those findings must therefore be held to support the judgment. It should, of course, be said that it does not follow that in every case the company will be entitled to credit for all of its current expenditures, or to receive a compensation based on the entire cost of its works. Reckless and unnecessary expenditures, not legitimately incurred in the actual collection and distribution of the water furnished, or in the acquisition, construction, or preservation of so much of the plant as is necessary for that purpose, cannot be allowed. Nor can the investment on which the company is entitled to base its compensation be held to include property not now actually employed in collecting or distributing the water now being supplied, however useful it may have been in the past or may yet be in the future. It is the money reasonably and properly expended in each year in collecting and distributing the water which constitutes the current expenses which may be allowed; and it is the money reasonably and properly expended in the acquisition and construction of the works actually and properly in use for that purpose which constitutes the investment on which the compensation is to be computed. The amounts stated in the findings in this case are found to be of that character.

4. But it is contended that the findings in several particulars are unsupported by the evidence. It is claimed that the evidence does not justify the finding that \$750,000 had been actually expended in the purchase and construction of the plant. On this subject the evidence is extremely unsatisfactory. Apart from estimates testified to by engineers, the only evidence of the cost was the books of the company, which placed the amount at \$735,000. Of this sum defendants object to items amounting to about \$127,000, *vis.*, an alleged duplicate of the entry of \$13,932, an alleged overcharge of \$25,000 in the real-estate account, and the sum of \$38,000, alleged to be the cost of certain works abandoned and not in use. On these questions we have had little or no assistance from counsel for respondent, and our examination of the evidence has failed to satisfy us on any of them. The books, or those portions of them brought up in the transcript, require much explanation, which has not been furnished us. In fact, the case appears to have been tried largely on a wrong theory, the greater portion of the evidence consisting of the testimony of expert witnesses as to the value of the property. This is, at the best, an unsatisfactory way of determining the question of actual cost (for which purpose only could it be admissible), and should not be resorted to when better evidence can be obtained. As against the company, at least, its books furnish better evidence on this subject, and can-

not be disregarded. These books certainly show the cost to have been less than \$750,000, though we are unable to determine the precise amount properly shown by them; and the evidence clearly discloses that portions of the plant included in that cost are not now in use, if, indeed they have not been totally abandoned. We think, therefore, that this finding is not justified by the evidence. On this and kindred matters, not only is the burden of proof on the plaintiff, but it is bound to establish them by the most clear and satisfactory evidence, in order to overcome the presumption of the correctness of the action of the city council.

The finding that the expenses of the company for the year in question were \$40,000 is also attacked. The books of the company put the amount at \$44,255.80. Of this amount, appellants object to items of about \$5,000, as unnecessary and improper, and object particularly to an item of \$12,800, being an unpaid bill, which is disputed by plaintiff, and on which its liability is left doubtful. Counsel for respondent have not attempted to answer these points. As the evidence is presented to us in an unsatisfactory shape we will say no more than that it does not support the finding. Whether all of the items complained of are proper or improper cannot be determined upon this record, but some of them are not shown to be proper. It will be the duty of the court on a retrial to allow no item of expenditure which is not satisfactorily shown to be an actual and proper charge in the actual conduct of the business of supplying water; and, when legal or other general expenses are claimed, they must be shown to have had a proper relation to that business. Of course, the items of expenses in the present action should be disregarded. The trial being had after the expiration of the year for which the rates in question were fixed, the amounts of revenue and expenses are capable of exact proof.

With regard to the question of the depreciation of the plant by use, it is sufficient to say that ordinary repairs should be charged to current expense, that substantial reconstruction or replacement should be charged to the construction account, and that depreciation should not otherwise be considered. It is doubtless difficult in many cases to properly discriminate between current and ordinary repairs and such repairs as amount, in effect, to new construction. Such difficulties, when they arise, must be solved by the application of the principles on which ordinary business enterprises are conducted. It may be added that when, as appears to have been the case in this instance, portions of the company's expenses are specifically repaid by the consumers, such expenses should be eliminated from the computation. This will apply, at least, to the "taps" put in for private consumers.

5. Among other things, the court below made the following finding: "(10) That the taking of evidence as to the value of the plaintiff's plant, and the rates that should be fixed by the common council of said city, during the month of February, 1890, for the year commencing July 1, 1890, was by said common council delegated to a joint committee, consisting of three members from the board of delegates and three members from the board of

aldermen of said common council. That said joint committee proceeded to, and did, take evidence from the plaintiff and its officers and other witnesses for a number of days; and that on the 21st day of February, 1890, the plaintiff then being before said committee by its attorney, said attorney inquired of said committee whether other evidence would be taken, and announced that, if other evidence would be taken, he (the said attorney) desired to be present, and especially that if evidence was given by members of the board of public works of said city, or estimates were taken from said members of the value or cost of the plaintiff's plant, that he (said attorney) desired to be present, and examine said members of the board of public works as to the evidence given by them or the estimates furnished. That it was announced by one of said committee at that time, in the presence of the other members, that he did not know of any other evidence that was to be taken, which was not disputed by any other member of the committee. That there, at that time, and immediately following the demand of said attorney as aforesaid, the city engineer of said city, who was present, was privately and secretly informed that the committee desired to have him present at a meeting to be held the following day, to give an estimate of the value of said plant. That on the following day said committee met secretly, and without notifying the water company or its said attorney, and took the testimony of said city engineer and one Schuyler, a member of the board of public works of said city, and took from them their estimates of the value and cost of every part of the distributing system, pumps, wells, and other property of the plaintiff, not including its water rights, rights of way, or real estate. That said meeting was held secretly, in a back room of the office of the city attorney, while all of the other meetings of the committee had been held publicly in the room of the board of aldermen; was held on a legal holiday, when the offices of the city in the city hall were closed; and said meeting was held with the doors closed and locked. That the plaintiff had no notice or knowledge of said meeting or the taking of said evidence, and was not present, either by its officers or its attorney or otherwise, and was given no opportunity to be present or investigate or cross-examine with reference to the evidence given and estimates furnished. That said estimates so furnished were largely less than the cost as proved or estimated by the evidence of the officers of the plaintiff taken by said committee, and sworn statements furnished by its officers; and the estimates so furnished in the absence of the plaintiff were taken, but with few exceptions, and as to small amounts, as the value and cost of said plant by said committee, and made the basis of their report and of the rates fixed by them, and subsequently adopted by the ordinance of the common council. That the report of said committee was made up and concluded on the 24th day of February, 1890, was presented to both houses of said common council on the evening of that day, and was then adopted by each of said bodies without change. That the attorney of the plaintiff appeared before each of said bodies, and demanded that the plaintiff be al-

lowed to offer evidence to said common council with reference to the fixing of said rates; but his right to offer said evidence was denied, and no evidence was received or heard. That the evidence taken by the committee was taken down by a stenographer, and transcribed, but was never read to or submitted to either board of said common council; but that the members of said committee, or some of them, stated their recollection of the evidence upon which their said report was based. That the ordinance mentioned in the complaint, fixing said rates, was passed and adopted by both of the bodies of said common council on the evening of the 25th day of February, 1890, without any further hearing, or opportunity to be heard, on the part of plaintiff."

It is claimed that this finding is not altogether in accord with the evidence; but, though we find some verbal inaccuracies, we think that in all material particulars it is sufficiently supported. It is plain that these facts show so much of unfairness in the investigation had by the common council as to overcome the presumption of the correctness of its decision. It was clearly the duty of the council to give to the water company, at least when requested to do so, a reasonable opportunity to be heard, not merely for the purpose of presenting its own evidence, but also of explaining or overcoming, if it could, evidence presented by others. The company, of course, could not claim as a right to be heard at any time it chose; but it certainly was entitled, upon reasonable request for that purpose, to be present when evidence was being produced before the council or its committee, or to be otherwise informed of that evidence, and allowed to overcome it if possible. The action of the committee, for which no sufficient excuse was given, appears to have been taken for the very purpose of excluding the plaintiff when that evidence was received, and it therefore seriously impugns the fairness of the investigation. Indeed, such an investigation ought to be held publicly, and upon such reasonable public notice of the times and places of the meetings as will enable those interested to be present; and a neglect of this precaution, when unexplained, must always give rise to injurious suspicions.

A number of other points have been discussed by counsel, but they are all either covered by what has been said, or have been thereby rendered unimportant. For the reasons above set forth, *the judgment and order appealed from are reversed, and the cause remanded for a new trial.*

We concur: **Henshaw, J.; McFarland, J.**

Garoutte, J., concurring:

The findings of fact made by the trial court which are deemed necessary to a consideration of the questions presented before us are as follows: "(1) On the 24th day of February, 1890, and at the time the ordinance mentioned in plaintiff's complaint was enacted by the common council of said city, the water plant and system of the plaintiff was of the value of \$750,000. (2) The necessary operating expenses of plaintiff in conducting its property

from July, 1890, to July, 1891, and the sum actually expended, was \$40,000. (3) Plaintiff was and is indebted upon its outstanding bonds, regularly issued, in the sum of \$1,000,000, bearing interest at 5 per cent per annum, of which sum \$750,000 was necessarily expended in the construction of the plant, and the interest upon which is \$50,000 per annum. (4) The total receipts received under said ordinance from July 1, 1890, to July 1, 1891, amounted to \$85,788.95, and no more. (5) The annual depreciation of plaintiff's plant is $\frac{3}{4}$ per cent per annum. (6) The rates, as fixed by the ordinance, for the year commencing July 1, 1890, were not just or reasonable, and were grossly oppressive, unjust, and unreasonable."

Owing to the fact that the case was not brought to trial in the lower court until the year had expired covered by the ordinance, it will be observed that the court was enabled to find the actual receipts to the plaintiff from ratepayers during that period. In the discussion of the questions presented by this appeal, we shall assume that the findings of the court to the effect that the water plant of the plaintiff corporation was of the value of \$750,000, and that its operating expenses for the year would be and were \$40,000, have support in the evidence, and stand as facts on the record. In the fixing of water rates by a city, as contemplated by the Constitution, it is evident that the valuation of the plant is the basic element upon which the whole investigation rests. The original cost of construction is simply an element to be considered in fixing the present valuation. It is a circumstance, strong or weak, entering into the final conclusion of the municipality upon the question. But as to the amount of the bonded indebtedness, or the amount of interest annually accruing thereon, we fail to see their materiality in determining the value of the plant, or the sum total of revenue to be raised from the sales of water. It is not a question in which ratepayers are concerned whether the water company has no outstanding indebtedness, or is floundering under a bonded debt, which threatens to sink it at any moment. If the municipality is required to establish a scale of rates which will produce a revenue sufficient to pay interest upon outstanding bonds, this provision of the Constitution would not only be a perpetual guaranty to the bondholders for the payment of their annual interest, but a constant incentive to additional issues of bonds. Such conditions were never contemplated by anybody. It is the duty of the municipality, when it has arrived at a determination as to the valuation of the plant, to determine the necessary outlay for the ensuing year; then to determine what would be a reasonable, just, and fair compensation to the company, based upon the valuation of the plant; and thereupon to fix a schedule of rates which will produce that sum of money. If there be outstanding bonds, the company may apply its income to the payment of interest thereon. If there be no outstanding bonds, this income may pass to the pockets of the stockholders, in the shape of dividends declared. A municipality must fix a fair and just rate for the water, based upon the valuation of the plant; and, when it has done this,

its duty has been performed, and the revenue collected under such rates is the property of the company, to do with as it seems best.

Under and pursuant to constitutional authority (Const. art. 14, §§ 1, 2), the legislature (Stat. 1881, p. 54), passed an act, by the terms of which it was made the duty of the board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, in the month of February of each year, to fix the rates which shall be charged and collected by any person, association, company, or corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof. It is now contended by appellant that, the authority to fix water rates coming directly from the Constitution to the municipality, the rates fixed under such authority have the same binding force and effect, and occupy the same position as to the law and the courts, and should receive the same consideration, as though fixed directly by the legislature, in the absence of the aforesaid constitutional provisions. Let it be conceded; still the claim is unsound that this action of the municipality is conclusive. It is neither above nor beyond the law, and a court of equity will reach out and review it whenever the facts so demand. The legislature itself has no right or power to legislate a man's property away from him, and beyond doubt courts are vested with jurisdiction to declare all such attempts void, and will exercise that jurisdiction whenever the occasion presents itself. The legislature of the state of Minnesota enacted that the rates for freights and fares fixed by the railroad commission of that state should be conclusively presumed to be reasonable. In *Chicago, M. & St. P. R. Co. v. Minnesota Railroad & W. Commission*, 184 U.S. 418, 83 L. ed. 970, 8 Inters. Com. Rep. 209, this enactment was declared void, as depriving a person of his property without due process of law, the court saying: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law." Again, it is said in *Stone v. Farmers' Loan & T. Co.* ("Railroad Commission Cases"), 116 U.S. 307, 29 L. ed. 636: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." The same doctrine is also declared in *Georgia R. & Bkg. Co. v. Smith*, 128 U.S. 174, 33 L.

ed. 377; *Budd v. New York*, 143 U.S. 517, 86 L. ed. 247, 4 Inters. Com. Rep. 45; *Reagan v. Farmers' Loan & T. Co.*, 154 U.S. 863, 40 L. ed. 1014; and *St. Louis & S. F. R. Co. v. Gill*, 156 U.S. 649, 39 L. ed. 587.

As far as we are given light to see, from the consideration of the doctrine enunciated by the many cases coming from the highest court of the land, it would appear to be immaterial whether this power to fix a schedule of rates is vested in the legislature, or delegated by the legislature to some inferior board or tribunal, or given to such board or tribunal by direct grant from the Constitution. Whether it be done by the express act of the legislature, or by council or commission, under authority from a higher power, or whether the act of such council or commission in fixing rates be judicial or legislative, are matters outside the question. If we understand the doctrine declared by the highest judicial tribunal, it is that the courts have no power to declare rates fixed by the body legally authorized so to do unreasonable, unless those rates are so unreasonable and oppressive as to deprive a party of the equal protection of the law, and result in a practical confiscation of his property. But that, when any attempt is made to despoil the owner of his property, it is the highest duty of a court of equity under the Constitution to afford him shelter and protection. In *Spring Valley Waterworks v. San Francisco*, 82 Cal. 306, 6 L. R. A. 756, an exact duplicate of the present question was before this court, and it is there said: "But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing." Aside from any question of actual fraud, rates that are so unreasonable and unjust as to deprive the owner of any revenue whatever from his property would amount in law to fraud upon his rights under the Constitution. In disposing of appellant's contention that the schedule of rates fixed by the city council is conclusive upon the court, we have also disposed of respondent's contention that the law giving to the city the right to fix water rates is violative of the Constitution of the United States, as depriving a man of his property without a hearing before a judicial tribunal. Both positions are equally erroneous.

This court is not here to declare what are reasonable rates. The Constitution has vested that power and duty in the council of the city of San Diego, and the exercise of that power by the council cannot be questioned by the courts unless constitutional rights are violated. The question is not, what rate would this court fix if the duty were cast upon it of fixing rates? but, rather, will the owners of the plant be deprived of constitutional rights by an enforcement of the order of the council fixing rates? If the rate fixed by a municipal council was twice too large, I know not what jurisdiction of this court could be invoked to

right the wrong. Hence it is apparent that it is only in exceptional cases that an order fixing rates may be set aside by judicial decree. Taking the findings of fact as they stand, the schedule of rates fixed by the city should not be disturbed. The valuation of the plant is \$750,000. The operating and current expenses are \$40,000. The revenue from the sale of water under the schedule of rates would be, and actually was, \$65,000. This leaves a profit of \$25,000 upon the investment. To be sure, it is small when we consider the amount of money invested. To be sure, it is not enough, and possibly not one half the sum that could be earned if that amount of money was invested in other business undertakings. But with these things we have nothing to do. Those are matters passed upon by the city in the exercise of a discretion granted by the Constitution, and its decision as to the reasonableness of the amount of revenue to be derived by the company from the rates is conclusive upon the courts. While this sum is not enough upon this character of investment, still it is $8\frac{1}{4}$ per cent, and such return is a substantial profit. We mean it is so substantial that a court of equity, in view of the law of the land, cannot say that the rates are so unreasonable as to be confiscatory in character, and thus violative of any principle of constitutional law. Mr. Justice Brewer, of the Supreme Court of the United States, has probably given this question more thought and investigation than any other jurist in this country; and he says, in *Chicago & N. W. R. Co. v. Dey*, 85 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, "Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 8 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge." Subsequently the same question was again presented to him in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 382, 40 L. ed. 1014, and also in *Ames v. Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835; and in those cases neither he nor any other of the justices of that court retreated or advanced from that position.

This balance of \$25,000 is profit, unless it is swallowed up by the finding of the court that plaintiff's plant suffered an annual depreciation of $8\frac{1}{4}$ per cent and the conclusion of law therefrom that a percentage upon the investment to that amount shall be added to the operating expenses before the point is reached where profit begins. We are satisfied that this finding has no support in the evidence, even conceding the conclusion of law drawn therefrom sound. In the first place, the evidence develops that there can be

no general depreciation of this plant as a whole. There are tunnels, wells, reservoirs, water rights, and real estate, amounting to more than one half of the valuation of the plant. There is no depreciation of these things. There is no wear and tear; no permanent and gradual destruction by use and age. Most of them stand as everlasting as the hills. The theory of plaintiff in this regard seems to be that the life of a plant of this character may be approximated at thirty years, and that a sinking fund of one thirtieth of its value should be collected from the ratepayers annually, and laid aside to be handed to the stockholders upon the sad occasion of its demise, as an alleviating salve to their sorrow. But such a thing is all wrong, for it results in the consumers of water buying the plant and paying for it in annual instalments. Consumers of water cannot be charged with cost of construction. They are only to pay a fair interest upon such cost; and, as we look at this matter, if this $8\frac{1}{4}$ per cent is not stowed away in the vaults as a sinking fund to make glad the hearts of the stockholders upon the expiration of the thirty years, which theory cannot be tolerated for a moment, then it must go into the plant as cost of construction, and therefore not chargeable against the consumers. The result of such expenditure is only to increase the valuation of the plant, and to thereby draw from the consumers an income from the amount of the investment. If improvements are to be made in the plant, the cost of these improvements should be charged against the construction account. If repairs are to be made upon the plant as it stands,—as, for example, a new pipe substituted for an old piece of the same size and quality,—such charge should be considered operating expenses.

Upon an examination of the record, we find these views fully corroborated in the evidence of the water company, given by one of its most important witnesses. He testified: "Where we took up one pipe line or a portion of it on the street, and put down another, if it was the same size pipe, to renew it, we would charge it to expenses. If it was a different size, we would charge the difference between them—the increased size—to construction. Where we sell pipe that we take up, we credit that to construction. If we have to renew any portion of the same size pipe, we charge it to expenses." This question has arisen incidentally in *Union P. R. Co. v. United States*, 99 U. S. 402, 25 L. ed. 274, and also in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 382, 40 L. ed. 1014, 4 Inters. Com. Rep. 560, but neither case looks the other way from the views we have expressed. When the question arises between the corporation, upon the one side, and its bondholders or stockholders, upon the other, or when it arises upon a construction of a contract with the government, as in one of the cases just cited, operating expenses, cost of construction, and net earnings may stand upon a different footing. Those cases are not this case. This is neither a question of bookkeeping nor net earnings. The particular system pursued by corporations in segregating and applying their gross receipts is likewise immaterial. The whole matter is a pure question of what is just and right between all parties interested.

The consumers of water have rights and possess equities which must be considered equally with those of the company. They are to be taxed to pay the amount called for by the schedule of rates, and these rates, in justice to them, should be fixed at the smallest possible amount, taking into consideration what is just and equitable to the owners of the property. In cases of the present character, under the head of operating expenses, the company is entitled to charge for keeping the plant in its normal condition; and the sinking of new wells, the building of new reservoirs, the erection of additional buildings, and the substitution of larger and better pipe (to the extent of the difference), do not come under the head of operating expenses, but should be charged to construction account. If this were not so, a water plant inferior in all things in a few years could be transformed into a water plant superior in everything, at the expense of the consumer. This would be an advantage to the owner, and a burden to the ratepayer neither contemplated nor justified by the law. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

Temple, J., concurring:

I agree generally in the views expressed by Mr. Justice Garoutte. I do not comprehend how in this case the exercise of the power to regulate charges or to fix compensation for furnishing water is a taking, within the meaning of § 14 of article I of the Constitution. The waterworks were all constructed subsequent to the adoption of the Constitution of 1879. The city owns no waterworks. It is provided in § 19, art. 11, of the Constitution that any individual or company shall have the use of the streets, for laying down pipes and conduits and making connections therewith, so far as necessary for introducing into and supplying the city and the inhabitants with fresh water, "upon the condition that the municipal government shall have the right to regulate the charges thereof." The corporation therefore constructed its works, and invested every dollar of its capital upon this express condition. The privilege of distributing water for pay is a franchise which might have been withheld altogether. It is really a privilege granted to a private individual to perform a public service for pay. It is granted to all upon this express reservation of the right to regulate charges. Article 14 is the complement to the section before quoted. It declares that the use of all water appropriated for sale or distribution is a public use, subject to the control of the state, and that in cities the "rates or compensation" shall be fixed annually by the governing body of such city, which rates shall continue in force for one year only; and, further, that any individual or company collecting water rates otherwise than as so established shall forfeit his or its franchise and works of the city. There is here no taking under the power of eminent domain, nor in any other sense than is implied in every service rendered for hire. There is, then, no obligation to remunerate water companies for investments made or to allow interest thereon,

either upon first cost or present value. The obligation is to compensate for service rendered. What will constitute just compensation involves many considerations. Certainly no allowance need be made for unnecessary expenditures, either in construction or management. Nor is the test always the cost of the companies. There is no limit to the number of companies which may bring water into a city. The franchise is freely offered to all in the Constitution. If there are many companies, and thereby the cost of management is increased, this fact would not call for increased rates. The service is worth no more when rendered by ten companies than when one company furnishes all the water. Incidentally to the inquiry as to what is a fair compensation for the service, the governing board may well inquire into the cost which the company whose rates are to be regulated have incurred in bringing water to the city, and in distributing it. But these matters are merely incidental, and never determinative of the question.

All the elements entering into the question having been determined, opinions would still vary as to what would be fair compensation. The Constitution has imposed upon the governing body of the city the duty of determining that question, and granted the privilege of the streets and the franchise to distribute water upon the express condition that such boards may determine the question. As already shown, the works have been constructed under this express agreement. The court cannot fix the rates,—is, in fact, expressly prohibited by the letter of the Constitution from so doing. The company will forfeit its franchise and property if it collects rates "otherwise than as so established." This prohibits them from collecting charges as fixed by the courts. The only proper judicial question is whether compensating rates have been fixed. Whether they are too high or too low is not a judicial question. The judge cannot substitute his judgment for that of the body to whom the discretion is given by the Constitution. There is much learning upon this subject in the law books, and a great variety of opinions, not to say contrariety, can be found. I know of none which—the facts considered—need be deemed adverse to these views. If there were no such constitutional provisions, the case might be different. I notice that § 19 of article 11 applies only to cities which own no public works. Whether the privilege of using the streets, or the right to distribute and sell water, exists or can exist in cities which do own such works, may be a question. If they do exist, there can be no doubt of the application of article 14 to persons or corporations selling water in such cities. In such cases could the city be compelled to take and pay for other works which only diminish the value of its own property?

Harrison, J., concurring:

I concur in the reversal of the judgment and order of the supreme court. In finding the value as well as the cost of the plant, the court included many items which were not proper to be considered for that purpose, and which are mentioned in the opinion of Mr. Justice

Van Fleet as improperly constituting a part of the cost of the plant. While the cost of the plant may be properly considered as an element of evidence in ascertaining its value, I am clearly of opinion that it should not form the basis of estimating the revenue which the water company is entitled to receive. The value of the plant may change from year to year as materially as may the cost of operating the works, and there is good reason for holding that the Constitution requires the rates to be fixed each year, in order that they may be adjusted to this changing of value. It is not necessary here to lay down a rule which shall be applicable to all conceivable conditions, since the conditions governing in one municipality, or attending the supply of water to its inhabitants, will hardly ever be the same elsewhere; and it is only proper in the present case to consider the circumstances attending the water company and the municipality now before the court.

In designating a city council as the body to fix these rates, the Constitution has clearly indicated that they are not to be fixed by the courts. The water company has the right to protection by the judiciary from the enforcement of such rates as will deprive it of compensation for furnishing the water; but, if the rates fixed by the council afford compensation to the water company, the question of the reasonableness of this compensation is a question of fact, which is not open to review by the courts. If the courts are authorized to determine the amount of compensation which will be reasonable, the rates will be fixed by them, rather than by the city council; and, for the same reason, the city council, and not the courts, are authorized to determine whether the rates, to be reasonable, shall be fixed at such an amount as will yield to the water company any definite rate of interest.

Even if it should be conceded that reasonable rates would be such as will yield to the water company a return equal to the lowest current rate of interest on the value of its property, it appears from the findings of the court that the rates fixed herein yielded a return of more than 8 per cent upon the value of the plant; and it is a matter of general notoriety that this is more than is on an average received by capitalists from permanent or fixed investments, with the guaranty of the government as their security. What may be the lowest current rate of interest upon an investment depends upon so many circumstances that no particular rate can be predicated in advance of any particular investment; but it is in all instances a question of fact, and not of law, and is not to be determined by the judiciary. After it has been determined by the city council,

the judiciary are not authorized to set aside its determination on the ground that in its judgment it is too small, any more than it could set aside the rates on the ground that the income yielded thereby would be too great.

Beatty, Ch. J., dissenting:

I think the judgment and order appealed from should be affirmed. In fixing water rates, it is the duty of the city council to provide for a just and reasonable compensation to the water company. Anything short of that is simple confiscation, and is not only a violation of constitutional rights, but is an extremely shortsighted policy. Rates ought to be adjusted to the value of the service rendered, and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal to, at least, the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing the water to consumers. To arrive at the actual value of the plant, water rights, real estate, etc., cost is an element to be considered, but is not conclusive. The plant may have cost too much. It may have been planned upon too liberal a scale. Its construction may have been extravagantly managed. The real estate and water rights may have cost less or more than their present value. And therefore cost will seldom represent the actual capital at present invested in the works, but such present value is the true basis upon which compensation, in the shape of dividends, is to be allowed. As to current expenses, all operating expenses reasonably and properly incurred should be allowed, taxes should be allowed, and the cost of current repairs. In addition to this, if there is any part of the plant, such as main pipes, etc., which at the end of a term of years—twenty years, for instance—will be so decayed and worn out as to require restoration, an annual allowance should be made for a sinking fund sufficient to replace such part of the plant when it is worn out. In its findings and conclusions the superior court seems to have conformed to these views; and, making every allowance for any minor errors that may appear in the record, the evidence is amply sufficient to sustain every material finding, and the findings clearly sustain the conclusion that in this case the rates fixed were grossly and palpably unjust to the water company. The judgment and order should be affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Otto KELSEY, *Appt.*,

v.

Frederick D. GREEN

(69 Conn. 201.)

1. A father has no absolute right to the custody of a minor child which he can transmit to another to the detriment of the child.
2. A guardian of the person of a minor appointed on the application of the father in another state at his technical domicile has not an absolute right to the child as against a guardian appointed at the child's actual residence, but the custody will be awarded with reference to the welfare of the child.
3. The right of a father to the custody of his child which he has lost through his fault or misfortune does not necessarily revive when by reformation or otherwise he has become able properly to care for and maintain the child, but the welfare of the child will be the controlling consideration.
4. The place at which an infant "resides" to give jurisdiction for the appointment of a guardian under Gen. Stat. § 458, 459, is the place of his actual stated residence rather than his strict technical domicile.]

(June 15, 1897.)

APPEAL by petitioner from a judgment of the Superior Court for Hartford County remanding the minor to the custody of defendant in a habeas corpus proceeding for the purpose of obtaining the custody of a minor child of Ferdinand Ward. *Affirmed.*

Statement by Andrews, Ch. J.:

The return was as follows: "The respondent, in obedience to said writ, brings the said Clarence Ward into court, and says that he is in no manner, without law or right, confined, imprisoned, restrained, or deprived of his liberty, and further avers with reference thereto as follows: (1) The said Clarence Ward is the son of Ferdinand Ward, now of Geneseo, in the state of New York, and of Ella Ward, the wife of said Ferdinand Ward, and the nephew of the respondent. (2) The said Ella Ward died at Stamford, Connecticut, on or about March 1, 1890. (3) The said Ferdinand Ward at the time of the decease of said Ella Ward, and for some time prior thereto, was a convict confined in the penitentiary at Sing Sing, in the state of New York; having been convicted in the courts of said state of a felony, and lawfully sentenced to imprisonment in said prison. (4) From the time of the sentence of said Ward, as set forth in paragraph 3, until her death, the said Ella Ward and her said son, Clarence Ward, resided in Stamford, in this state; having removed from New York to Stamford with the knowledge and approval of said Ferdinand Ward. (5) The said Ella Ward, at her decease, left a considerable estate, and a last will and testament, by virtue of the provisions of which a trust was created

for the benefit of the said Clarence; the income of said estate, or so much thereof as might from time to time be found necessary to be expended by the trustees for the maintenance and education of the said Clarence until he shall arrive at the age of twenty-one years; the principal to be paid to him when he shall have arrived at said age, or, in case of his decease prior thereto without issue, said income to be paid one half part to his said father, and the balance to other beneficiaries named in said will. (6) Said will was proved and approved at East Haddam, in the state of Connecticut, before the court of probate for said district, and was also proved and approved in the proper tribunal in the state of New York. (7) The trustees named in said will declined to accept said trust, and thereupon the Franklin Trust Company, a corporation located in Brooklyn, New York, was duly appointed trustee under the provisions of said will, both in Connecticut and in New York, accepted said trust, duly qualified in both states, and is now in the discharge of its duties thereunder. (8) To all these proceedings the said Ferdinand Ward was duly made a party, and gave his consent and approval thereto. (9) Upon the decease of the said Ella Ward, the question presented itself as to the proper disposition to be made of the person of the said Clarence, as said the Franklin Trust Company, under its charter, had no power to act as guardian of the person of the said Clarence; his father being then confined in the state prison, and the nearest relatives on the side of the father positively declining to assume any personal care of, or custody of, the said Clarence. (10) It was finally agreed between all the relations upon both sides, including the father, and with the concurrence of the Franklin Trust Company, that said Clarence should be placed under the care and custody of his uncle, the respondent, at Thompson, in this state, and the respondent, without legal action being taken in reference thereto, should assume and thereafter occupy the position of a guardian over the person of the said Clarence Ward. (11) In accordance with the arrangement aforesaid, the said Clarence was forthwith removed from Stamford, Connecticut, where he was then residing, to the house of the respondent, in said Thompson, and has continued to reside there until the present time. (12) The said Ward was released from state prison on or about 1892. After being so released, the said Ward approved and ratified said arrangement with reference to the custody of Clarence. (13) Some time after the release of the said Ward from prison, he demanded of the respondent the custody of Clarence; but the respondent did not feel authorized to assume the responsibility of disregarding the terms of the arrangement hereinbefore mentioned without the consent and approval of the other contracting parties thereto, and referred the said Ward to such other parties for such consent and approval. (14) The other parties interested in

NOTE.—For some cases as to the discretion to be exercised in respect to the custody of children, see *Sheers v. Stein* (Wis.) 5 L. R. A. 781, and *note*; *Weir* 38 L. R. A.

v. Marley (Mo.) 6 L. R. A. 672; *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593; *Re Lally* (Iowa) 18 L. R. A. 681; *Nugent v. Powell* (Wyo.) 20 L. R. A. 199.

the welfare of the said Clarence as aforesaid declined to consent to the change in the child's status as contemplated by the said Ward. (15) The respondent thereupon suggested that the question as to the right of the said Ward to the custody and control of the said Clarence be referred to the adjudication of the proper court upon the application of the said Ward. (16) The said Ward refused to take any legal action in the matter, but did on the 18th day of September, 1894, acting through his agents thereto by him employed, enter the state of Connecticut and the town of Thompson forcibly, and without prior demand upon the respondent, and, contrary to the wishes of the said Clarence, did attempt to abduct the said Clarence, and remove him from the custody and care of the respondent, and beyond the limits of this state and of the jurisdiction of its courts. (17) Thereupon, on the 8th day of October, 1894, after due hearing had, and upon legal motion thereof, the court of probate for the district of Thompson did appoint the respondent the legal guardian of the person of the said Clarence, which said appointment the respondent accepted, and is now in the discharge of his duties thereunder, the same having never been annulled or set aside." "(21) The said Clarence, ever since the date of his residence with the respondent as hereinbefore set forth, has remained with the respondent of his own free will and accord, and has been supported, maintained, and educated by the respondent under the arrangement hereinbefore stated, and the said Clarence still desires to remain with the respondent. (22) The respondent is the legal guardian of the said Clarence, and as such is entitled to his care and custody, and is desirous of maintaining, supporting, and educating him as aforesaid, and it is for the best interests of the said Clarence to remain in the care and custody of the respondent; and the petitioner is not the guardian, and in no manner entitled to have the care and custody, of the said Clarence."

To this return the plaintiff replied as follows: "(1) Paragraphs 17 and 22 are denied. (3) All the other paragraphs of the return are admitted. Second. And by way of further reply to said return the petitioner says that the residence of said Clarence Ward was not at Thompson at the time of said Green's alleged appointment as his guardian, nor has it ever been at said Thompson, or elsewhere in the state of Connecticut, but is now, and always has been, in the state of New York, and that the court of probate of Thompson had not jurisdiction to make the appointment alleged in paragraph 17 of said return. And the petitioner says that on the 1st day of July, 1895, the residence of said Clarence Ward was and for a long time previous thereto had been, at Geneseo, Livingston county, in the state of New York, and within the jurisdiction of the surrogate court of said county, and that on that day said court, having jurisdiction therefor under the laws of the state of New York, duly appointed said petitioner to be the guardian of said Clarence Ward, which appointment has never been annulled, and is in full force." The defendant denied this reply.

The court found that the defendant was lawfully appointed guardian of the person of said

Clarence Ward on the 8th day of October, 1894, by the court of probate for the district of Thompson, in this state; that the plaintiff was appointed such guardian on the 1st day of July, 1895, by the surrogate court for the county of Livingston, in the state of New York. The finding then proceeds: "(6) It was admitted that at the time of the appointment of the respondent as such guardian the said Ferdinand Ward was, and for a long time had been, a legal resident of the state of New York, and that at the time of the appointment of the petitioner as aforesaid the residence of said Ferdinand Ward was Geneseo, New York. (7) Excepting as above stated, no evidence was offered at said hearing by either of the parties to said proceeding. (8) From the facts set forth in said return, I find it to be for the best interest of said minor child that he remain in the care and custody of the respondent. (9) Upon said hearing, counsel for the petitioner claimed, as matters of law, that the appointment of the respondent as guardian as aforesaid was void, and that because the said Ferdinand Ward, at the time of said application and appointment of the respondent, was a legal resident of New York state as aforesaid, said court of probate of Thompson had no jurisdiction of the subject-matter of said application and appointment, and that the same was of no effect, and that, because of said appointment of the petitioner by said surrogate court of New York state as aforesaid, it was the duty of the court, upon the facts set forth in said return to said writ, to award the custody of said minor, Clarence Ward, to the petitioner." The said judge found the issue for the defendant, denied the writ, and remanded the said Clarence Ward to the care and custody of the defendant. From that judgment the plaintiff has appealed to this court.

Messrs. William C. Case and William S. Case, for appellant:

The legislature meant in its use of the word "residing," domicil, and not mere residence, between which there is quite a difference.

Salem v. Lyme, 29 Conn. 74.

The domicil of a legitimate, unemancipated minor is, if his father be alive, the domicil of the latter.

Cannon's Estate, 15 Pa. Co. Ct. 312; *Blumenthal v. Tannenholz*, 81 N. J. Eq. 194.

The domicil of Clarence Ward was the domicil of his father, Ferdinand, "for the domicil of the unemancipated minor is always that of his father."

5 Am. & Eng. Enc. Law, p. 866, and cases there cited; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751.

A bare contract by the father with a third person that the latter shall have the custody of the former's child is in the nature of a mere consent, and may be revoked by the father. He is therefore entitled, on habeas corpus, to have the child delivered over to him.

9 Am. & Eng. Enc. Law, p. 240, and cases there cited; 17 Am. & Eng. Enc. Law, p. 370, and cases there cited; *Johnson v. Terry*, 84 Conn. 263.

Courts of probate are courts of inferior jurisdiction and their decrees are never conclusive of jurisdictional questions. Their judgments

may always be attacked collaterally for want of jurisdiction.

Sears v. Terry, 26 Conn. 273; *First Nat. Bank v. Balcom*, 35 Conn. 359, and authorities there cited; *Culver's Appeal*, 48 Conn. 173.

If Mr. Kelsey is the legal guardian of Clarence he has, by virtue of his office, certain duties and rights in relation to this minor, the very first of which is the right to his custody, and the duty to enforce this right.

This right can only be enforced by a writ of habeas corpus.

Williamson's Case, 26 Pa. 9, 67 Am. Dec. 374; *People, Trainer, v. Cooper*, 8 How. Pr. 288.

Messrs. Charles E. Perkins and Charles E. Searls, for appellee:

The best interest of the minor is always the paramount question in proceedings by writ of habeas corpus.

Church, *Habeas Corpus*, ed. 1886, chap. 31, see particularly §§ 438, 441, 443, 446, 447; 9 Am. & Eng. Enc. Law, p. 243; *Hussey v. Whiting*, 145 Ind. 580; *Nichols v. Giles*, 2 Root, 461; *Johnson v. Terry*, 34 Conn. 259.

The granting of the relief asked for by the petitioner is always a matter of discretion.

Church, *Habeas Corpus*, § 443, and other sections above cited; 9 Am. & Eng. Enc. Law, p. 245.

The office of the writ is to release from illegal restraint, and when such is disproved, the writ has performed its functions and jurisdiction ceases.

9 Am. & Eng. Enc. Law, p. 242, and following.

The courts are not bound to deliver the minor over to the custody of any particular person.

Church, *Habeas Corpus*, § 445; 9 Am. & Eng. Enc. Law, pp. 245, 246.

It is, to say the least, doubtful whether a guardian appointed in another state can bring a suit, as guardian, in the courts of this state. He is in the same position as an administrator.

Smith v. Madden, 73 Fed. Rep. 833.

Andrews, Ch. J., delivered the opinion of the court:

Two errors are insisted on: (1) That the judge erred in holding that the question of the interest of the minor could affect the right of the plaintiff to the custody of his ward; (2) that the judge erred in overruling the claims of the plaintiff that the appointment of the defendant as guardian was void for the reason that the court of probate in the district of Thompson had no jurisdiction to make the appointment.

Most of the argument which is made in behalf of the plaintiff seems to us to be misapplied. The contention here is not between the father, on the one hand, and a stranger, as guardian, on the other, but between two guardians,—one appointed by a court at the place where the minor has had his actual dwelling place for six or eight years, and the other by a court at the place where it is said the technical domicile of the minor's father is. This writ, if granted, would not put the minor into the care and custody of his father, but into the hands of an utter stranger in fact, as well as in blood, who, although a fit man to be a guar-

dian, can have no kindness or affection for the minor, nor for whom can the minor have any affection or good will. Prima facie, it is true, a father has the legal right to the custody of his minor child. But he has no absolute right, which he can at his own will transmit to another, to the detriment of the child. The plaintiff was appointed guardian of the person of Clarence Ward by a court in the state of New York on the application, as the record shows, of Ferdinand Ward, the father of Clarence. By that appointment, made on that application, it is very likely that the father has excluded himself from the right to claim the custody of his son. It is certain that the appointment of the plaintiff, made on that application, gains therefrom no added merit or force. The stress of the argument made here, that the parental relation ought to control, has nothing to rest upon. But were it otherwise, and the case was between the father and a guardian, we think the court did not err in considering the interest of the minor, in determining into whose hands he should be placed. "While it is the strict legal right of the parents, and those standing in loco parentis, to have the custody of their infant children, as against strangers, a court will not, on habeas corpus, regard this right as controlling, when to do so it would imperil the personal safety, morals, health, or happiness of a child in controversy. The right of the father or mother to the custody of their minor children is not an absolute right to be accorded to them under all circumstances for it may be denied to either of them, if it appears to the court that the parent, otherwise entitled to this right, 'is unfit for the trust.' And in contests between parents and third persons as to the custody of a child of such parents the opinion is now almost universal that neither of the parties has any rights that can be allowed to militate against the welfare of the infant. The paramount consideration is what is really demanded by its best interests. And the rule is virtually the same in contentions between parents for the possession. The court is not bound to award the custody to either contending party in such controversies, but may, subject to the welfare and best interests of the child, award it to a third party. The child in contentions of this kind has the right to the court's protection against 'such misfortunes of its parents, or the influences of such gross or immoral practices in their lives, as will seriously imperil its life, health, morals, or personal safety.' But what measure of wickedness or profligacy on the part of the parent will be sufficient to warrant the court in depriving the parent of his natural right to the possession of his minor child must necessarily depend upon the facts and circumstances of each particular case." Church, *Habeas Corpus*, § 440. Authorities to support the rule thus expressed may be almost indefinitely cited. Thus, in *Richards v. Collins*, 45 N. J. Eq. 283, it is said: "In resolving the general question of what will best subserve the interest and happiness of the child, its own wish and choice may be consulted and given weight, if it be of an age and capacity to form a rational judgment. There is no fixed age which capacitates such choice. It depends upon the extent of its mental devel-

opment. . . . The wishes of children of sufficient capacity to form them are given especial consideration, where parents have for a length of time voluntarily allowed their children to live in the family of others, and thus form home associations and ties of affection for those having their care and nurture, and when it would mar the happiness of the children to sever such ties. The relation of parent and child is regarded as not fully characterized by the relative duties or service and support. Nature's provision of mutual affection commonly exists as the incentive to parental and filial duty and the bond of family union. It is the instinct of childhood to attach itself and cling to those who perform toward it the parental office; and they become endeared to it by ministering to its dependence. A parent, by transplanting his offspring into another family and surrendering all care of it for so long a time that its interests and affections all attach to the adopted home, may thereby seriously impair his right to have back its custody by judicial decree. In a controversy over its possession, its welfare will be the paramount consideration in controlling the discretion of the court. The strict right of the parent will be passed by, if a judgment in observance of such right would substitute a worse for a better condition." In *Re O'Neal*, 8 Am. Law Rev. 578, Judge Hoar gave this opinion: "Suppose by a pure misfortune, as insanity, or being cast away . . . a father has left his child destitute and dependent upon charity, does that give the child the right to form such new relations as to take from the father the right to the custody of the child? Upon the best reflection, I am satisfied that it does. When the father, by misfortune, is compelled to leave the child utterly helpless, the child ought to be considered as emancipated by the father. If . . . the child has made new relations in life, so deep and strong as to change its whole nature and character, the father has no right to reclaim it. I am satisfied that this is a sound proposition. The child is not the father's property. It is a human being, and has rights of its own. The father has a right to the custody of his child, because, from general experience, the natural and trained affections of the child attach to the father and those of the father to the child. If the father has left the child at an age too early for it to remember him, and it is placed in circumstances so that it must perish unless cared for, and other persons have expended money and become attached to the child, and the child has formed such associations as cannot be severed without injury to it, then the father has no legal right to sunder those ties. . . . It is within the judicial duty of the court to determine that the assent of the father has been given to the arrangement, which cannot be terminated without injury to the child. This principle would apply under the same circumstances if a father became insane. A human being cannot be treated like a piece of property." In *State, Lynch, v. Bratton* (Del.) 15 Am. Law Reg. N. S. 350, the court uses this language: "The father's right [to the custody of his infant child] is not absolute or unqualified. He may relinquish or forfeit it by contract, by his bad conduct, or by his misfortune in be-

ing unable to give it proper care and support. Where a father has, through his fault or his misfortune, lost or forfeited his right, and subsequently, by reformation or otherwise, reinstates himself in a position to properly care for and maintain his child, his right does not necessarily revive, but a court, upon habeas corpus, will exercise a sound discretion in view of all the circumstances with reference to the welfare of the child itself." On a hearing of a habeas corpus relative to the possession of a child, the question is one of discretion, and the further question whether the father is the proper person to have the care of it is legitimate. *Johnson v. Terry*, 34 Conn. 262; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Mercein v. People*, 25 Wend. 64, 85 Am. Dec. 653; *Verser v. Ford*, 37 Ark. 27; 9 Am. & Eng. Enc. Law, p. 243; *Prime v. Foote*, 63 N. H. 52; *Re Goldsworthy*, L. R. 2 Q. B. Div. 75.

The court of probate in Thompson had jurisdiction to appoint a guardian to Clarence Ward. His actual stated residence was in that district. General Statutes, §§ 458, 459, use the word "resides" in this sense, rather than in the sense of strict technical domicil. *Denslow v. Gunn*, 67 Conn. 361. In other sections of our statutes, generally, the word "reside" is used in a sense which includes all who are the actual, stated dwellers in any given place, even though they may have a technical domicil elsewhere. *Yale v. West Middle School Dist.* 59 Conn. 489, 18 L. R. A. 161; *Connecticut Hospital for Insane v. Brookfield*, 69 Conn. 1.

There is no error.

The other Judges concur.

Leonard D. FISK *et al.*

v.

City of HARTFORD.

(69 Conn. 375.)

A riparian owner has no right to have the sewage of a city turned into the stream above his mill instead of being diverted elsewhere, although from one third to one half of the stream has been taken by the city without right and has entered the sewerage system; but the disposal of the sewage is under the control of the city, and the remedy of the riparian owner for wrongfully taking the water is by action for damages or by injunction.

(July 12, 1897.)

RESERVATION by the Superior Court for N. Hartford County for the opinion of the Supreme Court of Errors in a suit brought to enjoin defendant from interfering with complainants' right to the flow of water in a river. *Judgment for defendant advised.*

The facts are stated in the opinion.

Messrs. Robinson & Robinson and William F. Henney, for plaintiffs:

Unless the city proceeds under the act of 1882 it has no right to proceed at all.

NOTE.—As to the diversion of streams for city water supply, see also Haupt's Appeal (Pa.) 8 L. R. A. 536; *Rigney v. Tacoma Light & W. Co.* (Wash.) 23 L. R. A. 423; *Tampa Waterworks Co. v. Cline* (Fla.) 33 L. R. A. 373.

That general powers to protect public health and build sewers do not confer upon municipalities the right to take innocent lands, water rights, etc., is very clear. The power calls for a special grant, and provision must be made in the grant for compensation.

Cavanagh v. Boston, 189 Mass. 426, 52 Am. Rep. 716.

The diversion of the stream as alleged in the bill is not an abatement of a public nuisance.

A permanent appropriation of innocent land to the public use can never be made without compensation.

Re Cheesebrough, 78 N. Y. 232.

Municipal authorities themselves cannot arbitrarily declare a thing to be a nuisance until such fact has been lawfully ascertained, and that by judicial adjudication.

Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *State, New Jersey R. & Transp. Co., v. Jersey City*, 29 N. J. L. 170; 15 Am. & Eng. Enc. Law, p. 1179, note 1; *Tiedeman*, Pol. Power, p. 427.

Even an express power to abate nuisances doesn't warrant the destruction of valuable property, which was lawfully erected, or anything that was erected by lawful authority.

Clark v. Syracuse, 13 Barb. 32; *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95.

A city cannot take water from a running stream for purposes of health, or any other public purpose, without compensating the millers on the stream who are entitled to the usufruct of the water.

Harding v. Stamford Water Co. 41 Conn. 87; *Kellogg v. New Britain*, 63 Conn. 238; *Tiedeman*, Mun. Corp. § 354, p. 729, note 4.

If such facts were pleaded in the complaint as showed as a matter of law that the river was a nuisance, that could not be set up by the city in defense of this proceeding, because, if the stream is in any sense a nuisance, it is so simply because of the city's own use of it.

Waffle v. New York C. R. Co. 58 Barb. 413; *O'Brien v. St. Paul*, 18 Minn. 176; *Gould v. Booth*, 66 N. Y. 62; *Kobs v. Minneapolis*, 22 Minn. 159; *Tiedeman*, Mun. Corp. pp. 737, 738; *Hannibal v. Richards*, 52 Mo. 330; *Weeks v. Milwaukee*, 10 Wis. 269; *Finley v. Hershey*, 41 Iowa, 394.

An injunction is a proper remedy.

6 Am. & Eng. Enc. Law, p. 502, notes 2 and 3; *Tiedeman*, Mun. Corp. p. 787, note 1; *Hollingsworth & V. Co. v. Foxborough Water Supply Dist.* 165 Mass. 183; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272; *Hart v. Jamaica Pond Aqueduct Corp.* 183 Mass. 438; *Coudrey v. Woburn*, 136 Mass. 409; *Middleton v. Flat River Boom Co.* 27 Mich. 533; *Lyon v. McLaughlin*, 82 Vt. 423; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Woodruff v. Catlin*, 54 Conn. 277; *Morgan v. Danbury*, 67 Conn. 484; *Lewis, Em. Dom.* § 641; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 63 Am. Dec. 892; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557.

Messrs. Lewis E. Stanton and William J. McConville, for defendant:

The interceptor is built by the street board under the ordinances of the court of common council.

88 L. R. A.

Charter and Ordinances, pp. 271-281.

The interceptor is a great appliance or structure, which is built under the health laws.

The city is acting under its police powers; the court will not, by injunction, arrest the city when proceeding under health laws and exercising police powers.

Slaughter-House Cases, 83 U. S. 16 Wall. 36, 31 L. ed. 894; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Munn v. Illinois*, 94 U. S. 124, 24 L. ed. 83.

Offensive trades may be prohibited as public nuisances, and private parties are not entitled to damages for the destruction of their business.

Taunton v. Taylor, 116 Mass. 254; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Com. v. Alger*, 7 Cush. 52.

It makes no difference how the nuisance originated. The city must abate it, and it ought not to be arrested by a court of equity in its attempt to do so.

Re Cheesebrough, 78 N. Y. 232; *Russell v. New York*, 2 Denio, 461; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Morgan v. Danbury*, 67 Conn. 484; *Wood*, Nuisances, §§ 743, 745; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Baker v. Boston*, 12 Pick. 184, 23 Am. Dec. 421.

Injury to private parties in such a case is *damnum absque injuria*; no private property is taken by the construction of the interceptor.

Morgan v. Danbury, 67 Conn. 484; *Morgan v. Binghamton*, 103 N. Y. 500; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Atwater v. Canandaigua*, 124 N. Y. 602; *Cooley*, Const. Lim. pp. 542-544.

Even if the plaintiffs are entitled to compensation they have not sought the proper remedy. Court will not issue an injunction to prevent the city from laying out a street; even if a private party be injured to some extent his remedy is not in equity.

Fellows v. New Haven, 44 Conn. 240, 26 Am. Rep. 447; *Woodruff v. Catlin*, 54 Conn. 297; *Hoey v. Mayo*, 43 Me. 322; *Benjamin v. Wheeler*, 8 Gray. 408; *Diamond Match Co. v. New Haven*, 55 Conn. 510; *Judge v. Meriden*, 38 Conn. 90; *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 395; *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 362; *Mead v. New Haven*, 40 Conn. 72, 15 Am. Rep. 14; *Healey v. New Haven*, 47 Conn. 805.

An injunction ought not to be granted in this cause, for the reason that the plaintiffs' right is doubtful, and they have full and adequate remedy at law for any consequential damages which may be inflicted upon them.

Hawley v. Beardsley, 47 Conn. 571; *Dodd v. Hartford*, 25 Conn. 232; *Sheldon v. Centre School Dist.* 25 Conn. 224; *Gould, Waters*, § 212, and note.

The city is acting under its powers to suppress a public nuisance. The prompt and immediate use of the interceptor is of the highest public importance. Courts will not for light reasons interfere with cities which are engaged in suppressing nuisances.

Dill, Mun. Corp. §§ 808-812; *Atty. Gen. v. Steward*, 20 N. J. Eq. 415; *Cleveland v. Citizens Gaslight Co.* 20 N. J. Eq. 201; *Morgan v. Danbury*, 67 Conn. 484; *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3; *Gilpin v. Ansonia*,

68 Conn. 72; *New Britain v. Sargent*, 42 Conn. 137; *Sedgw. Damages*, *109; *Heinemann v. Heard*, 50 N. Y. 27; *White v. Miller*, 71 N. Y. 133. 27 Am. Rep. 13; *Schile v. Brokhahus*, 80 N. Y. 620.

Torrance, J., delivered the opinion of the court:

To the original complaint in this case (which sought to enjoin the defendant from diverting, in the manner therein alleged, the flow of water into Park river) a demurrer was filed, and sustained, with leave to amend. The complaint was then amended; a demurrer thereto was filed; and thereupon the questions arising upon both demurrers were reserved for the advice of this court. As the determination of the questions arising upon the demurrer to the amended complaint disposes of the case reserved, it will be unnecessary to consider those arising upon the demurrer to the original complaint. The amended complaint consists of two counts.

The substance of the material parts of the first count, by paragraphs, may be stated as follows: (1) The plaintiffs are the owners of a valuable mill property on Park river, in the city of Hartford, with mills upon both sides of the river, one upon Elm street, and the other immediately opposite, upon Wells street. They are the owners, at that point and for a considerable space upon each side of it, of the banks of the river and of its bed, and the exclusive owners of the water privileges at that point. (2) The water power available at this point to the plaintiffs, by means of their dam, is equivalent to about 200 horse power upon the average. (3) The water privilege is an ancient one, having been established, used, and occupied as such for more than 250 years. (4) The value of the mill property in connection with the water privilege is \$250,000, and the plaintiffs have established a large and profitable business thereon as millers, and the water power is sufficient, without the assistance of steam, to carry on the entire business of the plaintiffs as such millers. (5) The defendant is the owner of a large and important system of reservoirs, for the use of the citizens of Hartford, for domestic and other purposes. The water of all these reservoirs is communicated to a certain distributing reservoir, whence by leading pipes it is carried to the streets, houses, stores, and lands in the city, and is thence nearly in whole returned to Park river, above the plaintiff's dam, by the present drains, pipes, and sewers of the city, and is thereby made available to the plaintiffs in the use of their said water privilege. (6) All the water collected and carried by the city in all of said reservoirs is from brooks, streams, and springs which are tributary to Park river, to the entire current and flow of which river the plaintiffs are entitled, by their mill and riparian ownership aforesaid. (7) Since the introduction of the system of water supply by said city, referred to in paragraph 5, down to the present time, the water collected in such reservoirs, as they were severally completed and put in operation, has been largely, if not entirely, returned to said river, and made available for the uses of plaintiffs in the enjoyment of the said mill privilege, as set forth in paragraph 5. "(8)

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The said city has recently, to wit, within about a year from the date of this complaint, built and completed a reservoir in the town of Bloomfield, known as the 'Tumbledown Brook Reservoir,' of very extensive area, in which the said city has accumulated, and still continues to accumulate and hold, vast quantities of water from the watershed, streams, brooks, and springs tributary to said Park river, and to whose usufruct the plaintiffs are entitled as aforesaid, and has connected the same by canals with said distributing reservoir, whence the said water is returned to said river, and made available for the uses of the plaintiffs in their mill work, as set out in paragraph fifth. (9) The surface water flowing from all points this side of the distributing reservoir now finds its way, either by direct surface flowage, or by the existing drains, pipes, and sewers of the city, into Park river. Some small portion of said surface water, however, and also a small portion of the water brought from the reservoirs, is carried into Park river below the complainants' dam, and into the Connecticut." (10) The city is now constructing an immense intercepting sewer, designed to divert, and which will divert, all the water now conveyed by pipes, drains, and sewers, and by surface flow into Park river, above plaintiff's dam, away from Park river, into the Connecticut river; and it intends to and will wholly divert said water, as aforesaid, unless restrained by injunction. "(11) The proposed intercepting sewer is particularly described in an exhibit which, by reference, is made part of this complaint, and will be filed in court as 'Exhibit B.'" (12) This diversion will deprive the plaintiffs of the use of from one third to one half the volume of water whose usufruct belongs to them, and will be a great and irreparable injury and damage to them. (13) By an act of the general assembly passed at its session in 1882, authority was given to the city to take, occupy, and appropriate any stream, or part of a stream, running in or through said city, and to remove dams, walls, and other obstructions to the free and healthful flow of such stream, or part of a stream, and to raise said dams and to build other dams where the public health or convenience may require, and to cause it to flow through a sewer or other aqueduct built in or upon the bed of said stream, or laid in the earth in or near the bank thereof; or by said act it was required that the city should agree, if possible, with parties interested, upon the damage on account of such improvement; and, if unable to so agree, that the city should have the damages appraised, and paid in the manner prescribed in said act. (14) In March, 1894, the plaintiffs presented their claim for damages in the manner prescribed by said act to the proper authority; but neither the city, nor anyone in its behalf, has "ever made any offer to compensate to any extent the plaintiffs for the damages which will arise from said so-called 'improvement,' nor have they agreed or attempted to agree with the plaintiffs upon such damages, although frequently requested by the plaintiffs." (15) Neither the city, nor anyone in its behalf, has taken any of the steps in said act prescribed, or otherwise, to have the plaintiffs' damages aforesaid ascertained or appraised; but it "threatens

to continue the building and completion of said intercepting sewer, and to divert from said stream of water, and from plaintiffs' use, nearly one half of its flow and current, without any compensation whatsoever to the plaintiffs for their damages resulting from said so-called 'improvement.' (16) Such diversion will injure the plaintiffs to the amount of at least \$100,000. (17) If the city does what it threatens to do, without agreeing with the plaintiffs as to their damages, or having the damages appraised and paid, the injuries inflicted upon the plaintiffs will be irreparable and incapable of estimate, and plaintiffs will be without adequate remedy. (18) On the 24th of July, 1893, the common council of the city were of opinion, and expressed that opinion by action at the time, "that the proper sewage of the city required the diversion of the water from Park river," and then passed certain votes, "whose effect will be to cause a large part of such stream which now flows into the natural channel of said river to flow through a sewer to be built in part in and upon said bed of said such stream, and in part upon either bank thereof." (19) On the same day the court of common council "passed a vote proposing said so-called 'improvement,' and referred the same to the board of street commissioners and the said court of common council and the said board of street commissioners prepared a descriptive survey of the improvement proposed, with a careful estimate of the cost of completing the same." (20) In February, 1894, the board of street commissioners gave proper notice of a time and place for hearing all parties interested in said improvement, and the plaintiffs appeared at the proper time and place, and made their claims to said board for the damages which would be caused to them by said improvement, and the consequent diversion of water as aforesaid. (21) At said meeting no agreement was made with the plaintiffs with reference to said damages. The relief prayed for was as follows: "The plaintiffs claim: An injunction restraining the defendant city from diverting into said intercepting sewer, or any part of the same, or elsewhere, the present current and flow of water into said Park river, at and above the said dam of plaintiffs, whether such present current and flow be through drains, pipes, sewers, surface flowage, or otherwise, until an assessment of the damages resulting to plaintiffs from such diversion shall have been assessed or agreed upon, and the payment thereof made or secured, in accordance with the provisions of an act of the general assembly entitled 'An Act Granting Control of Park River to the City of Hartford,' approved March 22, 1882."

The first sixteen paragraphs of the first count were made part of the second count, and the remainder of said second count, with the relief prayed for, was as follows: "(2) The defendant threatens to divert from said stream of water, and from the plaintiffs' use thereof, nearly one half of its flow and current, without any compensation whatsoever to the plaintiffs for their damages directly resulting from said so-called 'improvement.' (3) The diversion of said water, as aforesaid, by the defendant, will cause an irreparable damage to the plaintiffs, and damages incapable of

estimate. (4) The defendant has never compensated nor paid in any way the plaintiffs for the accumulation of the water of Tumbledown Brook Reservoir, as described in the eighth paragraph of the first count, nor have they attempted to agree with the plaintiffs as to the amount of said damages. (5) Until the plaintiffs are deprived of the use of said water, which is now returned to them as hereinbefore set out, they suffer no substantial damage; but when said water is carried past the plaintiffs' dam, as proposed by the construction and use of said intercepting sewer, as aforesaid, the same will be of great and irreparable damage to them. (6) For the accumulation of the waters of the stream and its tributary springs and brooks, described in paragraphs 6 and 7 of the first count, no compensation has ever been made to the plaintiffs on their predecessors in the ownership of the mill privilege aforesaid. (7) The storage capacity of said reservoirs is as follows: No. 1, 145,000,000 gallons; No. 2, 284,000,000 gallons; No. 3, 146,000,000 gallons; No. 4, 601,000,000 gallons; No. 5, 94,000,000 gallons; No. 6, 800,000,000 gallons. No. 6 is Tumbledown Brook Reservoir. The average daily consumption of said water by the defendant's water department is about 7,000,000 gallons. The plaintiffs amend the prayer for relief by making the same as it now stands paragraph 1 of plaintiffs' claims, and adding thereafter the following: (2) An injunction restraining the defendant city from diverting into said intercepting sewer, or any part of the same, or elsewhere, the present current and flow of water of the said Park river at and above said dam of the plaintiffs, whether such present current and flow be through drains, pipes, sewers, surface flowage, or otherwise, until the injury aforesaid done and to be done to the plaintiffs is compensated and paid for. (3) Such other and further relief as may to equity pertain."

After the complaint as thus amended was filed, it was further amended, by way of more specific statement, as follows: "The plaintiffs herewith amend the complaint by making more specific statement, as follows: (1) At the end of paragraph 19 add the following: The action and opinion of said court of common council referred to in paragraphs 18 and 19 were expressed by certain votes, copies of which, with the subject-matter and the correct date thereof, appear in the annexed journals of the board of common council and the board of aldermen of said court, which are marked Exhibit 'C' and 'D,' respectively, at pages 185-217, inclusive, and 251 of Exhibit C, and pages 222, 336, 337, 446, and 461 of Exhibit D. The plans, maps, and surveys referred to at page 217 of Exhibit C are made a part hereof by reference, the same being in the possession of the defendant, and of such a character that the plaintiffs are unable to file the same. The report of the committee with the resolution therein submitted, a copy of which appears at pages 336 and 337 in said Exhibit D, is still pending in said court of common council. (2) At the end of paragraph 20 add the following: The action of said street board referred to in this paragraph was pursuant to a vote of said court of common council, a copy of which, with the subject-matter and the correct date

thereof, appears in said Exhibit C, at pages 479-481, inclusive. A copy of the publication of the resolution therein mentioned, so far as there was any publication thereof, is the plaintiffs' Exhibit B. A copy of the publication of the notice given by said street board, and referred to in this paragraph with the correct date of such publication, is hereto annexed, and marked 'Exhibit E.'

Exhibit C shows, in substance, that the city, in July, 1898, resolved to construct the intercepting sewer complained of, in order to remove what is called in said exhibit C the "Park river sewage nuisance," and also as "an improvement to the city's sewerage system in general." Exhibit D shows, in substance, that in July, 1893, the common council appointed a committee to ascertain and report the probable cost of extinguishing the flowage rights of the plaintiffs, and of acquiring their entire mill property; that in November of that year said committee made a report, and asked for further power in the premises. This report was eventually tabled by the board of aldermen, in March, 1894, and so remains. Exhibit E is as follows: "Board of Street Commissioners, Hartford, Conn., March 19, 1896. This board will meet Monday evening, March 19, 1896, at 7:30 o'clock, to hear all parties interested in the matter of damages for the right of way for the proposed system of intercepting sewers and branches thereof. Parties interested are invited to be present. Charles H. Northam, President."

So far as it is deemed necessary to set out the demurrers, they are as follows: To the first count. "The defendants demur to the first count of the plaintiffs' complaint, for the following reasons: None of the votes or resolutions passed by the court of common council of the city of Hartford, referred to in paragraphs 18 and 19, or any paragraph of the first count, as amended, or in plaintiffs' specific statement, have the effect, or, as matter of law, contain any vote or determination of the common council, to divert any part of the Park river, or to take the waters of said river out from its stream, or any part thereof, or cause it to flow through a sewer or other aqueduct built in or upon the bed of such stream, or laid in the earth in or near the banks thereof. It does not appear from the first count, or any amendment thereof, that, by virtue of any of said votes or resolutions, the city of Hartford took any action under the act of March 22, 1882, referred to in said count." "Because it appears from the first count, as amended, that the notice or notices referred to in paragraphs 19 and 20 of same, as amended by specific statement, or any paragraph of said count, and the action of any of the board of street commissioners and of the common council of the city of Hartford, were each and all of them notices or action in relation to the construction of sewers under the ordinary regulations prescribed by law relating to the construction of sewers in accordance with the charter of the city, and were not either notices or action for any proceeding under the act of March 22, 1882, and were not part of any proceedings to divert the waters of Park river from the stream, or to carry said waters in any sewer laid in its bed near either of its banks." "Because it does

not appear from any averments in the first count contained that the special act of March 22, 1882, has any application to the building of the intercepting sewer described in the first count." To the second count: "The defendant also demurs to second count of amended complaint, for the following reasons: It appears from the second count, and from various paragraphs thereof, and especially from paragraph 10, that the defendant is not proposing to divert Park river, nor any streams of water which flow into the same, but is proposing merely to keep sewage out of Park river, to turn sewage or sewage water from certain sewers into an intercepting sewer, and take said sewage into the Connecticut river." "It appears from the second count, and especially from paragraph 10 of original complaint, now made part of second count, that the acts of the defendant complained of are done in the course of the construction of a certain intercepting sewer by the city of Hartford, and the proposed use of the same in order to turn sewage into the Connecticut river; and there are no averments in the second count which tend to show that such construction of a sewer or diversion of sewage on the part of the defendant is unlawful." The defendant demurs to the relief demanded in second count of complaint, because, upon the allegations of the second count, the plaintiffs are not entitled to the relief by way of injunction as therein sought." "The defendant demurs to the entire complaint as amended, for the following reasons: Because the special act of March 22, 1882, and found in Special Acts of 1882 (page 419), is merely a premissive act, authorizing the city of Hartford to do certain things named therein, but not imposing upon the city of Hartford any obligation to take action under the same, and because said act has no application to the building of said intercepting sewer, or to any damages arising therefrom." "Because the city of Hartford has full right, under the laws of the state, to abandon all action under the act of March 22, 1882, and also to resort to another method of drainage, and an injunction ought not to issue in order to restrain it from performing its duty in the premises." "Because, under the charter of the city, its court or common council is vested with full powers to pass ordinances for laying out and constructing and altering public sewers, through the highways, streets, including turnpike roads, alleys, and public grounds within the city, and also through the private inclosures within the same. And, further, by said charter it is made the duty of the board of street commissioners of the city of Hartford to cause the prompt completion of all necessary repairs of streets, highways, sewers, and public works, within the limits of the streets, highways, and thoroughfares of the city, other than public buildings." "Because it appears from the complaint that the defendant city is constructing said intercepting sewer under its police power, in the discharge of a governmental duty, in order to promote and preserve the public health." "Because it appears from the complaint that the object of the same is to compel the defendant city to take action under the act of March 22, 1882, when no obligation rests upon the city to take such action, and, if an injunction

should issue, the city would be restrained from making use of a sewer which is constructed in order to promote and preserve the public health." "Because the construction and use of said intercepting sewer is a public work of great importance, and of great necessity to the inhabitants of the city, as appears from the complaint, and especially from the 10th, 11th, and 18th paragraphs thereof; and the city will not be restrained by an injunction from using a public work, in order to force the city to pay damages for diversion of sewage water." "Because it appears from the complaint that all the acts on the part of the defendant complained of are being done by the city of Hartford, in the construction and management of its own system of sewers, and because polluted sewage water, referred to in the complaint, is a public nuisance, and, by law, the city has full right to abate a public nuisance without the payment of damages." "Because the plaintiffs have adequate remedy at law, by proper action against the city, if any of their rights to water, or to the flow of water into the Park river, shall be taken or injured by the city in consequence of the construction of said intercepting sewer."

Although the record in this case is somewhat voluminous, the facts decisive of it lie in narrow compass, and may be briefly stated as follows: The plaintiffs are the owners of a valuable water privilege and mill property on Park river. Prior to the acts complained of, the city of Hartford had constructed a system of reservoirs, at great expense, to supply itself and its inhabitants with water for domestic and other purposes. This water supply is all taken above the plaintiffs' dam, from brooks, streams, and springs which are tributary to Park river, to the entire current and flow of which river, including the water so taken by the city, the plaintiffs are exclusively entitled at their mills. The water so taken by the city is from one third to one half the volume of said river. This water is carried to a distributing reservoir, and thence, by leading pipes, to the city, where it is sold and distributed to the citizens through service pipes for use, and, after such use, is returned in great part to Park river, through the sewerage system of the city. This has been done ever since the city began to use such water supply, and, by reason of such return, the plaintiffs thus far have suffered no substantial damage from the use of said water by the city. The city now proposes to divert all the water thus flowing through its sewerage system, as aforesaid, into Park river, above the plaintiffs' mills, into a great intercepting sewer, which it is engaged in constructing, and, by means of such sewer, to carry such water directly into the Connecticut river. This, if done, will divert and take away from the plaintiffs' water privilege from one third to one half of the volume of Park river, as it has been accustomed to flow there, and will very greatly damage the plaintiffs. It further appears that under the act of 1882, referred to in the complaint, authority was given to the city to do the things set forth in said act with reference to "any stream, or part of a stream, natural or artificial, running in or through said city;" and also that the city

took such action with reference to purchasing or condemning the property of the plaintiffs, and appropriating Park river, under the act of 1882, as is set forth in the complaint and the exhibits which are made a part of it. It further appears that, in the opinion of the city authorities, the sewage and waste water thus returned to Park river created a nuisance, which ought to be abated in some other way; and that said authorities finally determined to abate such nuisance by building the intercepting sewer, and, through it, diverting said waste water and sewage into the Connecticut river.

These are the main controlling facts in the case, and the question is whether, upon them, the plaintiffs are entitled to the precise relief which they now seek. If the complaint could be regarded as one brought simply to enjoin the city from taking its water supply, or any part of it, from the tributaries of Park river, the case thus presented would be a very different one from the present case; but it cannot be so regarded. The complaint is not brought to have the city enjoined from diverting the water of Park river or its tributaries into the reservoirs and distributing pipes of the city, or from using the water so diverted, but it is brought to restrain the city from diverting its sewage into the intercepting sewer; and this is the very gist of the complaint. The allegations of the complaint are, in effect, that this sewage has heretofore been permitted to flow into Park river; that it is available for use at the plaintiffs' mills; that the city now intends to divert it into the intercepting sewer, past the plaintiffs' mills; that this will greatly lessen the flow of the river, to the plaintiffs' damage; that the city has no right to thus divert its sewage from Park river, and should be enjoined from doing so until it has paid or satisfied the plaintiffs' damages. It is true the complaint may be fairly said to allege, in effect, that the city gets its water supply from waters which belong to the plaintiffs, and that it has no right, as against the plaintiffs, to take and use such water as it does. But the complaint does not ask to have such taking and use enjoined against. It only asks to have the city enjoined from disposing of that water after it has become sewage.

Now, it is quite clear that the city either has, or it has not, the right, as against the plaintiffs, to take and use the water which constitutes its supply, as set forth in the complaint; and in either case we think it is equally clear that the city has the right, as against the plaintiffs, to dispose of that water after it enters the sewerage system as sewage, under its charter, as it sees fit. In other words, the plaintiffs may or may not have the right to have the whole or a part of the water supply of the city returned as water to Park river; but in either case they have no right to have it so returned after it has become sewage, or to have it returned through the sewerage system of the city, which are in effect the rights claimed in the present case. If the city has the right, as against the plaintiffs, to take and use the water in its reservoirs, then, clearly, it has the further right, as against them, either before or after it is used, to dispose of it under its charter as it sees fit. If, on the other hand, it has no

right, as against the plaintiffs, to take or use the waters in its reservoirs, which is, we think, the case stated in the complaint, this fact of itself does not give the plaintiffs a right to control the disposition of such water after it has entered the sewerage system, and become sewage. That control still remains with the city, and ought to remain with it.

As the court is bound to take judicial notice of the city charter (Gen. Stat. § 1087), we know that full control over its sewerage system, and over the disposal of sewage, is conferred upon the city; and there is nothing in the entire record which shows any loss of such control, or which shows that the plaintiffs have any rights which the city is bound to consider in dealing with its sewer system, or in dealing with the disposal of sewage. In this view of the case, it makes no difference whether the sewage is or is not injurious to health, or whether its open flow has or has not otherwise become a nuisance. In either case the city still has, and ought to have, full control over it, and the pipes, drains, and sewers through which it flows, or can be made to flow. If the city wrongfully takes and uses the plaintiffs' water, the remedy for such a wrong is ample, either by an action at law for damages, or, in a proper case in equity, by injunction; but where, as in this case, the plaintiffs apparently condone the wrongful taking and using of the water, on condition that it shall be allowed to come back to them in the form of sewage through the city sewers, and assert a right to sewage as such, and to have

it flow through the sewers as it has been accustomed to flow, they cannot have the remedy which they now seek, simply because they have not shown that they possess any such right. The complaint clearly shows that it is the sewage of the city, and not the waters of Park river or its tributaries in any proper sense, which the city is about to turn into the intercepting sewer; and it is this precise diversion, and nothing else, which the plaintiffs seek to have enjoined. For the reasons given, we are of opinion that they are not entitled to the injunction.

In this view of the case, the question whether the city, in what it has done or intends to do, as alleged in the complaint, is or is not acting under the act of 1882—a question much discussed upon the argument—becomes of secondary importance. We think, however, that the record clearly shows that the city is not acting in this matter under the authority conferred by the act of 1882, but under the provisions of its charter, without regard to that act. Furthermore, we think that what the city has done, and what it intends to do, as alleged upon the record, do not constitute a taking or appropriation of Park river, or any part of its bed or banks, or of any part of its waters, within the meaning of the act of 1882; and that its charter gives it full power to do what it has done and intends to do, as these matters are alleged in the complaint.

The Superior Court is advised that the complaint is insufficient.

The other Judges concur.

IOWA SUPREME COURT.

EAGLE MANUFACTURING COMPANY
v.

City of DAVENPORT, *Appt.*

Frances W. FRENCH

v.

SAME, *Appt.*

(.....Iowa.....)

1. The lien of an assessment for a street improvement attaches from the time when labor is first done or material furnished by the contractor in making the improvement after the contract is made, and not from the time of adopting a resolution for doing the work or the letting of the contract therefor under acts 23d Gen. Assem. chap. 14, § 12, providing that the assessment shall be a lien from the commencement of the work.

2. The sale of a narrow strip from the front of property for the sole purpose of avoiding a street-improvement assessment after the city has entered into a contract for the improvement but before the lien of the assessment attaches is void for the purpose of the assessment.

3. Land purchased after the execution

NOTE.—The effect of selling a narrow strip abutting on a street in order to avoid a street assessment upon the remaining property is a question 38 L. R. A.

of a contract for a street improvement with the knowledge, actual or constructive, on the part of the purchaser, that a strip of land 2 feet wide between the land purchased and the street to be improved had previously been sold by his grantor for the sole purpose of avoiding the assessment, is liable for such assessment although the purchase was made for a lawful purpose.

4. The owner of land abutting on a street for the improvement of which a contract has been entered into may lawfully sell a strip from the front of his property of less width than the 150 feet which would otherwise be liable for the assessment, and thereby avoid the assessment if such sale is in good faith for legitimate purposes and not merely a subterfuge to defeat the assessment.

(April 9, 1897.)

APPEALS by defendant from decrees of the District Court for Scott County enjoining it from collecting a street-paving assessment. *Reversed in first case. Affirmed in second.*

The facts are stated in the opinion.

Mr. E. M. Sharon, for appellant:

The law under which this improvement was made and the cost assessed does not provide

somewhat novel on which there do not seem to be any authorities not cited by the court.

that the cost be apportioned according to benefits but by frontage, and the same has been true of all the statutory law of the state in relation to the assessment of cost of street improvement or improvements in streets.

This court has repeatedly upheld that method of apportioning the cost, and has reaffirmed it on every occasion when the matter was presented, even in cases where it was admitted that no benefit accrued to the property from the improvement.

Warren v. Henly, 31 Iowa, 31; *Gatch v. Des Moines*, 68 Iowa, 720.

The grantor in a voluntary or fraudulent conveyance has not the right to pass upon the legality of the indebtedness or the justice of the claim which he seeks to defeat.

2 Bump, Fraud. Conv. pp. 591 *et seq.*

A corporation to which the principal stockholder, incorporator, or president conveys land is a purchaser with notice, unless its pleadings prove the contrary.

Billings v. Aspen Min. & Smelt. Co. 10 U. S. App. 1, 51 Fed. Rep. 838.

The law imputes personal knowledge of a fact of which the exercise of common prudence would apprise him.

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063.

A corporation may in judgment of law intend to defraud creditors.

Curtis v. Leavitt, 15 N. Y. 9; *Smith v. Morse*, 2 Cal. 524.

Transfers to defeat assessments are fraudulent conveyances.

Heath v. Page, 68 Pa. 106, 8 Am. Rep. 538; *Dougherty v. Miller*, 36 Cal. 88.

Appellant can see no difference in principle between the case at bar and cases where personal property is assigned or converted for the purpose of evading taxation.

Mitchell v. Leavenworth County Comrs. 91 U. S. 206, 23 L. ed. 302; *Holly Springs Sav. & Ins. Co. v. Marshall County Supers.* 52 Miss. 282, 24 Am. Rep. 668; *Albany City Nat. Bank v. Maher*, 19 Blatchf. 182; *Patrick v. Littell*, 36 Ohio St. 79, 38 Am. Rep. 552; *Poppleton v. Yamhill County*, 8 Or. 337; *Waller v. Jaeger*, 39 Iowa, 228; *Meyer v. Dubuque*, 49 Iowa, 193.

This statute does create a lien upon the land.

A construction will not be put upon a tax law which would enable a party for whom no purpose of exemption is expressed to escape taxation altogether.

Philadelphia v. Ridge Ave. Pass. R. Co. 102 Pa. 196, 23 L. ed. 302; *Cornwall v. Todd*, 38 Conn. 447; *Hubbard v. Brainard*, 35 Conn. 563; 3 Parsons, Contr. p. 287; *Big Black Creek Improv. Co. v. Com.* 24 Pa. 450; *Hudler v. Golden*, 36 N. Y. 447; *Eckhard v. Donohue*, 9 Daly, 214; *Weed v. Tucker*, 19 N. Y. 432.

Any transfers, real or fanciful, are made *pendente lite*, and the grantee takes the property subject to the liability of the property to pay the proper proportion of the expense of the work ordered.

Chaney v. State, Ely, 118 Ind. 494; *Blackie v. Hudson*, 117 Mass. 181; *Whiting v. Townsend*, 57 Cal. 515; *Meyer v. Dubuque*, 49 Iowa, 193.

The intent of the legislature must have been to protect the liability which the city assumed

in making the contract, by keeping the property liable for the improvement, intact as indemnity for the cost of discharging the liability assumed.

That intent can be assured beyond any question only by having the encumbrance on the property relate back to the time of ordering the work or letting the contract, as was held in—

Blackie v. Hudson, 117 Mass. 181.

If cities can be restrained by injunction from collecting taxes due them, until the termination of suits in equity, instituted for settling title, they would be embarrassed beyond anything compatible with the proper exercise of the functions of government, which they are organized to administer.

Macklot v. Davenport, 17 Iowa, 379; *Cook County v. Chicago, B. & Q. R. Co.* 35 Ill. 465.

Messrs. Bills & Hass, for appellees:

Taxes are not commonly a lien upon lands, unless made so by express legislative authority.

Cooley, Taxn. p. 305; *Jaffray v. Anderson*, 66 Iowa, 718.

Statutes are construed most strongly against the government and in favor of the subject or citizens, because burdens are not to be imposed, or presumed to be imposed, beyond what the statutes expressly and clearly import.

Cooley, Taxn. p. 202; 2 Dill. Mun. Corp. § 604; *Fowler v. St. Joseph*, 37 Mo. 228; *Mois v. Detroit*, 18 Mich. 495; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 253; *Neenan v. Smith*, 50 Mo. 525; *Coggeshall v. Des Moines*, 78 Iowa, 285; *Shotwell v. Moore*, 129 U. S. 590, 32 L. ed. 827; *Mitchell v. Leavenworth County Comrs.* 91 U. S. 206, 23 L. ed. 302.

There was no authority under the law and ordinance to institute an inquiry as to how far back from the street the rights of the abutting owners extended.

Amery v. Keokuk, 72 Iowa, 701; *Re Ward*, 52 N. Y. 895; *Morewood Avenue*, 159 Pa. 20; *Fifty fourth Street*, 165 Pa. 8; *Cincinnati v. Batsche*, 53 Ohio St. 324, 27 L. R. A. 536; *Richards v. Cincinnati*, 31 Ohio St. 506; *Terre Haute v. Mack*, 139 Ind. 99; *Crane v. French*, 50 Mo. App. 367; *Buse v. Cincinnati*, 28 Ohio L. J. 111.

The legislative intent is clear not to go beyond the property actually abutting and the personal liability.

Amery v. Keokuk, 72 Iowa, 701.

On petition for rehearing.

Our statute, in both affirmative and negative phrase, and in language which cannot be misunderstood, confines the lien of the tax to lots or lands bounding or abutting on such street or streets.

This decision abrogates that very important part of the statute, and holds that the lien of the tax may be extended to land which is not abutting, and which was not abutting at the time the lien of the tax took effect.

It not only does that, but it also overrules a former decision of this court.

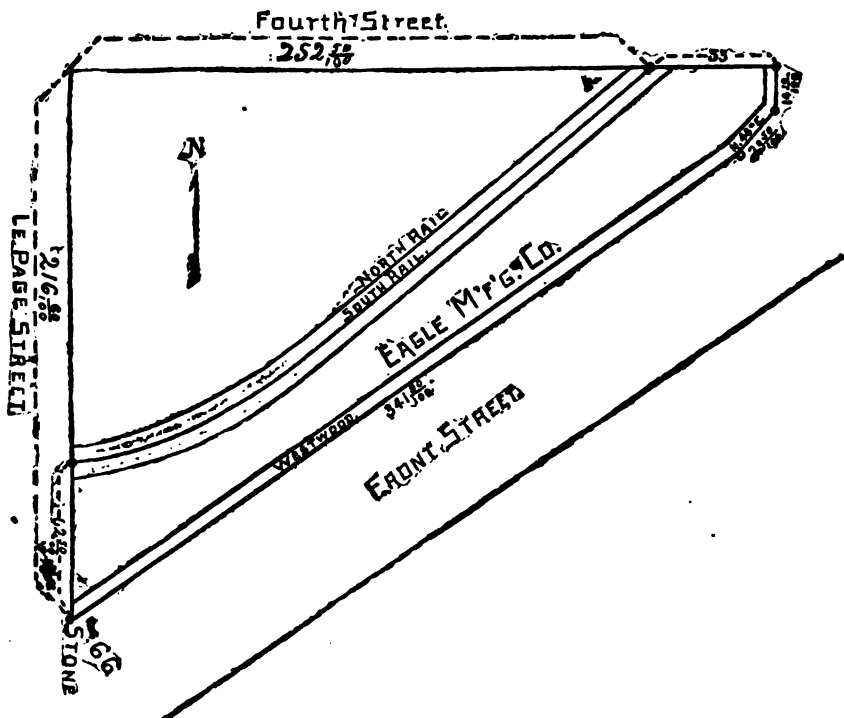
Amery v. Keokuk, 72 Iowa, 701.

Robinson, J., delivered the opinion of the court:

In the year 1886, George H. French became the owner of block numbered 123 in Le Clair's Ninth Addition to the city of Davenport. He

died testate in the year 1888, and Frances W. French became the executrix of his will. That gave to her a life estate in the property described, and by subsequent conveyances she became its owner in fee simple. On the 7th day of January of the year 1891, the paving committee of the defendant presented to its city council a report which recommended that designated portions of certain streets which were specified be paved during that year. The report was adopted, and resolutions which provided for paving according to the recommendations of the committee were also adopted on the same day. On the 26th day of the same month, after due notice, contracts for the paving contemplated by the resolutions were awarded. On the 2d day of May, 1891, a resolution was adopted which provided for the issuing of paving bonds on each of the contracts, and bonds to the amount of \$71,500 were issued in accordance with that resolution. A part of the paving provided for by the resolutions and contracts to which we have referred was of that portion of Front street which is adjacent to the block specified. That has the general outline

of a truncated triangle. The west side is 216.6 feet in length; the north side, bounded by Fourth street, is 305.5 in length; and the south-east side is 365.4 feet in length. In addition, there is a side at the east end 14.1 feet in length. The block was divided into two parts by a railway side track, which entered the block on the north boundary line 58 feet west of the east end, and thence extended in a south-westerly direction on a line slightly curved, crossing the west boundary line 62.5 feet north of the southwest corner. On the 7th day of April, 1891, Mrs. French conveyed to E. C. Westwood a part of the block next to Front street, 2 feet in width, and extending the entire length of the block on that street. On the 22d day of the same month she conveyed to the Eagle Manufacturing Company all of the remainder of the block, which was between the part conveyed to Westwood and a line parallel with, and 6 feet south of, the railway track. The outline of the block, the adjacent streets, the location of the side track, and the parts conveyed, are shown by the following plat:



The paving was completed in accordance with the contracts in the latter part of the year 1891. On the 4th day of November of that year the city engineer presented to the city council a report and plat which showed the amount of paving tax to be assessed on the lots and land abutting on the streets where paving had been done. Notice to all persons having objections to the plat was published, and in due time the Eagle Manufacturing Company and Mrs. French filed objections to the assessment of the paving tax on the portions of

the block in question which they then owned. The substance of the objections was that the objectors did not own, and had not since the paving was ordered, or since work thereon had been commenced, owned any part of the block which fronted or abutted on the part of Front street, which had been paved. The objections were overruled, and the tax for paving the part of that street upon which the block abutted was assessed upon the entire block at the rate of \$3,537.56 for each front foot. No attention was paid to the depth of the

block. These actions were brought to enjoin the enforcement of the tax against the portions of the block now owned by the plaintiffs. The district court rendered a decree in each case granting the relief asked.

1. It will be observed that no part of the block abuts on Front Street, excepting the strip which was conveyed to Westwood; and we are required to determine whether the conveyance to him, and the subsequent one to the Eagle Manufacturing Company, were effective to cut off the right which the defendant would have had, if they had not been made, to assess the tax against that portion of the entire block within 150 feet of Front street. The paving was done under an ordinance of the defendant, not set out, but which was similar to chapter 14 of the Acts of the 28d General Assembly; hence the provision of that act will be treated as applicable and controlling. The act provides for the paving and curbing of streets, and for the assessment of the cost thereof "upon the property fronting or abutting on said improvement." Section 12 contains the following: "Said assessment, with interest accruing thereon, shall be a lien upon the property abutting upon the street or streets upon which any said improvement is made, or upon such improvement from the commencement of the work, and shall remain a lien until fully paid, and shall have precedence over all other liens except ordinary taxes, and shall not be divested by any judicial sale, provided that such lien shall be limited to the lots or lands bounding or abutting on such street or streets, or on such improvement and not exceeding in depth therefrom 160 feet." It is important to determine the time when the lien of the assessment in question must be regarded as having attached to the property subject to it. It is contended on the part of the appellant that it attached when the resolution ordering the paving to be done was adopted, or at the latest when the contract for it was entered into. It is the general rule that taxes are not liens upon property, unless made so by statute, or by virtue of authority conferred by statute. *Jaffray v. Anderson*, 66 Iowa, 718; *Cooley, Taxn. 445 et seq.* And that is true of special assessments made on account of the improvement of streets. 2 Dill. Mun. Corp. § 659; 24 Am. & Eng. Enc. Law, p. 76.

Where a tax or special assessment is made a lien, the time at which the lien attaches must be ascertained from the statute or other authority which provides for it, and in this case it attached at "the commencement of the work." Is the adoption of a resolution directing that certain paving be done, or the letting of the contract therefor, or both, with the various preliminary steps which lead to them, the commencement of work, within the meaning of the statute? It is undoubtedly true that there are many good reasons, independent of the statute, for making the lien of the assessment commence with the letting of the contract for making an improvement, if not from the adoption of the resolution ordering it; and it is also true that legislative intent, if properly expressed, is controlling. We must gather that intent in this case from the statute itself. Section 2 of the statute refers to paving and curbing of streets and the construction of sewers,

and authorizes contracts "either for the entire work in one contract or parts thereof in separate and specified sections." Section 3 provides for a notice to bidders, which shall state as nearly as practicable "the extent of the work, the kind of materials to be furnished," and "when the work shall be done." Section 5 makes it the duty of the city engineer "to furnish proper grades and lines, and see that the work is done in accordance with the ordinances and regulations of the city, with respect to said grades and lines." Section 6 provides for the issue of bonds "from time to time as the work progresses." Section 9 provides for the payment, on requisition, of money received from the sale of the bonds, upon proof "that work has been done or materials furnished to the amount of said requisition." In each of these cases the word "work" is used to designate labor, or the product of labor and material combined, required to make the improvement as separate and distinct from the acts of the agents of the city preliminary to, and which terminate in, the formal execution of the contract. The word is next found in that part of § 12 which we have set out, and we are of the opinion that it is there used as in preceding sections to designate that which is required of the contractor to perform his part of the agreement. It follows that the lien of the assessment for an improvement made under the act in question attaches from the time when labor is first done or material is first furnished by the contractor in the making of the improvement after the contract is made. The record submitted to us fails to show when the work in question was commenced. A resolution adopted by the city council of the defendant on the 2d day of May, 1891, to authorize the issue of bonds, recites that "work has been commenced and is progressing" under the contracts. But, if that be treated as competent evidence to show the commencement of the work, it does not show that it was commenced before the deeds of Mrs. French to Westwood and to the Eagle Manufacturing Company were executed, and there is evidence on the part of the plaintiffs that nothing had been done under the contract for paving the part of Front street in question when the last of the two deeds was delivered. We therefore conclude that the work is not shown to have been commenced, within the meaning of the statute, and that the lien of the assessment in controversy is not shown to have attached, when the deeds of Mrs. French took effect.

2. It is insisted, however, that the deeds were executed for the purpose of evading the lien of the assessment, and that, as against the defendant, they are fraudulent and void. The avowed purpose of the deed to Westwood was to defeat the assessment on all of the block excepting the part conveyed to him. Mrs. French was represented, in all of the transactions which ended in the giving the deeds, by her son, Judge French. He attempted to compromise the claim of the defendant for the assessment which would be made if the improvement should be completed, on the basis of paying according to the area of the block, but his offer was rejected. He then went to Chicago with a deed executed by Mrs. French for the Westwood strip (excepting that a blank was

left for the name of the grantee), was introduced to Westwood, who was a practising lawyer of Chicago, and said: "Can I transfer you 2 feet of a block over in Davenport?" and Westwood answered, "What in the world will I do with it?" French replied: "I know what you can do with it. I will sell you a 2-foot strip, and I will personally take an option on that property. I will lease it for a year, and take an option to lease it for another year; and I want an option to buy it, and I will pay you \$41 for it now. That is what you can do with the property." Westwood said: "What will I have to pay?" French answered: "You will have to pay \$25." Westwood then asked for an explanation, and French told him the condition of the lot, and what the defendant was proposing to do. Westwood then consented to take the deed, and was paid \$41, of which \$25 were returned. It thus appears that Westwood was paid \$16 to accept the deed. There is not now, and never has been, any attempt to conceal the fact that the conveyance to Westwood was intended to defeat the assessment in question upon all of the block not conveyed to him. To justify the conveyance, it is said that the entire block was worth but about \$3,000; that the assessment in question amounts to \$1,292.62; that the paving of Fourth street on the north side of the block has been agitated, and that, if it is done, the assessment therefor on the block would be \$2,090; and that the two assessments would amount to more than the entire value of the block. The case thus suggested would be one of much hardship, which might well be provided against by legislative enactment. But the question we are required to determine is whether the conveyance to Westwood should operate to relieve the portions of the block not conveyed to him from the assessment actually made. The transaction was not designed to be of any benefit to the grantor, excepting as it might enable her to evade the payment of a valid assessment. The grantee had no use or desire for the strip conveyed to him, and had to be paid money to induce him to accept it. The strip, considered by itself, had little or no practical value. It is said it is valuable to sell to the owner of the adjoining part of the block, or to the defendant, to add to the street, or to erect thereon bill boards for advertising purposes. It is plain, however, that Westwood did not accept it on account of its intrinsic value, but for the money paid him, and for what he might receive in addition if it should be taken from him under the option reserved. The entire transaction on the part of the grantor, from its inception to its close, was for the sole purpose of defeating the collection of a valid claim which it was known would accrue. The defendant had incurred an obligation by its contract for the paving when all of the block within 150 feet of the street appeared to be liable for its proper share of the cost of the improvement; and, while no lien upon the block was then created, the conveyance to Westwood, if given effect, would operate as a fraud upon the defendant, for the reason that it was not made in good faith, nor was it a legitimate transaction. In law, it was fraudulent, and a court of equity will not interpose to give it effect; and the defendant, for the pur-

poses of the assessment in question, may treat it as void. See *Dougherty v. Miller*, 86 Cal. 83.

3. We are next required to consider the effect of the conveyance to the Eagle Manufacturing Company. It was not a part of the transaction with Westwood, although it may have resulted in part from that transaction, and it may have been designed in part to protect the remainder of the block from assessment. But the company was at the time trying to acquire more property, and bought that adjacent to what it owned, whenever offered, on the best terms it could obtain. It had leased the part of the block north of the side track, and used it for a lumber yard. The part south of the side track not conveyed to Westwood was not accessible from a street, excepting at one point on Fourth street. Judge French proposed to sell it to the company, and accepted therefor its offer of \$400. In view of its situation, that price does not appear to have been an unreasonable one for the grantor to accept. The part sold was a substantial portion of the block, large enough to be used for ordinary business purposes. It was leased by the company to a lessee which erected thereon a shed in the summer of the year 1891, which it has since used as a storehouse. It is not unlawful for a person to buy and sell property with reference to taxes which may be levied upon it. Liability for taxes is always an element affecting the value of taxable property which is considered by the careful investor. Nor is it unlawful for a person to so use property, or to divide it in such a manner, as to reduce the burden of his taxes upon it, provided the use or division be in good faith, for legitimate purposes, and not merely a subterfuge to defeat a proper and valid assessment. Applying these rules to the conveyance to the company, we conclude that the evidence fails to show that it was invalid or made for an illegal purpose, but that it was a reasonable and proper business transaction.

4. The effect of the conveyance remains to be determined. We have seen that the conveyance to Westwood was in law fraudulent, and of no effect as against the assessment in question. The company was represented in the purchase it made by its president, George W. French. He knew that the paving had been ordered. He states that he knew of the conveyance to Westwood when the purchase was made, but that he did not inquire why the conveyance had been made. He does not deny that he knew the object it was designed to accomplish. He and Judge French were brothers. They owned two thirds of the capital stock of the company, both were officers of it, and they occupied the same office. They conferred together in regard to important matters which pertained to their mother's business. The knowledge of George W. French, in his mind when he acted for the company in making the purchase, must be held to be the knowledge of the company. We are satisfied that he knew why the Westwood conveyance had been made when he acted for his company, or, if he did not have actual knowledge of it, that the facts which he knew would have caused a man of reasonable prudence to make inquiries which would have disclosed the purpose of the conveyance. Therefore the company purchased

the portion of the block which it now owns with constructive, if not actual, knowledge of the fact that it was subject to the assessment in question for the reason that the conveyance to Westwood was, in law, fraudulent, as against the defendant. Hence the part of the block acquired by the company is liable, with the strip conveyed to Westwood, for the assessment. But, since the conveyance to the company was for a lawful purpose, it had the effect to relieve the portion of the block northwest of it from that assessment. See *Amery v. Keokuk*, 72 Iowa, 704.

The decree of the District Court in favor of the Eagle Manufacturing Company is reversed, and the decree in favor of Frances W. French is affirmed.

Rehearing denied October 20, 1897.

STATE of Iowa

v.

Henry EIFERT, *Appt.*

(.....Iowa.....)

1. The person "injured by his sufficiently shown by an indictment stating that defendant, a banker, had when insolvent received a deposit from a certain person named.
2. A banker who, to show that deposits were not received with his knowledge or consent, testifies that on the day they were received he went to another town and telephoned those in charge of the bank not to receive any more deposits, may be asked on cross-examination how long he remained at that place and whether or not on his return he found any deposits to have been made after his instructions not to receive them, for the purpose of fully disclosing his connection with the deposit.
3. A banker who fails to repudiate the act of his son in receiving a deposit contrary to his instructions an hour or two before the bank finally closed and when its insolvency was known, and who fails to return the money, but within four days after its receipt includes it in a general assignment for the benefit of creditors, is guilty of accepting and receiving the deposit knowing himself to be insolvent in violation of the Iowa statute.

(*Robinson, J., dissents.*)

(December 12, 1895.)

APPEAL by defendant from a judgment of the District Court for Bremer County convicting him of fraudulent banking. *Affirmed.*

The facts are stated in the opinions.

Messrs. Gibson & Dawson, for appellant:

The indictment does not in a specific or other manner aver or state who the money alleged to have been deposited belonged to, or who was the owner of the same, or who was entitled to the possession of said money.

State v. McConkey, 20 Iowa, 576; 1 Whart. Crim. L. §§ 250, 251; 2 Whart. Crim. L.

§ 2006; *Davis v. Com.* 30 Pa. 421; *People v. Horr*, 7 Barb. 9, and authorities cited; *State v. Mason*, 13 Ired. L. 841; *People v. Carpenter*, 5 Park. Crim. Rep. 228; *State v. Morrissey*, 23 Iowa, 159; *State v. Potter*, 28 Iowa, 556; *State v. Chicago, B. & P. R. Co.* 63 Iowa, 509; Code, §§ 4296, 4298.

There is nothing in the Code or subsequent legislation limiting or changing the rules of evidence pertaining to the cross-examination of witnesses.

State v. Red, 53 Iowa, 70.

A party has no right to cross examine any witness except as to facts and circumstances connected with the matters stated in his direct examination.

Cokely v. State, 4 Iowa, 480; 1 Greenl. Ev. §§ 445-449; *Whitsett v. Chicago, R. I. & P. R. Co.* 67 Iowa, 155.

If the financial condition of the defendant was what the prosecution claims it to have been then the deposit in question having been made at about the last hour of the last day on which the bank did business it could have been collected back in full and was and would be treated under all the circumstances of its acceptance and receipt as a trust fund rather than a deposit received in the ordinary course of the banking business.

Wasson v. Hawkins, 59 Fed. Rep. 233; *American Trust & Sav. Bank v. Guelder & P. Mfg. Co.* 150 Ill. 336.

On petition for rehearing.

Having instructed Theodore not to receive the deposit there could be no receipt of it that would render the defendant criminally liable unless he were personally present at the time of such receipt and consented thereto.

Reynolds v. Keokuk, 72 Iowa, 373.

Where a fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy and cannot be permitted. When the indorsement of a note is forged, such indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy.

1 Am. & Eng. Enc. Law, p. 430; *Shisler v. Vandike*, 92 Pa. 447, 87 Am. Rep. 702; *McHugh v. Schuykill*, 67 Pa. 391, 5 Am. Rep. 445; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546.

Messrs. Milton Remley, Attorney General, and *Jesse A. Miller*, for appellee:

The indictment is sufficient if the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged.

State v. Golden, 49 Iowa, 48; *State v. Semonatan*, 85 Iowa, 57; *State v. Emmons*, 72 Iowa, 265.

The fact that the defendant endeavored to establish by his evidence in chief was that the deposit of C. H. Mohling was received without his knowledge and against his will, and that he never accepted the deposit and never consented to its acceptance. Anything

NOTE.—As to the criminal liability of a banker for receiving deposits knowing that his bank is insolvent, see note to *Com. v. Junkin* (Pa.) 31 L. R. A. 88 L. R. A.

A. 124; also *Carr v. State* (Ala.) 34 L. R. A. 634; *Meadowcroft v. People* (Ill.) 35 L. R. A. 176; *State v. Beach* (Ind.) 36 L. R. A. 179.

which would tend to contradict this evidence could properly be elicited upon cross-examination.

Bothwell v. Farwell, 74 Iowa, 324; *State v. Porter*, 84 Iowa, 131; *Player v. Burlington, O. R. & N. R. Co.* 62 Iowa, 723; *Glenn v. Gleason*, 61 Iowa, 28.

Where the principal upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby, as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach.

Story, Agency, § 289; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Pintel v. Cook*, 88 Wis. 485; *Crowe v. Capwell*, 47 Iowa, 426; *Farrar v. Peterson*, 52 Iowa, 420; Sackett, Instructions to Juries, 2d ed. pp. 63, 64; *Pike v. Douglass*, 28 Ark. 59; *Meyer v. Morgan*, 51 Miss. 21, 24 Am. Rep. 617; *Hawkins v. Lange*, 23 Minn. 557; *Breed v. First Nat. Bank*, 4 Colo. 481; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450, 32 Am. Rep. 380; *Waterson v. Rogers*, 21 Kan. 539; *Heyn v. O'Hagen*, 60 Mich. 150; *Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Hall v. Chicago, M. & St. P. R. Co.* 48 Wis. 317; *Stewart v. Mather*, 32 Wis. 344; *Drakeley v. Gregg*, 75 U. S. 8 Wall. 242, 19 L. ed. 409.

The ratification of an act by the principal has the same effect as previous authority to do the act, and relates back to the time the act was done.

Berryhill v. Jones, 35 Iowa, 335; *Herriott v. Kersey*, 69 Iowa, 111; *State v. Shaw*, 28 Iowa, 67.

On petition for rehearing.

Where a name is forged it may be ratified, and if ratified it is binding.

Greenfield Bank v. Crafts, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Cravens v. Gillilan*, 68 Mo. 28; *Crout v. De Wolf*, 1 R. I. 393; *Casco Bank v. Keene*, 53 Me. 103; *Forstyth v. Day*, 46 Me. 177; *Livinge v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Union Bank v. Middlebrook*, 33 Conn. 95; *Howard v. Duncan*, 3 Lans. 174; *Commercial Bank v. Warren*, 15 N. Y. 577; *Weed v. Carpenter*, 4 Wend. 219; *Fitzpatrick v. Caperton Cove School Tract Comrs.* 7 Humph. 224, 46 Am. Dec. 76; *McKenzie v. British Linen Co. L. R.* 6 App. Cas. 82.

Kinne, J., delivered the opinion of the court:

1. The indictment charges the defendant with the crime of fraudulent banking, committed as follows: "The said Henry Eifert, on the 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three, in the county aforesaid, being then and there engaged in the banking business, under the name and style of Bank of Tripoli, and then and there being insolvent, and well knowing himself to be insolvent, did knowingly accept and receive from C. H. Mohling a deposit in his banking and deposit business, the sum of one hundred dollars, consisting of gold and silver money, national bank bills, United States treasury notes and currency, and other notes, bills, and drafts circulating as money and cur-

rency, the particular description to the grand jury unknown, to the amount and of the value of one hundred dollars, contrary to the form of the statute in such cases made and provided." The sufficiency of this indictment was questioned by a demurrer, which was overruled, and an exception taken. It is urged that it is defective, in that it does not state whom the money alleged to have been deposited belonged to, or who was the owner of it, or entitled to its possession; that it fails to aver who, if any one, was defrauded. Section 1 of the act against fraudulent banking prohibits any bank, banking house, or party engaged in banking or deposit business from accepting or receiving on deposit any money when such banking house or deposit office, firm, or party is insolvent. Acts 18th Gen. Assem. chap. 153, § 1. Section 2 is as follows: "If any such bank, banking house, exchange broker, or deposit office, firm, company, or corporation, or party, shall receive or accept on deposit any such deposits as aforesaid when insolvent, any officer, director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory or permit or connive at, the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year or both fine and imprisonment, the fine not to exceed \$10,000." Acts 18th Gen. Assem. chap. 153, § 2. In support of the contention that the indictment is defective because it fails to state the name of the injured party, counsel rely upon cases decided by this court where it was held that the indictment, in certain cases, must set out the name of the person injured, or attempted to be injured. We do not think it is necessary to discuss these cases. Let it be conceded that the indictment in this case must show who the injured party is, and we think it must be held to conform to the law in that respect. It occurs to us that one reading this indictment would at once understand that the charge was that the money belonged to the person making the deposit; that he was the owner. If the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended to be charged, it is sufficient. Code, § 4305. Can there be any doubt that such a person, on reading this indictment, would understand that it charged that the defendant, knowing that he was insolvent, did knowingly receive a deposit of money from Mohling, and that it was his money which was thus deposited? We think not. Now, one may own money and may send it by someone to be deposited in a bank but we should not speak of the mere carrier of the money as a depositor, but the one for whom it was in fact taken to the bank would be the depositor. The owners of money deposited in a bank are the depositors of that bank; that is, they are the people, who made the deposit. We think that, read in the light of the requirements of our statute, the indictment, to the common understanding, as

fairly charges that Mohling was the injured party as if it had in express terms stated that he owned the money which he deposited.

2. It is strenuously urged that the court erred in permitting certain questions to be asked the defendant on cross examination. It appeared from the direct examination that the defendant undertook to state his connection, or rather want of connection, with the making of the alleged deposit. He testified that he left town that morning early and went to Waverly. That, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him that he was going to Waverly to look the ground over, and that, if things did not look favorable, he would send his son a telephone message, through a party who was with him, not to receive any more deposits, and to stop doing business; that he sent the message to his son to stop doing business, and not to receive any more deposits. On cross-examination, over the defendant's objection, he was required to testify when he returned from Waverly to Tripoli, and how long he remained in Tripoli, and as to whether he found any deposits had been made after 2 o'clock that day. The law undoubtedly is that the cross-examination must be confined to the matters about which the direct testimony is given. It is contended that on cross-examination the state was limited to what the defendant did at Waverly. We do not think so. The defendant was put upon the stand to show that Mohling's deposit was received without his knowledge and against his instructions, and to show such facts he testified as we have stated. The defendant having undertaken to explain his connection, or want of connection with this deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tended to contradict his testimony in chief, or which more fully disclosed his connection with this deposit, was proper. There was no error in the rulings in this respect. Even if the cross examination was improper, the defendant waived any error connected therewith, because, in the further progress of the trial, he testified to the same facts without objection. *State v. Wickliff*, 95 Iowa, 386; *Strong v. Iowa C. R. Co.* 94 Iowa, 380; *Bailey v. Bailey*, 94 Iowa, 598.

3. The eighth paragraph of the court's charge reads: "In determining whether the defendant received or accepted the alleged deposit of C. H. Mohling, you are instructed that it is not necessary that the evidence should show or that you should find that the defendant in person received such deposit, nor that he was personally present when it was received from said Mohling, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. But you are further instructed that even though the defendant instructed Theodore Elfert to close the bank, and refused to receive or accept further deposits, and that after such instructions to so refuse deposits, the said Theodore Elfert did accept and receive from said Mohling the deposit in question, if so you find from the evidence, still if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling from said Theodore Elfert, and placed

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among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was so received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed to have knowingly received or accepted such deposit." Exception is taken to so much of this instruction as relates to the action of the defendant in knowingly accepting and retaining the deposit, after full knowledge from whom and under what circumstances it had been made. The argument of defendant is that when the deposit was received and accepted by defendant's son and entered upon the books of the bank and upon the depositor's book the whole transaction was concluded. Now, the facts appear to be that the son had for a long time been in the bank, assisting his father; that the father was in the city of Waverly when the son, who had charge of the bank, received this deposit; that it was received on the afternoon of August 15, 1893, and several hours after the son had received a telephone message from his father to close the bank and to take no more deposits. That the father returned to Tripoli the same evening, and then learned that this deposit had been received, contrary to his orders; that said money was put into the assets of the bank, and that defendant never paid or tendered it back to Mohling. Now, when did defendant "knowingly accept and receive" this money as charged in the indictment? We think he must be said to have done so when he returned home, and first knew of the fact of its receipt, if he had given no directions to stop business and refuse deposits, then it might be said that he should be concluded by the transaction when the money was in fact received by his son, who had authority to act for him. But, having expressly directed the son to cease business and refuse deposits, he had no reason to suspect or believe that his orders would not be obeyed. It cannot therefore be said that he knowingly received and accepted the deposit when it was handed to his son, and by him accepted without the father's knowledge and against his express directions. When, however, he arrived home that evening, he became acquainted with all the facts. He then knew that this deposit had been accepted by the son after he had directed him to take no more deposits; he knew who made the deposit; he knew he was then insolvent, and that he had been before the son had received the deposit; and, knowing all the facts, he did not repudiate the transaction but retained and accepted the money, at the same time knowing that his bank would never open again. It seems to us that when defendant after full knowledge of all the facts on the evening of his return failed to repudiate the act of his son, and took no steps looking to a return of the deposit to Mohling, he then knowingly received and accepted the deposit. It must be borne in mind that this is not a civil action for damages for the recovery of the money deposited. It may be that in such a case recovery could be had of the defendant, notwithstanding the deposit was

received by his agent contrary to his directions. But the gist of the offense charged in the prosecution is in knowingly receiving and accepting a deposit, knowing that he was then insolvent. Surely one whose agent, without his knowledge or authority, and in disobedience of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but it cannot be doubted that after coming in possession of all the facts the principal may so ratify the act theretofore done as to make it binding upon himself and the basis of a criminal liability. If the defendant had, on being acquainted with what had been done, promptly disavowed the act of his son, and returned the deposit to Mohling, he would not have been guilty, as it could not then have been said that he had knowingly received and accepted the deposit. It seems to us that the instruction is correct, and quite as favorable to the defendant as he had a right to expect.

4. Finally, it is said that the verdict is contrary to the evidence. This conclusion is reached by council on the theory that the acts considered in the third division of this opinion, and held by us to justify the instruction complained of, do not, if established, show a violation of the statute. We think the evidence fully sustains the verdict. Indeed, it is difficult to understand, under our view of the law, how the jury could have reached a different conclusion.

Discovering no error in the entire record, *the judgment below is affirmed.*

A rehearing having been had the following additional opinions were handed down on May 15, 1897:

Given, J.:

A rehearing was granted in this case, that we might, with the aid of further arguments, reconsider the objections urged by appellant to the eighth paragraph of the charge to the jury, or, in other words, that we might review the conclusion announced in the third paragraph of the opinion. We have not at any time doubted the correctness of the opinion in other respects, and therefore limit our present inquiry to this one subject. In said instruction the jury was told, in effect, that it was not necessary that they find that the defendant had in person received the deposit, nor that he was personally present when it was received; that it was enough if it was received by the cashier or agent of the defendant under his authority; that though the defendant instructed his cashier to close the bank, and refused to receive further deposits; and that thereafter the cashier did accept and receive this deposit. "Still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling, by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit."

Appellant's first complaint in his argument on rehearing is that there is no evidence to

warrant that part of the instruction to the effect that it was not necessary that the defendant should have received the deposit in person, or have been personally present, nor that it was enough if it was received under his authority. It is true there was no evidence to which this part of the instruction, taken alone, could apply; but it was a correct statement of the law, and aided to make plain that which followed in the instruction. Appellant insists that in what follows in said instruction the court attempts to apply to this criminal charge the principle of ratification. He contends that a criminal act cannot be ratified, and cites in support 1 Am. & Eng. Enc. Law, p. 480, and the cases therein referred to. The instruction does not submit the question of defendant's accepting and receiving the deposit by a ratification of what the cashier had done. It rests the question of accepting and receiving upon whether the defendant retained the deposit, and placed and treated it as part of the assets of the bank, with full knowledge of the circumstances under which it had been received by the cashier. The doctrine of ratification is not invoked to charge the defendant with having accepted and received the deposit as of the time it came into the hands of the cashier. The case was submitted upon the inquiry as to whether the defendant accepted and received the deposit after being informed of the circumstances under which it had come into the hands of the cashier. In the instruction under consideration, the jury was told that if the defendant, with knowledge of the circumstances under which the deposit was received, accepted and retained it as a deposit, and placed it among and treated it as a part of the assets of the bank, "he will be deemed to have knowingly accepted such sum as a deposit." In the former opinion we said: "It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to the return of the deposit to Mr. Mohling, he then knowingly received and accepted the deposit."

Appellant contends that, if the defendant and his bank were insolvent at the time the money was received, Mr. Mohling could pursue it as a trust fund in the hands of either the defendant or his assignee, and recover it in kind, or its equivalent, if it had been so mixed with other money as to destroy its identity. He cites *Wasson v. Hawkins*, 59 Fed. Rep. 233, and *American Trust & Sav. Bank v. Guader & P. Mfg. Co.* 150 Ill. 836. Whether such is the law we need not determine, for, if it be, it would apply with equal force if the deposit had been received by the defendant in person, or by his authority. If it be conceded that Mr. Mohling had the right to pursue that deposit as a trust fund, it does not follow that the defendant did not knowingly receive and accept it. He not only failed to repudiate the act of his son in receiving the deposit, and failed to return it, but, within four days after its receipt, included that money in a general assignment made by him for the benefit of his creditors. We have re-examined the case with care, and reach the conclusion that the former opinion is correct, and it is therefore adhered to.

Robinson, J., dissenting:

The defendant was accused and convicted of the crime of fraudulent banking, in that, when insolvent and knowing that fact, he "did knowingly accept and receive from C. H. Mohling a deposit in his banking and deposit business, the sum of \$100." The court properly charged the jury that it was not necessary to constitute the offense charged that the deposit should have been received by the defendant in person, but that it was sufficient if the deposit was received under his authority by his cashier or agent. *State v. Cadwell*, 79 Iowa, 435. But the court also charged the jury that, if the deposit was received by his agent in violation of his authority, "still if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received, . . . and placed among and treated it as part of the funds or assets of the bank, . . . he will be deemed to have knowingly accepted such sum as a deposit." It seems to me that this portion of the charge, as applied to undisputed facts in the case, was erroneous, and that the evidence is not sufficient to sustain the verdict. The law does not forbid an insolvent banker to retain a deposit properly received, but to accept or receive it; and whether the defendant is guilty does not depend merely upon his having retained the deposit in question, but whether, by his acts, he accepted or received it, within the meaning of chapter 153 of the Acts of the 18th General Assembly, after he knew that it had been received by his agent in violation of his instructions. It is the general rule that, to constitute a crime, there must be a wrongful act, done with a criminal intent, or the intentional doing of an act from which a criminal intent is conclusively presumed. 1 McClain, *Crim. L.* §§ 112-128; 1 Bishop, *Crim. L.* §§ 364 *et seq.* Wrongful acts, which create a civil liability, may fall short of crime, and the inquiry in this case is not whether the facts show that the defendant is civilly liable for the deposit in question, but whether his acts amounted to the accepting or receiving of the deposit, within the meaning of the statute. He is not charged with having permitted or connived at the accepting or receiving of the money.

The evidence shows without conflict the following facts: The defendant went from Tripoli to Waverly, in the morning of August 15, 1893. Before going, he talked with his son Theodore, who was left in charge of the bank, and stated that he was going to Waverly, "to look the ground over," and that, if things did not look very favorable, he would send a telephone message to the son to stop business, and not receive any more deposits. The defendant sent a message to that effect before 2 o'clock of that day. It was received by the son, but he did not obey it, because he thought his father took too gloomy a view of the situation, and received several deposits, including the one in question, after he received the message, and before 4 o'clock, when he closed the bank. The defendant returned at night, and was informed by his son that he had closed the bank, but that he had kept it open until 4 o'clock, and had received deposits, including the one made by Mohling. The defendant was dissatisfied that his order had not been obeyed,

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but did nothing with the money received. There is no evidence whatever that he placed it among the assets of the bank. It had been received and placed with the funds of the bank by his son. There is no pretense that it had been kept apart from the money previously in the bank, nor that it could have been identified and treated as a special deposit. It is not shown that the defendant took actual possession of it, but it seems to have remained where the son placed it until the assignment for the benefit of creditors was made. The bank was never opened after it was closed by the son, as stated. When he received the deposit of Mohling, the amount was entered in the pass book of the latter, and it is not shown that any other entry was made in any book until after the assignee had taken possession of the bank. The son then asked of the assignee the privilege of posting in the books the work done on the 15th of August. Mohling never made any demand for the return of the money he had deposited, and it does not appear that it was ever suggested to the defendant by any one that the deposit should be refunded before he made the assignment for the benefit of creditors. The entire amount due Mohling, including the deposit in question, was \$548.44, and it is shown that, before the assignment was completed, the defendant endeavored to have Mohling commence suit, aided by attachment to recover the amount due him, and represented that, if he would do so, he would obtain all of it. The total amount due Mohling, including the deposit in question, was set out in the schedule of claims attached to the assignment, but the defendant did not prepare the schedule. That was done by his attorney and his son, and he does not appear to have given the fact that the Mohling claim included the deposit in question any thought, but, if he had purposely included it, that fact would not have shown that he had accepted or received the money. That had been done, in violation of his instructions, by his son, and the money so mingled with the funds of the bank that it could not be identified. The unauthorized act of the son was effectual to create between the defendant and Mohling the relation of debtor and creditor (*Independent Dist. v. King*, 80 Iowa, 500), because it was the right of Mohling, in the absence of actual knowledge of the limitation upon the power of the son, to rely upon the apparent authority with which the defendant had clothed him to receive the deposit. The relation stated having been established, it could not have been changed, and the money given the character of special deposit, without the consent of Mohling. It is not shown that the defendant attached to his assignment an inventory of his assets, and the record is entirely barren of evidence to show that he had any intent in making the assignment to appropriate to his own use any money or other property which belonged to Mohling, or to alter their relation in any manner. The assignee acquired only the right of the defendant in the property assigned. *Meyer v. Evans*, 68 Iowa, 183; *Independent Dist. v. King*, 80 Iowa, 501. If Mohling had any special interest in or lien upon the property assigned while it was in the hands of the defendant, that interest or lien could have been enforced against the assignee.

See *Bruner v. First Nat. Bank* (Tenn.) 84 L. R. A. 532, and *notes*, 97 Tenn. 540.

It is my opinion that the evidence is sufficient to show a civil liability only; that it wholly fails to show that the defendant accepted or received the deposit in question within the meaning of the statute; and that it does not

show any act on his part done with a wrongful intent, or from which a wrongful intent should be presumed. Therefore I think the judgment of the district court should be reversed, and that the defendant should be awarded a new trial.

MICHIGAN SUPREME COURT.

William F. DUMMER, *App't.*

v.

Charles O. SMEDLEY, Receiver of the Gypsum Plaster & Stucco Company *et al.*, *App'ls.*

LIDGERWOOD MANUFACTURING
COMPANY, *Intervener.*

(.....Mich.....)

1. A mortgage will not be rendered invalid by the fact that all the money which it is

NOTE.—Bonus stock of corporations.

I. General principle involved.

II. Constitutional and statutory provisions.

III. Effect of recitals and nominal payment.

IV. Stock as bonus to purchasers of bonds.

V. Mere acceptance of shares; surrender; cancellation.

VI. Rights of creditors.

VII. Bona fide purchasers.]

I. General principle involved.

Honesty and good faith require that shares of stock in a corporation must represent an actual investment of capital, else they tend to mislead the public. Since the creditors of a company can hold the shareholders liable only to a limited amount, if at all, after their stock is paid for, the capital paid in constitutes the real foundation of the company's credit. A nominally paid-up capital of \$1,000,000 when only \$10,000 are actually paid in is a misrepresentation which tends, and is generally intended, to deceive those who deal with the corporation.

The necessity of actual payment of the nominal stock of a corporation is the principle on which various classes of decisions rest. Many cases like that of *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 203, deny the right of a corporation to release or surrender the obligation of a subscriber to pay for his shares.

There are numerous cases also in which the adequacy of the compensation for shares when paid in property is the matter in issue. These proceed on the underlying principle that it is necessary that they should be paid for.

So far as concerns the relations between the corporation and the shareholders themselves when the rights of third parties who deal with the corporation are not involved, there seems to be no reason why any contract fairly entered into between the company and its members in respect to the payment of their subscriptions or distribution of the shares should not be given effect, unless, indeed, such contract improperly discriminates between shareholders themselves and is objected to by some of them. Generally speaking, it is when the creditors of a corporation have interests involved that the contract between the company and its members attempting to dispense with the full and fair payment for the shares will be denied effect. This principle will be seen to be quite

given to secure is not paid over at its execution and it does not state that it is given for future advances, if it is given in good faith for a needed amount, and the money is paid over as fast as it can be raised by the mortgagees.

2. Existing creditors of a corporation cannot impeach a transaction by which the corporate stock is increased and issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security so as to avoid the mortgage and treat the advance as a payment for stock.

clearly apparent in nearly all the decisions on the subject as they appear below.

The power of a corporation to issue stock for the purchase of property at anything less than its par value is denied in *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527, where the statutes expressly provide that the trustees may purchase property and issue stock to the amount of the value thereof in payment therefor. It distinguishes the case of *Van Cott v. Van Brunt*, 82 N. Y. 535, where a railroad company was allowed to issue stock at less than its par value to pay for the construction of the road on the ground that the statute made no provision there as to its issue of stock for property.

But this matter of the amount of consideration that must be obtained for stock when issued to pay for property and without any purpose of issuing it as a bonus will not be considered further in this note. The question of the fraud of stockholders in taking stock as the compensation for property which they know to be worth less than the stock is often a question of fact. The purpose of the present note is to consider the legality of stock intended as a bonus without going into the questions of actual fraud in issuing stock for property at an overvaluation. The cases involving the latter question are numerous. These cases may be said to start with the assumption that mere bonus stock issued without consideration is to be deemed a fraud upon creditors. Among cases of this class are *Gogebic Invest. Co. v. Iron Chief Min. Co.* 78 Wis. 427; *Re Western of Canada Oil, Land & Works Co. L. R. 1 Ch. Div. 115, 45 L. J. Ch. N. S. 6, 33 L. T. N. S. 645, 24 Week. Rep. 165.*

The distribution among shareholders of shares of stock which had once been fully paid and afterwards acquired by the corporation was sustained in *Com. v. Boston & A. R. Co.* 142 Mass. 146, and held to be authorized by the statutes.

The principle involved in the question as to the obligation to make actual payments for stock is well illustrated in *Winston v. Dorsett Pipe & Paving Co.* 129 Ill. 64, 4 L. R. A. 507, where it is held that one who subscribes to stock merely to enable the corporation to obtain a certificate of organization under an agreement with the other subscribers that he shall not be liable on the stock but shall hold it as trustee, and that they will help him dispose of it, is liable on his subscription as between

3. A mortgage by a corporation to secure money advanced to it in good faith cannot be reduced in favor of liens of subsequent creditors because at the time of, and as an inducement to, the advance, the mortgagees received stock of the corporation as a bonus.
4. A lien may be given to a second mortgagee and to a receiver of a corporation for money advanced to pay interest on the first mortgage and taxes, as against attachment creditors of the corporation.
5. Sale of machinery to a corporation with notice that it is in a bad condition financially, and under a guaranty of payment by a third person, does not entitle the seller to a lien for its price.
6. Attachments levied on the property of a mortgagor subsequently to the execution of the mortgage are properly given priority over money afterwards paid over on the security of the mortgage in accordance with the agreement under which it was executed.

(July 28, 1896.)

CROSS-APPEALS from a decree of the Circuit Court for Kent County in an action brought to foreclose a mortgage on property of

himself and the state or the creditors of the corporation, but not on an assessment in a suit by other stock subscribers, where they have not fully paid for their shares. This merely gives effect to the contract of the parties as between themselves without denying the right of creditors to rely on the entire good faith of the subscription list.

In respect to the liability of stockholders in a foreign corporation on account of so-called bonus stock for nonpayment of the whole or part of the par value of the stock, it is held, in *Allen v. Fairbanks*, 45 Fed. Rep. 445, that whether or not such liability, as determined by the laws of the state of incorporation, would be enforceable in other states, that at any rate such stockholders were liable to contribution for their share of the debts of the corporation to other stockholders who had been obliged to pay them by force of the statutes, which made all of them liable ratably in proportion to their stock and coequal to the extent of the liability.

Stock dividends have sometimes been spoken of as the issue of bonus stock, but the questions respecting these are usually in reference to the distinction between capital and income as affecting the rights of life tenants and remaindermen of the stock.

II. Constitutional and statutory provisions.

Since every corporation is a creature of the law, it is plain that its existence must be subject to all such conditions, of whatever nature they may be, as the lawmaking power shall prescribe. Injustice, frauds, and scandals in the management of corporations have caused the enactment of constitutional and statutory provisions which expressly require the full payment of the stock of every corporation. These provisions vary somewhat but all tend to the general result of securing for every corporation an actually invested capital equivalent to the amount of its nominal stock.

Similar constitutional provisions are now found in a considerable number of states. Under such provisions, however, there may still remain the question whether or not the issue of stock as an extra inducement to the purchase of bonds is prohibited. As to this, see *infra*, IV.

It is expressly provided by Ill. Const. 1870, art. II, § 13, that "no railroad corporation shall issue any

the Gypsum Plaster & Stucco Company, the complainant appealing from so much of the decree as allowed other claims in priority to the mortgage, and defendants appealing from so much of the decree as allowed the mortgage as a valid claim on the property. *Modified*.

The facts are stated in the opinion.

Messrs. T. J. O'Brien and James H. Campbell, for William F. Dummer;

General creditors having no lien on the debtor's lands cannot attack conveyances as fraudulent.

For v. Willis, 1 Mich. 321; *Nugent v. Nugent*, 70 Mich. 52; *Voorhies v. Friable*, 25 Mich. 481, 12 Am. Rep. 291; *Fearey v. Cummings*, 41 Mich. 376.

Conveyances to defraud creditors are not void as against the creditors themselves, but only voidable at their option on taking proper proceedings.

McMaster v. Campbell, 41 Mich. 513.

A mortgage to secure a present loan and contemplated future loans is valid.

Brace v. Berdan, 104 Mich. 356; *Shirras v. Caig*, 11 U. S. 7 Cranch, 34, 8 L. ed. 260; *Craig v. Tappan*, 2 Sandf. Ch. 78; *Bank of Utica v. Finch*, 8 Barb. Ch. 293, 49 Am. Dec.

stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation, shall be void." *Chicago City R. Co. v. Allerton*, 84 U. S. 18 Wall. 233, 21 L. ed. 902.

In a considerable number of states there are somewhat similar constitutional provisions.

One of the mischiefs sought to be remedied by the constitutional provision against issuing fictitious stock or issuing stock except for money or property actually received or labor done is to protect stockholders against spoliation and to guard the public against worthless securities. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 566; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

Such constitutional provision is not intended to interfere with the usual and customary methods of raising funds by railroad corporations for the purpose of building their roads or to accomplish other legitimate corporate purposes. *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187.

The issue of stock as a part of the price of property legitimately purchased is not in violation of the constitutional prohibition against issuing stock except for money or property received or labor done. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 566.

See also *Brown v. Duluth, M. & N. R. Co.* 53 Fed. Rep. 599, *infra*, IV.

After subscribers have fully paid for their stock their giving it back to the corporation to be disposed of as a bonus to accompany the sale of bonds does not violate a constitutional provision prohibiting the issue of stock except for money or property at a reasonable value. *Davis Bros. v. Montgomery Furnace & Chemical Co.* 101 Ala. 127.

Holders of fictitious stock which is void under the Constitution of the state have no standing in a court of equity to ask relief. *Arkansas River Land, Town, & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587.

Stock issued without any consideration therefor is illegal under Wis. Rev. Stat. § 1753. *Wood v. Union Gospel Church Bldg. Assn.* 63 Wis. 9.

So, the issue of stock of a corporation at less than at its par value being void under Wis. Rev. Stat. § 1753, one who pays money for stock on an agree-

175; *Gadsden v. Gasque*, 2 Strobb. L. 324; *Louisville Bkg. Co. v. Leonard*, 90 Ky. 106; *Newkirk v. Newkirk*, 56 Mich. 525; *Ladue v. Detroit & M. R. Co.* 13 Mich. 380, 87 Am. Dec. 759; *Brackett v. Sears*, 15 Mich. 244; *Robinson v. Cromelein*, 15 Mich. 816; *Lanahan v. Lawton*, 50 N. J. Eq. 276; *Tully v. Harloe*, 85 Cal. 302, 95 Am. Dec. 102; *Griffin v. New Jersey Oil Co.* 11 N. J. Eq. 49.

There was legal power in the company to make the mortgage, and it possesses all requisite legal formalities.

Morawetz, Priv. Corp. § 171, p. 168, note 2.

Smedley, receiver, is not entitled to a lien prior to the mortgage lien for moneys paid by him for interest on the Uhl mortgages and for taxes.

Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; *Manwaring v. Powell*, 40 Mich. 871; *Rahit v. Attrill*, 106 N. Y. 428, 60 Am. Rep. 456; *Greeley v. Provident Sav. Bank*, 98 Mo. 458.

The mortgagees are not liable in respect to the stock issued to them as a bonus.

Only subsequent creditors (that is, creditors whose debts are contracted after the issue of

the stock) are entitled to enforce their claims against holders of unpaid stock or stock issued as a bonus or for less than its face value.

Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227; *Morawetz, Priv. Corp.* § 597; *Coit v. North Carolina Gold Amalgamating Co.* 14 Fed. Rep. 12, 119 U. S. 343, 30 L. ed. 420; *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676; *Haldeman v. Ainslie*, 82 Ky. 895; *Washburn v. Green* ("Richardson v. Green"), 133 U. S. 30, 33 L. ed. 516.

The utmost liability of Dummer, Gill, and Dickinson would be to account for the value of the stock issued to them at the time they took it. That value was nil.

Morrow v. Nashville Iron, Steel, & C. Co. 87 Tenn. 282, 8 L. R. A. 87; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227.

The mortgage stands as a security for the new five year notes (second series) substituted for the original notes executed at the same time that the mortgage was.

Bank of Utica v. Finch, 3 Barb. Ch. 293, 49 Am. Dec. 175; *Buck v. Wood*, 85 Me. 204; *Burdett v. Clay*, 8 B. Mon. 287; *Callard v. Mat-*

ment that he shall have to pay but 50 per cent of the par value is in part *delicto*, and cannot recover back his money, although the stock is void. *Clarke v. Lincoln Lumber Co.* 59 Wis. 655.

The issue of bonus stock by a corporation, the effect of which was involved in *Washburn v. Green* ("Richardson v. Green"), 133 U. S. 30, 33 L. ed. 516, was directly prohibited by 2 Mich. Comp. Laws, § 7757, declaring that a railroad company shall not "sell, dispose of, or pledge any shares," nor "issue certificates of shares" until fully paid. One who took such bonus shares is therefore held liable to pay for them notwithstanding a contract between him and the company that the stock shall not be assessable.

In *Washburn v. Green* ("Richardson v. Green"), 133 U. S. 30, 33 L. ed. 516, the lower court recognized his claim for actual advances of money to the entire amount, without deducting therefrom anything on account of his liability as the holder of bonus stock. But the court on appeal, without expressing any approval of this, merely holds that the decree gave him the fullest measure of allowance to which he could possibly be justly entitled.

III. Effect of recitals and nominal payment.

Since the law does not tolerate any transparent device to evade its provisions, it is evident that a mere recital in certificates of stock that they have been fully paid cannot be effective, if untrue, except, at least, when innocent persons have been deceived thereby. As to such persons, see *infra*, VII.

Stockholders who vote an increase of stock and distribute it among themselves cannot escape liability to assessment thereon by having the stock issued as fully paid, even if they act in good faith and in the belief that they are entitled to the stock. *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227.

A fictitious arrangement by which stock is issued as full paid, when in fact it is not, may be set aside in equity as a fraud on subsequent creditors of the corporation who have trusted the company in reliance upon its apparent and professed capital having been fully paid in. *First Nat. Bank v. Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676.

So, the issue of stock purporting to be full paid, but which was really a gift to the holder in order to get his recommendation and influence for the 88 L. R. A.

company, makes him liable to creditors. *Penninsular Sav. Bank v. Black Flag Stove Polish Co.* 106 Mich. 585.

An arrangement by which stock is nominally paid and the money taken back as a loan to the stockholder is held, in *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 781, to be a mere device to change the debt from a stock debt to a loan, and therefore not a valid payment as against creditors of the corporation, though it might be good as between the company and the stockholder.

Shares issued to a person to entitle him to be a director, for which he gives his check but at the same time receives a check of equal amount from the company, are held to be in effect unpaid shares for which he is liable as a contributor on the insolvency of the company. *Hay's Case*, L. R. 10 Ch. App. 600, 44 L. J. Ch. N. S. 721, 33 L. T. N. S. 466.

The above cases fully recognize and act upon the principle that as to creditors of a corporation who rely on its apparent capital stock the shareholders who have taken certificates which recite a full payment thereof cannot be protected against liability as stockholders on unpaid subscriptions. As to such creditors it is held, in *Handley v. Stutz* and *First Nat. Bank v. Gustin Minerva Consol. Min. Co.*, that the shareholders were not relieved from liability by an untrue representation that the stock was paid for, and no distinction is raised in those cases between a subscriber to stock and one who obtains it without any subscription. In neither of them do the shareholders in question seem to have made subscriptions for the stock. But that distinction is raised in New York cases which expressly hold that one who obtains stock purporting to be fully paid, although knowing that it is not, cannot be held liable to any greater extent than that for which he is liable on the face of the certificates, if he has not subscribed for the stock or entered into any contract other than that which is implied by the mere acceptance of the shares.

In the first of these New York cases it was held that one who takes certificates of stock with a clause therein stating the further payments to which the stock may be subjected by the order of the directors is not liable to a greater extent to creditors of the corporation, although his title may be conditional on the payment of future calls, and that such payment is optional with him. *Seymour v. Sturges*, 26 N. Y. 134.

thors, 10 La. Ann. 233; *Patterson v. Johnston*, 7 Ohio, pt. 2, p. 235; *Bobbitt v. Flowers*, 1 Swan, 511.

Dummer holds as trustee for Gill and Dickinson. For whatever is payable to them and secured by the mortgage, and is entitled to foreclose the mortgage in his own name for the entire indebtedness.

1 Jones, Mortg. 707, § 846; *Hubbell v. Blakeslee*, 71 N. Y. 63.

Dummer is entitled to a decree for the interest he paid on the prior mortgages to Uhl after default by the company.

Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197; *Manwaring v. Powell*, 40 Mich. 871.

The taking of the personal obligation and guaranty of Gill precludes the Lidgerwood Company from asserting any lien on the property of the gypsum company.

Palmer, Appellant, 1 Dougl. (Mich.) 422; *Sears v. Smith*, 2 Mich. 243; *Wisconsin M. & P. Ins. Co. Bank v. Filer*, 83 Mich. 496; 2 Washb. Real Prop. § 16, p. 90; *Au Sable River Boom Co. v. Sanborn*, 36 Mich. 358.

There was in fact no fraud and no misrepresentation which induced the Lidgerwood

Company to sell upon the credit of the gypsum company, and it did not sell upon that credit.

The case is not one in which equity will create and enforce a lien in favor of the Lidgerwood Company for the unpaid purchase price of the machinery.

Bennett v. Nichols, 12 Mich. 22; *Perkins v. Perkins*, 16 Mich. 162; *Kelly v. Kelly*, 54 Mich. 30; *Richards v. Arms Shingle & L. Co.* 74 Mich. 57; *Huston v. Waldron*, 96 Mich. 49.

Messrs. Maher & Salisbury, for William L. Tyler:

Dummer, Gill, and Dickinson should be treated as debtors of the company owing the unpaid balance for the stock issued to them. The capital stock of a corporation constitutes a trust fund for the benefit of its creditors for the payment of its debts, and if not paid for in full by the parties to whom it is issued a court of equity will compel payment so far as necessary to satisfy the corporate debts.

Dwight v. Scrantom & W. Lumber Co. 82 Mich. 630; *Turnbull v. Prentiss Lumber Co.* 53 Mich. 887; *Washburn v. Green* ("Richardson v. Green") 133 U. S. 80, 33 L. ed. 516; 23 Am. & Eng. Enc. Law, pp. 856, 857, note 8.

Other cases hold that one who received so-called bonus stock on which 40 per cent has been credited, but did not subscribe for the stock or enter into any engagement to pay the 40 per cent, cannot be made to respond to the creditors of the company as upon an unpaid subscription, but that the transaction, if *ultra vires*, was simply a nullity. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Christensen v. Quintard*, 20 N. Y. S. R. 61.

These New York cases are clearly out of harmony with the other decisions on the subject in other jurisdictions. The first of them, the case of *Seymour v. Sturgeess*, might possibly have been harmonized with the general doctrine on the ground that the creditor seeking to enforce the stockholder's liability had not relied on the apparent payment of that stock because he became a creditor of the company before the defendant became a stockholder, but no such point was raised in the case or in the other New York cases above named.

The same rule seems applicable to cases like those just named in which partly paid shares are issued as full paid, that applies to the issue of mere bonus shares; but there is no attempt here to trace out all cases in which shares have been issued with a percentage thereof not paid, and which are not called or treated as bonus shares.

IV. Stock as bonus to purchasers of bonds.

While the purely gratuitous issue of stock is unquestionably condemned by nearly all the decisions, and held void as against subsequent creditors, a more difficult question is raised in respect to the issue of stock as a bonus to purchasers of bonds in order to induce them to purchase such securities of the company. The case of *DUMMER V. SMEDLEY* holds that such issue cannot be impeached, at least by existing creditors of the company, and the decision is limited to such creditors.

But several cases hold that such a bonus to bond purchasers may be valid even as against subsequent creditors.

Although a railroad company in the exercise of good faith may use bonds and stock to pay for the construction of its road, it cannot rightfully, at least as against creditors or stockholders, issue its stock to anyone as full paid without getting some fair or reasonable equivalent for it. *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104.

Increased stock disposed of to purchasers of bonds 38 L. R. A.

in equal amount in order to induce them to buy the bonds was held to be lawful, where the actual value of both stock and bonds was not more than the par value of the bonds which was paid to the company on the purchase. *Handley v. Stutz*, 129 U. S. 417, 35 L. ed. 227.

The usual method of raising money to build railroads or for any legitimate corporate purpose was not intended to be forbidden by Minn. act 1887, chap. 12, making it unlawful for a railroad company to sell, dispose of, or pledge any of its shares or issue them until fully paid nor except for money, labor, or property actually received and applied for corporate purposes, and declaring that all fictitious stock shall be void. The delivery of stock as a part of the contract by which bonds of the company are sold is not forbidden by this statute if the amount is not unreasonable or beyond the value actually received. *Brown v. Duluth, M. & N. R. Co.* 53 Fed. Rep. 889. See also *supra*, II.

Other cases are to the contrary.

In case of bonus stock given as an inducement to the purchase of bonds of a corporation it was held, in *Hebberd v. Southwestern Land & Cattle Co.* (N. J.) 36 Atl. 122, that while such transaction was valid as between the corporation and the purchaser, the holders of such bonus stock might be required to pay for it in satisfaction of the demands of creditors after the exhaustion of all other assets upon the ground that its issuance was a fraud in law upon the creditors. This case seems to treat the issue of such bonds as a mere bonus, and not as part of the consideration of the sale.

So, where a large amount of stock was issued to accompany bonds of the corporation in order to induce the purchase of the latter, and one of the directors of the company took some of these shares on which 40 per cent was credited but not paid, it was said that, as between the stockholder and the corporation, the transaction was unquestionably valid and was unaffected by the peculiar considerations which arise when it is impeached in the interests of a creditor, but it is added that the rule is inflexible that in all matters pertaining to the assets creditors must be preferred to stockholders, and that personal profits of members which would diminish the common fund must be held for the benefit of the corporation until creditors are paid. Therefore, it is decided that this director's claim to the bonus of 40 per cent on these shares must

The mortgage was fraudulent as to creditors of the Gypsum Plaster & Stucco Company.

The Lidgerwood Company was not originally a party to this suit, but was allowed to intervene as a defendant after a portion of the proofs had been taken in the court below. At that time a receiver had been appointed and was acting for the Gypsum Plaster & Stucco Company, and there was no question but that the company had become and was insolvent and unable to pay its debts. Under such circumstances unsecured creditors are entitled to only a *pro rata* distribution of assets.

Turnbull v. Prentiss Lumber Co. 55 Mich. 887.

A mortgage which is fraudulent as to existing creditors will also be fraudulent as to subsequent creditors.

yield to the demand of a creditor of the corporation. *Skratka v. Allen*, 7 Mo. App. 434. This decision was affirmed on this point in 76 Mo. 384. A similar decision was made in this case as to the effect of bonds issued to stockholders as in fact, though not in name, a bonus in order to compensate them for the burden of calls which they had not understood would ever be required.

And an agreement by which a subscriber to the organization stock of a corporation is to have, on payment therefor, not only the stock, but an equal amount of the bonds of the company, was declared void, not only as to creditors, but as to the corporation itself, since it amounts to a stratagem or device by which the payment of the subscription is to be avoided. *Morrow v. Nashville Iron, Steel, & C. Co.* 87 Tenn. 262, 8 L. R. A. 37.

V. Mers acceptance of shares; surrender; cancellation.

In most cases the holder of unpaid shares of a corporation is held liable as a stockholder to creditors who have relied on the apparent capital of the company irrespective of the question whether or not he had merely accepted the shares under some arrangement other than by subscribing for them or expressly agreeing to pay for them. The fact that he has become a shareholder and holds shares for which the corporation has not received payment is treated as sufficient to establish his liability to such creditors, but an exception to this appears in New York where it is held that in the absence of either statutory or contract liability a person to whom shares have been issued as a gratuity, such as the case of issue to a shareholder with bonds of the company to compensate him for unexpected calls on other shares of stock, does not by accepting them commit any wrong upon creditors or make himself liable to pay the nominal value of the shares as he would be if he had made a subscription for them or a contract to pay for them. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Christensen v. Quintard*, 29 N. Y. S. R. 61; *Seymour v. Sturges*, 26 N. Y. 134. See further, as to these cases, *supra*, 111.

One who has received as "full paid" shares for which he pays nothing but subsequently surrenders them to the corporation, which issues them again for value to a bona fide purchaser, cannot be held still liable to creditors of the company. *Erskine v. Peck*, 18 Mo. App. 282, Affirmed 83 Mo. 465.

Shares of stock issued without any real consideration, with the evident purpose of depriving other stockholders of influence in the affairs of the company, may be canceled in equity, although they are of no real value. *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 428.

VI. Rights of creditors.

It has already been said that the rights of creditors 38 L. R. A.

Bench v. White, Walk. Ch. (Mich.) 496; *Herachfeldt v. George*, 6 Mich. 456.

Messrs. Taggart, Knappen, & Denison, with *Mr. C. O. Smedley*, for Nancy M. Hinsdill:

The release of Mrs. Hinsdill's existing levy in October, 1892, was procured by fraud.

All persons now interested under this mortgage were parties to the fraud. The complainant claiming the benefit of the security obtained by Russell is bound by his acts in obtaining the mortgage.

Busch v. Wilcox, 82 Mich. 815.

Mrs. Hinsdill by suing in attachment has not elected to affirm the fraudulent contract. This case is not brought within the doctrine of election.

Spread v. Morgan, 11 H. L. Cas. 588; *Black*

itors may be sufficient ground for impeaching the issue of bonus stock when that may be valid as between the corporation and its shareholders. And that this is because creditors who deal with a corporation having a specified capital stock are entitled to rely on that as representing the actual stock of the company. To this effect are nearly all the cases hitherto cited in preceding divisions. But it is manifest that a distinction is raised by this principle between creditors already existing when the bonus stock is issued and those who subsequently deal with the corporation. The cases are substantially agreed in holding that only subsequent creditors are entitled to enforce their claims against holders of increased stock, since it is only they who could by any legal presumption have trusted the company upon the faith of the increased stock. *Handley v. Stutz*, 139 U. S. 417, 36 L. ed. 227; *First Nat. Bank v. Gustin* *Minerva Consol. Min. Co.*, 42 Minn. 327, 6 L. R. A. 678; *Colt v. North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 425; *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *DUMMER v. SMEDLEY*. See also *Winston v. Dorsett Paving & Pipe Co.* 129 Ill. 64, 4 L. R. A. 507, *supra*, I.

The right of creditors to compel the holders of bonus stock to pay for it contrary to their actual agreement with the corporation rests neither on implied contract nor upon any trust-fund doctrine, but on the ground of fraud. The fraud in such case consists in the misrepresentation as to the actual amount of capital upon the faith of which persons have dealt with the corporation and given it credit. *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470.

To entitle the creditor to have the benefit of the liability of the holder of bonus stock all that is necessary for him to urge or prove in that regard is that he is a subsequent creditor, and if the fact is that he dealt with the corporation with knowledge of the arrangement by which the bonus stock was issued that is matter of defense. *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470.

The right of action of a creditor against the holders of bonus stock does not accrue until the corporation becomes insolvent. *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470.

VIII. Bona fide purchasers.

There may be conflicting equities between a bona fide purchaser of certificates of stock which purport or are represented by the books of the company to be fully paid, and creditors who have relied on the full payment of the nominal stock of the corporation. The cases (some of which were cases of partly paid stock) substantially agree in holding that a bona fide purchaser of shares which purport to be fully paid is not liable to creditors of the company because of their nonpayment. *Re British*

v. *Miller*, 75 Mich. 329; *Kingsbury v. Kettle*, 90 Mich. 476; *Way v. Stebbins*, 47 Mich. 296; *Davis v. National Bank of Commerce*, 45 Neb. 589.

The mere bringing of suit to rescind a contract is not such an election as to preclude the plaintiff from amending so as to make it one for damages for false representations inducing the contract.

Nysewander v. Lowman, 124 Ind. 584.

The bringing of suit by attachment for the purchase price of either real or personal property sold on the ground of fraudulent disposition of property by the debtor is no bar to an action to rescind the contract and to disaffirm the transaction where the first suit is begun without full knowledge of the facts proving the fraud.

Farmers Pure Linseed Cake Co. v. L. R. 7 Ch. Div. 538, 47 L. J. Ch. N. S. 415, 38 L. T. N. S. 45, 26 Week. Rep. 834. Affirmed as *Burkinshaw v. Nicol*, L. R. 8 App. Cas. 1004, 48 L. J. Ch. N. S. 179, 39 L. T. N. S. 808, 26 Week. Rep. 819; *Barrow's Case*, L. R. 14 Ch. Div. 422, 49 L. J. Ch. N. S. 498, 42 L. T. N. S. 891; *Carling's Case*, L. R. 1 Ch. Div. 115, 45 L. J. Ch. N. S. 38 L. T. N. S. 645, 24 Week. Rep. 185; *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. App. Cas. 29; *Ex parte Currie*, 7 L. T. N. S. 486; *Foreman v. Bigelow*, 4 Cliff. 508; *Steaoy v. Little Rock & Ft. S. R. Co.* 5 Dill. 348; *Cleveland Rolling-Mill Co. v. Texas & St. L. R. Co.* 27 Fed. Rep. 250; *Brant v. Ehlen*, 69 Md. 1; *Erskine v. Lowenstein*, 11 Mo. App. 596; *Young v. Erie Iron Co.* 65 Mich. 111.

A bona fide purchaser of certificates of stock in the usual commercial form, without any intimation that they are not fully paid, is entitled to regard them so, although they do not expressly state that they are paid. *West Nashville Planing Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252.

That is, in the absence of notice to the purchaser of stock that it is not paid for or of anything to put him upon inquiry as to that fact he is entitled to assume that it is fully paid. *Johnson v. Lullman*, 15 Mo. App. 55; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496.

It is stated in the case of *Keystone Bridge Co. v. McCluney*, that the certificates involved in *Foreman v. Bigelow*, 4 Cliff. 508, were also in the usual form, without stating whether or not they were paid up.

But in *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496, it appeared that the company claimed that the stock was paid and that the books of the company would have shown the purchaser that this was the case.

The court cannot expand the contract of such a purchase or fix upon him any engagement larger or other than that into which he has entered. *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. App. Cas. 29; *Ex parte Currie*, 7 L. T. N. S. 486.

Contrary to the doctrine of the above cases, it is held in *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, that the holder of shares is not exempt from liability to creditors for the amount that remains unpaid upon them, although he may have bought and paid for them relying on representations that they were fully paid.

So, it is declared by Chief Justice Daly in *Tasker v. Wallace*, 6 Daly. 372, that it is wholly immaterial whether or not a person is a bona fide and innocent purchaser of stock which the vendor assured him had been paid, or which he had every reason to suppose had been paid, when his liability is asserted by a creditor of the corporation for unpaid stock, and that his remedy, if he has been inveigled into the purchase of unpaid stock, is against the holder.

But this is contrary to the general doctrine, and entirely inconsistent with the doctrine asserted in the other New York cases.

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Bach v. Tuck, 47 Hun. 537; *Hays v. Midas*, 104 N. Y. 602; *Equitable Co-operative Foundry Co. v. Hersee*, 103 N. Y. 25; *Conrow v. Little*, 41 Hun. 895.

The recovery of a judgment is held no bar to another action to enforce a collateral obligation to pay the same debt so long as the debt is collected but once.

Pelton v. Baker, 158 Mass. 849; *Vanuzem v. Burr*, 151 Mass. 386; *Baltimore & O. Teleg. Co. v. Interstate Teleg. Co.* 8 U. S. App. 340, 54 Fed. Rep. 50, 4 C. C. A. 184; *Fay v. Jenks*, 73 Mich. 312; *Durfee v. Joslyn*, 92 Mich. 211.

The objection of failure to return or offer to return the amount received by Mrs. Hinsdill at the time of the release of her levy is without merit.

A bona fide purchaser of stock who takes it as paid-up stock cannot be held liable for the amount unpaid thereon in New York under the doctrine of the case of *Seymour v. Sturges*, 26 N. Y. 184, to the effect that no contract to pay for the stock can be implied from the mere purchase. *Wintringham v. Rosenthal*, 25 Hun. 580.

One who buys shares without being induced to do so by any report made by the company, although he thinks them paid up when they are not, is not free from liability for what is unpaid on them. *Blyth's Case*, L. R. 4 Ch. Div. 140, 26 L. T. N. S. 124, 125, 25 Week. Rep. 200.

Statements by officers or directors of a corporation to the effect that stock is fully paid, unless shown to have been made in the performance of their duties, are held, in *Browning v. Hinkle*, 48 Minn. 544, insufficient to make a purchaser of such shares a bona fide purchaser such that he cannot be held liable if the shares are not paid.

The mere fact that shares of stock are marked "Non-assessable" does not prevent a transferee of them from being held liable to pay unpaid calls thereon to the full amount. *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 884. The question of notice to bona fide purchasers of shares purporting to be fully paid is not discussed in this case.

One who took shares as an original allottee with constructive notice that they had not been paid for "in cash," as required by statute, but that they were issued in exchange for property received from another person, is held not to be a bona fide purchaser, but to be liable to pay for the shares. *Rowland's Case*, 42 L. T. N. S. 785.

So, the holder of unpaid shares knowing that they were allotted to a vendor of property was held liable to calls to the full nominal amount of the shares, in *Crickmer's Case*, L. R. 10 Ch. App. 614, 24 Week. Rep. 219, 45 L. J. Ch. N. S. 596, where they had not been issued in such a way as the law required to be regarded as paid up.

But in *Carling's Case*, L. R. 1 Ch. Div. 115, 45 L. J. Ch. N. S. 5, 38 L. T. N. S. 645, 24 Week. Rep. 165, where shares were allotted to persons to enable them to become directors and the certificates purported to be fully paid, it was held that they could not be required to pay for them, but that their contract "must either be adopted or rejected in its entirety. If it is rejected, they are not shareholders at all. If it is adopted, the company is entitled to say 'They are not your shares, but ours,' but that does not make them hold unpaid-up shares."

Although an innocent purchaser of stock might be protected as such in case he had received the stock, yet he cannot be compelled to receive it under his contract if the stock is not fully paid as it purports to be. *Sturges v. Stetson*, 1 Biss. 246.

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The greater the payment made by the Gypsum Plaster & Stucco Company upon its judgment the less will be the amount of the new debt. The return of a portion of its debts so paid would only increase the amount of its liability under the new judgment and proceedings.

Kley v. Healy, 127 N. Y. 555.

Messrs. Taggart, Knappen, & Denison, with **Mr. Benn M. Corwin**, for Charles O. Smedley:

The mortgage was fraudulent as against creditors generally.

Express fraudulent intent need not be found if the necessary effect and operation of the conveyance are to perpetrate a fraud or improperly to hinder and delay creditors.

Buck v. Sherman, 2 Dougl. (Mich.) 180; *Sweet v. Converse*, 88 Mich. 8; *Cutcheon v. Buchanan*, 88 Mich. 594; *Crips v. Towsley*, 78 Mich. 400.

If there is the intent to hinder and delay other creditors, or if the fraud upon them is the necessary result of the transaction, the mortgage cannot stand as valid security for any sum whatever.

Showman v. Lee, 86 Mich. 560; *Willison v. Desenberg*, 41 Mich. 160.

The true primary relation of Dummer, Gill, and Dickinson was as stockholders and not as mortgage creditors.

Morrow v. Nashville Iron, Steel, & C. Co. 87 Tenn. 262, 3 L. R. A. 87; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 781; *Scoville v. Thayer*, 105 U. S. 143, 26 L. ed. 988.

The mortgage beneficiaries being holders of unpaid stock cannot enforce the mortgage as against creditors.

Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227; *Washburn v. Green* ("Richardson v. Green"), 133 U. S. 80, 33 L. ed. 516.

Mr. Charles B. Blair, for intervener:

What was at first a mere foreclosure suit had been widened into a suit for the protection of a trust fund in the receiver's hands, and for the administration and distribution of this fund among, first, the lien claimants in accordance with such priorities as the court should decide they were entitled to, and thereafter to the receiver as the representative of the creditors and stockholders of the insolvent corporation.

Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 811; *McNeal Pipe & F. Co. v. Woltman*, 114 N. C. 178.

The receiver's appeal brings up such controversies and such only as he as receiver has an interest in.

Singmaster's Appeal, 86 Pa. 169; *Chapoton v. Her Creditors*, 46 La. Ann. 412; *Payne v. Dejean*, 32 La. Ann. 890; *Mausberg's Succession*, 37 La. Ann. 126.

That is the question as to the validity of the mortgage and the claim to enforce payment of unpaid stock. In regard to those questions he stands officially as the representative of the trust fund.

Morawetz, Priv. Corp. §868; *High, Receivers*, §315; *Curtis v. Leavitt*, 15 N. Y. 44; *Atty. Gen. v. Guardian Mut. L. Ins. Co.* 77 N. Y. 272; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46.

As none of the lien claimants except Mrs. Hinsdill have appealed but have acquiesced in 38 L. R. A.

the decree below so far as it fixes priorities, the receiver cannot continue the litigation in this court any more than he could if each had formally waived any appeal.

Salmon v. Pierson, 8 Md. 297; *Chapoton v. Her Creditors*, 46 La. Ann. 412; *Kohn v. Wagner*, 1 Rob. (La.) 275; *Bryant v. Thompson*, 128 N. Y. 426, 13 L. R. A. 745; *Stewart v. Codd*, 58 Md. 86; *Re Graff*, 146 Pa. 415; *Herbst's Appeal*, 90 Pa. 358; *Singmaster's Appeal*, 86 Pa. 169; *Millon's Appeal*, 82 Pa. 121; *Bates v. Ryberg*, 40 Cal. 468.

It would be a violation of the duty of impartiality owing to the creditors for the receiver to take sides in contests between creditors *inter se* and to attempt to prefer one set of interests to another.

First Nat. Bank v. Barnum Wire & I. Works, 58 Mich. 317, 60 Mich. 499; *High, Receivers*, §1.

If a sale were ordered it should be of the whole property as an entirety, a running concern, an integer, as one court says; and the liens of all, including that conceded to the Lidgerwood Company by the order of June 25, 1895, should fasten upon the proceeds in their proper order. Sales of such property are so made according to the usual practice of courts of equity.

National Foundry & P. Works v. Oconto Water Co. 52 Fed. Rep. 43; *Hammond v. Farmers' Loan & T. Co.* 105 U. S. 77, 26 L. ed. 1111; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Sleger v. Arctic Refrigerating Co.* 89 Tenn. 453, 10 L. R. A. 580; *Badger Lumber Co. v. Marion Water Supply, E. L. & P. Co.* 48 Kan. 187, 15 L. R. A. 652; *McNeal P. & F. Co. v. Woltman*, 114 N. C. 178; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 811; *Cooper v. Cleghorn*, 50 Wis. 113.

The position which has been taken by the mortgagee and lien claimants has been consistently incompatible with separation of the apparatus and plant.

The parties recognized the existence of the equitable lien of the Lidgerwood Company and its right to enforce the same in this suit in lieu of seeking a remedy at law. The order of June 25 was accordingly made the basis of which was that the best interest of all parties demands that it be considered and treated as inseparable and an integral part of the plant as a whole. They could not if they wished take an inconsistent position now because the consent of the Lidgerwood Company to the order was accompanied by a waiver of present rights and of the opportunity of immediate seizure and possession; and because the order being final in its nature (*Hake v. Coach*, 105 Mich. 425) has not been appealed from, and because the appellants having consented to it in open court could not now go back of it if they wished.

Russell v. White, 63 Mich. 409; *Wyatt v. Sweet*, 48 Mich. 539; *Brick v. Brick*, 65 Mich. 230.

The lien rests upon the fraud the direct and proximate result of which was the sale, the passing of the title (voidable), and the annexation of the apparatus as a permanent improvement and an integral part of the plant. The consent of the Lidgerwood Company to this annexation being procured by the fraud was in law no consent.

Morrison v. Berry, 42 Mich. 398, 36 Am. Rep. 446; *American Sugar Ref. Co. v. Fancher*, 145

N. Y. 561, 27 L. R. A. 757; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 819; *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 289.

By annexation it would not necessarily become a part of the freehold so as to fall under the prior mortgage and liens to the exclusion of any right of the vendor therein. He would still be entitled to a charge or equitable lien on the whole property and to priority over earlier mortgages and liens, not necessarily to the full extent of his claim, but to the enhanced value of the whole plant due to the annexation.

McNeal Pipe & F. Co. v. Woltman, 114 N. C. 178; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 811; *Foodick v. Schall*, 99 U. S. 255, 25 L. ed. 848.

If the vendor retained title until payment, or reserved a vendor's lien, or took back a chattel mortgage, his claim upon the apparatus would be given priority over the mortgagee's.

Wheeler v. Bedell, 40 Mich. 698; *Crippen v. Morrison*, 18 Mich. 28; *Coleman v. Stearns Mfg. Co.* 88 Mich. 88; *Wood v. Holly Mfg. Co.* 100 Ala. 326.

The effect of the fraud was to entitle the Lidgerwood Company to treat the sale, the annexation, and its consent thereto as null and void (*American Sugar Ref. Co. v. Fancher*, 145 N. Y. 561, 27 L. R. A. 757; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 819; *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 289) as against the wrongdoer and those who stand in its shoes. One who not having altered his condition on the faith or the possession and apparent ownership of the property, asserts a right to the property because of any assumed right thereto in the wrongdoer, necessarily attempts to deprive the plaintiff of his property inequitably.

Newton v. Porter, 5 Lans. 416, 69 N. Y. 138, 25 Am. Dec. 152; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 27 L. R. A. 757; *Carley v. Graves*, 85 Mich. 483; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 811; *Cook v. Tullis*, 85 U. S. 18 Wall. 332, 21 L. ed. 933; *Huxley v. Rice*, 40 Mich. 73; *Burnett v. First Nat. Bank*, 38 Mich. 634; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 698; *Price v. Brown*, 98 N. Y. 888; *National Mahawee Bank v. Barry*, 125 Mass. 20; *Moore v. Crawford*, 180 U. S. 122, 32 L. ed. 878; *Bresnihan v. Sheehan*, 125 Mass. 11; *Re Hallett*, L. R. 13 Ch. Div. 696; Pom. Eq. Jur. §§ 1053, 1051, and note citing many cases, 155, 981, 1044, p. 1436; 1 Beach, Mod. Eq. Jur. § 226.

Equity lends its aid to the enforcement of these constructive trusts when the remedy at law is inadequate (*American Sugar Ref. Co. v. Fancher*, 145 N. Y. 561, 27 L. R. A. 757; *Newton v. Porter*, 5 Lans. 432; *Huxley v. Rice*, 40 Mich. 82; 2 Pom. Eq. Jur. § 1053; *Edwards v. Hulbert*, Walk. Ch. (Mich.) 54) treating the fraudulent vendee or holder of the property as a trustee (*American Sugar Ref. Co. v. Fancher*, 145 N. Y. 558, 27 L. R. A. 757; *Newton v. Porter*, 5 Lans. 422, 69 N. Y. 140, 25 Am. Dec. 152). The doctrine is familiar and has often been applied in the state under circumstances sufficiently diverse to illustrate the willingness and flexibility of equity in molding its relief to suit any particular state of facts, its controlling

purpose being to render full and complete justice.

Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 788; *Wilson v. Eggleston*, 27 Mich. 257; *Huxley v. Rice*, 40 Mich. 73; *Michigan Air Line R. Co. v. Mellen*, 44 Mich. 831; *Edwards v. Hulbert*, Walk. Ch. (Mich.) 54; *Carrier v. Heather*, 62 Mich. 441; *Loomis v. Roberts*, 57 Mich. 284; *Crooks v. Whitford*, 40 Mich. 599; *Davis v. Filer*, 40 Mich. 310; *Pierce v. Pierce*, 55 Mich. 629.

Where property is wrongfully taken by fraud a court of equity will intervene, raise a constructive trust by implication, and enforce an equitable lien for the protection of the true owner within the following limits:

(a) Where the property can be clearly traced and the fact that it has been disposed of, converted into other property, or changed in its form, as corn into whisky, does not prevent the intervention of equity.

(b) Where the remedy by law is inadequate. *Newton v. Porter*, 5 Lans. 429; *Williamson v. New Jersey Southern R. Co.* 29 N. J. Eq. 820; *Pollock*, Contr. 547; 2 Pom. Eq. Jur. § 899; *Topham v. Duke Portland*, 1 De G. J. & S. 517; 2 Pom. Eq. Jur. §§ 899, 1267, note 8; *Central Nat. Bank v. Continental Mut. L. Ins. Co.* 104 U. S. 67, 26 L. ed. 699; *Moore v. Crawford*, 180 U. S. 122, 32 L. ed. 878; *Thompson's Appeal*, 23 Pa. 16; *Bresnihan v. Sheehan*, 125 Mass. 11; *Day v. Roth*, 18 N. Y. 448; *Onwego Starch Factory v. Lendrum*, 57 Iowa, 578, 42 Am. Rep. 58; *Myer v. Car Co.* ("Meyer v. Western Car Co.") 102 U. S. 10, 26 L. ed. 60; *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446.

The elementary doctrine that the equitable right which is prior in time must prevail as against a later right unless superior equity be shown in the latter, protects us in our claim to priority.

Wood v. Holly Mfg. Co. 100 Ala. 351; *Nazareth Literary & Benev. Inst. v. Lowe*, 1 B. Mon. 257; *Thomas v. Hanson*, 44 Iowa, 651; *Crumb v. Davis*, 54 Iowa, 25.

Under an after-acquired property clause the mortgagee would take whatever interest he acquired upon the theory that this clause was an agreement which equity would specifically enforce in his favor; and would therefore hold to cover after-acquired property without an actual conveyance, since equity regards that as done which equitably ought to be done. That it would not specifically enforce such an agreement without requiring the mortgagee to give full effect to the rights of the Lidgerwood Company.

Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 817; *Myer v. Car Co.* ("Meyer v. Car Co."), 102 U. S. 10, 26 L. ed. 60; *Wood v. Holly Mfg. Co.* 100 Ala. 351; 1 Beach, Mod. Eq. Jur. §§ 417-419; *Hanold v. Bacon*, 36 Mich. 1.

Neither Mrs. Hinsdill nor the other creditors nor the mortgagee have any right or equity to have appropriated to the payment of their debts the property to which the Lidgerwood Company is equitably entitled as between it and the Gypsum Plaster & Stucco Company, since they have advanced nothing and given no credit on the faith of the latter's possession

of such property, and ought not to reap the fruits of the fraud any more than the Gypsum Company itself.

American Sugar Ref. Co. v. Fancher, 145 N. Y. 560, 27 L. R. A. 757; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 578, 42 Am. Rep. 58; *Buffington v. Gerriah*, 15 Mass. 156, 8 Am. Dec. 97; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46.

The receiver is like an assignee for creditors or in bankruptcy (*Carley v. Graves*, 85 Mich. 488; *People v. City Bank*, 96 N. Y. 82), is not a purchaser for value any more than are the general creditors whom he represents.

Koch v. Lyon, 82 Mich. 515; *Brown v. Brabb*, 67 Mich. 22; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 560, 27 L. R. A. 757; *Yeatman v. New Orleans Sav. Inst.* 95 U. S. 768, 24 L. ed. 590; *Cook v. Tullis*, 85 U. S. 18 Wall. 841, 21 L. ed. 987.

An antecedent debt, even where there is a direct pledge to secure it, is not such value as gives one the standing of a bona fide purchaser entitled to protection.

Bozheimer v. Gunn, 24 Mich. 372; *McGraw v. Solomon*, 88 Mich. 449; *People's Sav. Bank v. Bates*, 120 U. S. 565, 80 L. ed. 757; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 199; *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 561, 27 L. R. A. 757; 1 Beach, Mod. Eq. Jur. § 891.

Creditors with levies are in no better position, and are not purchasers for value.

Michigan Paneling Mach. & Mfg. Co. v. Parcell, 88 Mich. 475; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 578, 42 Am. Rep. 58; *Goodwin v. Massachusetts Loan & T. Co.* 152 Mass. 199; *Buffington v. Gerriah*, 15 Mass. 156, 8 Am. Dec. 97; *Fitzsimmons v. Joslin*, 21 Vt. 129, 52 Am. Dec. 46; *Scott v. McGraw*, 3 Wash. 679; 8 Am. & Eng. Enc. Law, p. 848; 1 Beach, Mod. Eq. Jur. § 843, note 6, 894.

When equity finds a constructive trust *ex maleficio*, and the trust property has been converted and mingled with the funds or property of the wrongdoer, the true owner is entitled to a charge upon the whole to the amount that the trust funds are traceable into the substituted property.

Re Baillett, L. R. 18 Ch. Div. 709; *Newton v. Porter*, 5 Lans. 426; 1 Beach, Mod. Eq. Jur. § 284; *Harrison v. Smith*, 88 Mo. 210, 53 Am. Rep. 571; *Staller v. Coates*, 88 Mo. 520; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Carley v. Graves*, 85 Mich. 486; *Baker v. New York Nat. Exch. Bank*, 109 N. Y. 81, 53 Am. Rep. 150.

Mr. Gill concealed the existence of his mortgage under circumstances which required him to speak, and his representations were such as to amount to a direct denial of its existence. He now sets it up as against the very party whom he deceived; but equity says that he who is silent when he ought to speak is debarred from speaking when in conscience he ought to be silent.

Michigan Paneling Mach. & Mfg. Co. v. Parcell, 88 Mich. 480; *Bank of United States v. Lee*, 38 U. S. 13 Pet. 119, 10 L. ed. 87; *Morgan v. Chicago & A. R. Co.* 96 U. S. 720, 24 L. ed. 744; 2 Pom. Eq. Jur. §§ 818, 686; 2 Beach, Mod. Eq. Jur. § 1105.

There would be an estoppel barring Mr. 88 L. R. A.

Gill's assertion of the existence and lien of a mortgage the existence of which he denied and thereby induced the Lidgerwood Company to give the credit and part with its property.

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; *Northern Counties of England F. Ins. Co. v. Whipp*, L. R. 26 Ch. Div. 482; Brett, Lead Cas. in Eq. 167; 2 Pom. Eq. Jur. §§ 818, 781, 686, 781.

All the mortgagees and Mrs. Hinesdill likewise are the beneficiaries of this fraud, and claim here on this appeal the fruits of that fraud, and assert their priority over our claim. The fraud under such circumstances is necessarily adopted and becomes constructively their own.

Fitzsimmons v. Joslin, 21 Vt. 129, 52 Am. Dec. 46; *Buffington v. Gerriah*, 15 Mass. 156, 8 Am. Dec. 97; *Clark v. Reader*, 40 Fed. Rep. 515.

The Lidgerwood claim, while subsequent to the mortgage, entitles them to attack the latter as fraudulent. If it was designed as a fraud against existing creditors it was equally designed as such against subsequent ones as a retreat in the event of pecuniary trouble; the mortgagor was hopelessly insolvent, and the then existing debts are all of them still outstanding. The Lidgerwood Company dealt without notice of the mortgage, its existence being fraudulently concealed.

2 Pom. Eq. Jur. § 974; 1 Beach, Mod. Eq. Jur. § 104; *Keeler v. Ulrich*, 83 Mich. 88; *Brown v. Vandermeulen*, 44 Mich. 524; *Beach v. White*, Walk. Ch. (Mich.) 500; *Herckfeldt v. George*, 6 Mich. 466; *Smith v. Vodges*, 93 U. S. 188, 23 L. ed. 481; *Cass v. Phelps*, 89 N. Y. 164; *Sommermeier v. Schwartz*, 89 Wis. 71; *Mulock v. Wilson*, 19 Colo. 802; 8 Am. & Eng. Enc. Law, pp. 751, 753, and notes.

A conveyance once avoided for fraud by an assignee or receiver is avoided as to all creditors; and all subsequent as well as existing creditors share in the fund without distinction.

Kehr v. Smith, 87 U. S. 20 Wall. 86, 22 L. ed. 815; *Norton v. Norton*, 5 Cush. 580; *Ammon's Appeal*, 68 Pa. 289; *Trimble v. Turner*, 18 Smedes & M. 362; Walt, Fraud. Conv. § 104; 1 Beach, Mod. Eq. Jur. § 104.

Where one, erroneously supposing himself entitled to lands, this mistake being without fault of the owner, expends money in good faith in permanent improvements which enhance the value of the lands, he has no remedy at law; but in chancery his strong natural equity is recognized.

Bright v. Boyd, 1 Story, 478, 2 Story, 605; *Union Hall Assn. v. Morrison*, 89 Md. 293; *Hatcher v. Briggs*, 6 Or. 46; *Vaile v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557; *Preston v. Brown*, 35 Ohio St. 80.

If a court of equity is asked to give relief of any kind it will impose the condition on the true owner of doing equity, and charge the lands with a lien measured by the enhanced value.

Parsons v. Moses, 16 Iowa. 444; *Williams v. Gibbs*, 61 U. S. 20 How. 538, 15 L. ed. 1014; *Canal Bank v. Hudson*, 111 U. S. 82, 28 L. ed. 859; *McLaughlin v. Barnum*, 31 Md. 453; *Thomas v. Evans*, 105 N. Y. 612, 59 Am. Rep. 519; *Walker v. Beauchler*, 27 Gratt. 511; *Kelly v. Kelly*, 54 Mich. 80; *Desot v. Ross*, 95 Mich.

88; *Sherman v. A. P. Cook Co.* 98 Mich. 61; *DeMey v. Defer*, 103 Mich. 244.

Application for rehearing.

The court has overlooked entirely the order of June 25, 1895. Under this we are entitled to a lien. This is *res judicata* and binding on all courts. It is final, establishing a status or relation.

Hake v. Coach, 105 Mich. 425.

And it has not been appealed from; besides it was made by consent in open court and for that reason is binding here.

Russell v. White, 68 Mich. 409; *Wyott v. Sweet*, 48 Mich. 539; *Brick v. Brick*, 65 Mich. 230.

Long, Ch. J., delivered the opinion of the court:

This is an action to foreclose a mortgage made by the Gypsum Plaster & Stucco Company to the complainant on October 4, 1892, on 120 acres of land in the township of Wyoming, Kent county, with the gypsum mines and mills thereon, to secure payment of \$25,000, with interest. The mortgage was recorded October 5, 1892. A chattel mortgage covering the personal property about the mills was given as additional security. It appears that prior to 1891 the Union Mills Plaster Company, a corporation, had been engaged in business near Grand Rapids in the quarrying of plaster rock, and in the manufacture and sale of land and calcined plaster. The lands and quarries, with the mills, were sold by the company to Andrew L. Hubbell, and by him, December 31, 1891, conveyed to the Gypsum Plaster & Stucco Company, a corporation organized under the laws of Illinois, for the stated consideration of \$165,500, and the company's notes were given for this amount. The stockholders of the new company were James B. Hubbell, Mr. Russell, and Mr. Garland. The two latter held one share each, and the balance of the stock was held by Mr. James B. Hubbell. The capital stock was \$100,000. A note for this amount was given to Andrew L. Hubbell by the company, as a part of the purchase price of the property, and was by him transferred to James B. Hubbell, and by the latter surrendered and canceled, and in this manner the capital stock was treated as fully paid. The Gypsum Plaster & Stucco Company also assumed certain of the debts of the Union Mills Plaster Company, among them being many debts still existing and involved in the present litigation. The company also gave a mortgage to the Union Mutual Life Insurance Company, which amounted at the date of the transfer, for principal and interest, to \$28,600. Thereafter the company carried on the business, and became more and more involved in financial difficulties. A foreclosure decree was taken upon the insurance company mortgage, and the day of sale was fixed for October 6, 1892. From time to time during that summer, levies of attachments and executions had been made upon the property, subject to the mortgage, when, about the 1st of October, these levies amounted in all to \$14,000. Mr. Frank L. Noble had been the active business manager of the corporation, and a portion of Mr. Hubbell's stock had been trans-

ferred to him. Mr. Hubbell, Mr. Noble, and Mr. Russell were then the directors and stockholders. It was found necessary to raise money, not only to satisfy the insurance company's decree, but to compromise or adjust the attachment and execution levies, and provide a working capital for the company. Negotiations had been for some time carried on between the corporation and Mr. E. F. Uhl, of Grand Rapids; and before October 1st this had resulted in an agreement that Uhl would take from the corporation a mortgage of \$35,000, and would loan it the sum of \$80,000, the remainder being for his services in procuring the loan. Mr. Herbert R. Gill, of Ohio, was extensively interested in the plaster business, as a purchaser of such material. He examined the property, and considered the lands and quarries worth \$100,000, and the improvements \$18,000. In expectation that he would ultimately be interested in the business, he had associated himself with Mr. Hubbell and Mr. Noble in active efforts to procure further capital. Together they had interested Mr. Dummer, the complainant here, who was the vice-president of the Northwestern National Bank of Chicago. Together they had determined that \$35,000 in addition to that realized on the Uhl mortgage would be necessary to carry on the business successfully. The mortgage in controversy was given to Mr. Dummer, but the moneys were not all paid in at that time, being paid from time to time, as will be stated hereafter. The Uhl mortgage was given on October 5, the decree of the insurance company satisfied, and on the same day the mortgage in controversy was recorded. The moneys advanced by Mr. Dummer were paid over to Mr. Russell, who, with Mr. Noble and Mr. Gill, came to Grand Rapids, and entered upon the task of adjusting the liens upon the property.

It is claimed by the defendants that these gentlemen represented to the attachment and execution creditors that they had only a small amount of money available, and could not pay in full; and that these creditors, supposing that the moneys came from the Uhl mortgage over and above the amount necessary to pay the insurance company decree, compromised their claims at about 50 cents on the dollar, taking renewal notes for the residue, upon the representations of these parties that the company would be able to go on and do a successful business and pay its debts; and that they thereupon discharged their levies. It is also claimed that at this time the creditors knew nothing of the existence of the Dummer mortgage, and did not discover it had been given until thirty-three days thereafter. Afterwards they began suits as the renewal notes matured, and the same attachment and execution liens were placed upon the property, together with many additional ones. The dates of the attachment and execution levies will hereafter be shown. In the meantime, Mr. John W. Dickinson, of Chicago, had become interested with Dummer and Gill, and the \$25,000 represented by the Dummer mortgage was paid by the three, as follows: October 4, 1892, by Dummer, \$8,500; October 17, 1892, by Dummer, \$1,500; September 21, 1892, by Gill, \$600; October 24, 1892, by Gill, \$400;

November 4, 1892, by Gill, \$2,100; November 7, 1892, by Gill, \$1,500; November 29, 1892, by Gill, 2,000; December 7, 1892, by Gill, \$400; January 10, 1893, by Gill, \$2,000; January 13, 1893, by Gill, \$1,000; January 23, 1893, by Dickinson, \$2,000; February 6, 1893, by Dickinson, \$500; February 11, 1893, by Dickinson, \$500; February 24, 1893, by Dickinson, \$500; March 10, 1893, by Dickinson, \$500; March 25, 1893, by Dickinson, \$1,000. At the time of the execution of the mortgage in controversy, a series of notes was executed, due in from thirty days to eighteen months, and were all payable to Mr. Dummer. After the moneys were all paid in, the corporation took up these notes, and issued a new series of notes, dated back as of the date of the mortgage, and running from one to five years, *vis.*: Five notes of \$2,000 each, to Mr. Dummer; five notes of \$2,000 each, to Mr. Gill; five notes of \$1,000 each, to Mr. Dickinson. The complainant claims that these notes were given in place of the old ones, and were secured by the \$25,000 mortgage. It is claimed by the defendants that in June, 1893, Dummer, Gill, and Dickinson agreed to surrender \$10,000 of their holdings under this mortgage, or two fifths of the holdings of each, in order that the company might raise money elsewhere, and agreed to accept for their security a third mortgage for \$10,000, running to John W. Dickinson, and which mortgage was executed; that, to accomplish this, the second series of notes was surrendered by Dummer, Gill, and Dickinson, and new notes taken, thus leaving their interest in the mortgage only \$15,000, the remaining \$10,000 being released for the benefit of the company, and being represented by five notes of \$2,000 each. The complainant claims that, while these notes and the mortgage to Dickinson were executed, the arrangement was never completed, and that the mortgage in controversy stood as security for the payment of the second series of notes. It appears that in November, 1892, the capital stock of the corporation had been increased from \$100,000 to \$500,000. Of this increase, \$100,000 was made preferred stock, and was to be used for the purpose of paying creditors as fast as they could be induced to accept the same. Of the remaining \$300,000 of stock, it had been agreed that Dummer and Gill should have \$2.50 for each \$1 of money paid in by them, thus giving Dummer and Gill each \$25,000 of the stock; and when Dickinson entered into the arrangement, he was given a similar issue of stock, amounting to \$12,500. In 1893, litigation was commenced by some of the execution creditors to set aside the Dummer mortgage, as fraudulent as against them. Mr. Dummer appeared and answered. This litigation is still pending, and by consent of the parties, has been transferred to the present suit. The business of the corporation was continued until January 1, 1894, when the company entered into a pool with other manufacturing companies. The mill was thereafter operated only at intervals, to produce its quota of material, and but little money was realized by the corporation.

On July 6, 1894, this bill was filed. Defendants Hinsdill and Tyler answered. The bill was taken as confessed against the Gypsum

Plaster & Stucco Company. In December, 1894, Mr. Smedley was appointed receiver, and was thereupon granted leave to intervene and answer. He filed an answer, setting up that the mortgage was invalid, and averring that the general creditors of the Gypsum Plaster & Stucco Company had rights in the properties prior to the Dummer mortgage. After some proofs were taken, the Lidgerwood Manufacturing Company, a New York corporation, also obtained leave to intervene as a defendant, and, by way of affirmative relief, alleged that in March, 1893, it sold to the Gypsum Plaster & Stucco Company a cable apparatus for hoisting rock out of the quarry, for the price of \$4,000, of which \$3,500 remained unpaid; that this property had become an essential part of the plant, and was procured by the company by fraud; and that, though the intervenor was entitled to take the property, it had so become a part of the plant that equity and the interest of all the parties required it should remain there, and the intervenor should have a lien for the amount unpaid. The answer of the defendants Hinsdill, Smedley, and Tyler also set up facts as a basis of affirmative relief in the nature of a cross bill, and they ask that the complainant's mortgage be vacated.

It appeared upon the hearing that the complainant had advanced \$1,050 for the payment of delinquent interest upon the Uhl mortgage, in order to prevent foreclosure; that the receiver had paid taxes upon the company property, and also delinquent interest upon the Uhl mortgage, to the amount of \$1,365. The proofs were taken in open court and by deposition, and on September 20, 1895, a decree of foreclosure was entered, and awarded priority to the several parties as follows: (1) To the complainant, \$1,050 and interest for moneys advanced to pay delinquent interest on the Uhl mortgage. (2) To receiver Smedley, \$1,365 and interest, being the amount paid by him for taxes and delinquent interest on the Uhl mortgage. (3) To the Lidgerwood Manufacturing Company, \$4,000, being the entire amount of its unpaid debt and interest. (4) The complainant Dummer, the sum of \$10,000 and interest for advances made by him under the mortgage. (5) To H. R. Gill, \$4,100 and interest, for moneys advanced by him under the mortgage prior to November 7, 1892, that being the date when defendant Hinsdill levied the first attachment after the giving of the Dummer mortgage. (6) To defendant Hinsdill, \$4,408, with interest, being the amount of her debt under the levy of November 7, 1892. (7) To H. R. Gill, \$4,561, for moneys advanced by him on the Dummer mortgage after the Hinsdill levy, and before the next levy. (8) To E. D. Preston and D. H. Armstrong, \$4,000 and interest, they being the next levying creditors, and being the full amount of their claim. (9) To H. R. Gill, \$1,161, being for moneys advanced on the Dummer mortgage after the foregoing named levies, and before the next levy. (10) To E. D. Preston, \$177, he being the next levying creditor. (11) To H. R. Gill and John W. Dickinson, \$4,800, being the remainder to Gill for his advances and to Dickinson for advances made by him before the next levy. (12) To C. O. Smedley, \$365,

he being the next levying creditor. (18) To John W. Dickinson, \$2,800, being the remainder of his advances upon the mortgage. From this decree defendant Smedley, as receiver, and the defendants Hinsdill and Tyler, appeal. The other defendants do not appeal. The complainant also appeals from the decree.

The receiver contends that the mortgage is fraudulent and void as against the general creditors, and that the lien under it should be postponed to the payment of their claims. This claim is based upon two grounds: (1) That the mortgage was given for a greater amount than was paid at its execution, and, if any future advances were to be made, such fact was not set forth in the mortgage; (2) that the beneficiaries under the mortgage were stockholders in the corporation, they having received a large number of shares of the bonus stock.

It appears from the record that the corporation had ample power to borrow money and give security on the corporate property therefor. The statute of Illinois under which this corporation was organized gives it this power. From a careful reading of the record, it appears to us that no other conclusion can be reached than that, before the time the mortgage was given, and arrangement was made by the corporate authorities to make a loan of that amount. They regarded the condition of the company as serious, and that by the placing of the Uhl mortgage, and thus discharging the insurance company decree, the company would not be in a condition to go on with the business without further means. Mr. Gill had been working to make the loan. Dummer was seen, and was offered some of the bonus stock if he would take part of the mortgage. While the arrangement was not fully completed, Mr. Dummer says that Gill agreed to put in \$10,000 if the company would arrange for the other \$5,000, as he (Dummer) was to put in \$10,000. Matters were in this condition when the mortgage was executed. Dickinson thereafter consented to put in the other \$5,000. From all that took place during the few days prior to the execution of the mortgage and the conduct of the parties afterwards, it is apparent that it was the intent of all the parties that the full sum of \$25,000 should be paid in. As soon as Gill could raise his money he was to pay it over. Dummer put in \$8,500 at first, and within a few days thereafter paid over the balance of \$1,500, completing his share. Gill and Dickinson subsequently paid the full amount they were to take. There was no showing upon the record that there was any bad faith in the giving of the mortgage, and the consideration was fully paid. The mortgage was therefore a valid lien upon the property, at least as between the corporation and the mortgagees.

The fact that the mortgage did not state that it was given to secure future advances would not render it void as to creditors. *Brace v. Berdan*, 104 Mich. 856. A mortgage is not fraudulent for including contemplated advances. *Newkirk v. Newkirk*, 56 Mich. 525. Counsel for receiver cites *Showman v. Lee*, 86 Mich. 560, in support of his contention; but all that was held in that case was that, if the mortgage was taken for a greater amount,

than was actually paid, the parties must act in good faith; that parties who take security from insolvents or from parties who are indebted to others must act in good faith, and so as not to unnecessarily hinder, delay, or defraud creditors; that the taking of a mortgage for an amount in excess of the debt or the assumed liability is a badge of fraud in law, if the purpose is to protect the debtor's interests from other creditors. This is but the statement of a familiar principle of law. In the present case, however, no such showing is made. The parties were acting in good faith, and the whole of the consideration thereafter paid. The mere fact that the mortgage was given for a greater amount would not necessarily make the mortgage fraudulent. There must be some fact or circumstance showing an intent to hinder, delay, or defraud creditors, and this is necessarily a question of fact. This record, as we have said, discloses no such fact.

The contention that the beneficiaries under the mortgage stood as stockholders, and not as mortgagee creditors, has no force. It is claimed by counsel for the receiver that the record discloses that these beneficiaries intended to become interested as stockholders, and that the mortgage was a plan adopted to save them against the risk of loss on their investment, while they obtained all possible chances of gain. Counsel treats the question as though the stock given to the mortgagees was part of the original capital stock. This is not the fact. The original capital stock was \$100,000, and was treated as fully paid. The corporation received all the properties for that amount and the payment of some old debts, and in this suit the original stock must be treated as fully paid up. In November, 1892, the stock was increased from \$100,000 to \$500,000. The mortgagees took the mortgage with the understanding that this should be done, and they be assigned certain shares of this common stock, the first \$100,000 being held as preferred stock. At that time the company was greatly embarrassed, and, as is claimed, found it difficult to raise money on a second mortgage. The mortgage had been given to Uhl for \$85,000. There were certain attachment and execution levies against the property to be taken care of, and the proposition was made to Dummer and Gill that a portion of this "bonus stock," as it is called, should be given to them if they would advance this \$25,000 on the mortgage.

In *Handley v. Stutz*, 139 U. S. 417, 85 L. ed. 227, this subject was fully discussed. The bill was filed by Stutz and other creditors against the Clifton Coal Company, to compel an assessment upon certain shares of stock for the satisfaction of the debts of the company. The company was organized in 1883, and the capital stock of \$120,000 all subscribed and paid for. In May, 1886, the stock was increased to \$200,000. The increased stock was issued to Handley and the other defendant under the following circumstances: After unsuccessful attempts to sell \$50,000 of its bonds secured by mortgage, the company offered \$1,000 stock as a bonus with each \$1,000 bond. The defendants bought the bonds, and took the bonus stock. The

debts of the complainants were created before the increase of the stock. Speaking of this bonus stock, the court said: 'The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. . . . To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. . . .

. . . It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained. . . . It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the stockholder's liability." Speaking further in the case as to the rights of creditors, and what particular creditors would be affected by the increase of the capital stock, it was said: "We have no doubt that the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock." In *Washburn v. Green* ("Richardson v. Green"), 138 U. S. 80, 38 L. ed. 516, it appeared that Richardson had advanced moneys on bonds, and taken stock as bonuses. On a suit to foreclose the mortgage, the moneys actually advanced by him were allowed, without any reduction on account of the bonus stock, though there were general creditors subsequent to the mortgage securing his bonds.

It is therefore apparent from these cases which we think embody the settled law on the subject, that the defendants Hinsdill and Tyler are not in position to question the right of the corporation to increase its capital stock, and to sell or pledge such bonus stock to raise money for the legitimate purposes of the corporation. Their debts antedated the giving of the mortgage.

As to creditors whose debts have since arisen, the receiver contends that, in equity, they have the right to an equitable set-off against the mortgage for the amounts due upon their demands. In the first place, it may be said that that question was not raised by the answer of the receiver, and for that reason cannot now be considered; and, second, we know of no rule of equity that would allow such set-off against the mortgage under the circumstances here stated. The mortgagees were acting in good faith; had paid in full for the mortgage, upon the understanding that this bonus stock should be assigned to them. The company had a right to issue the stock, and sell

for the best obtainable price. It realized \$25,000 cash for the mortgage and stock. There is no showing here that the mortgage and stock were worth a dollar more than the \$25,000. We think the complainant was entitled to his decree of foreclosure for the full amount of the mortgage, and that he had such right under the second series of notes, as the third was never used, and the first was delivered up and canceled. We are also of the opinion that the court was not in error in giving the complainant the prior lien for interest paid on the Uhl mortgage. It was necessary to protect his own mortgage lien. Neither do we think the court was in error in providing, second, that the receiver should have a lien for the moneys paid by him for interest on the Uhl mortgage and the taxes on the property. It would be inequitable to hold that the receiver, having protected the property from sale for the taxes assessed and interest on the Uhl mortgage, and preserved the security for the mortgagees, should not now be protected.

We now come to the discussion of the priorities fixed by the court in other portions of the decree. The Lidgerwood claim is made a lien prior to the complainant's, except as to the moneys advanced as interest upon the Uhl mortgage. We think this claim cannot be sustained by the Lidgerwood Company. A court of equity will not create a lien upon real estate in favor of a party unless, from the nature of the transaction, rights have sprung up which ought to be held binding upon the specific property. *Kelly v. Kelly*, 54 Mich. 30.

In the present case there is nothing in the record showing that the company ever intended to claim a lien upon the corporate property of the Gypsum Plaster & Stucco Company. On the other hand, the Lidgerwood Company was informed by Gill, before the machinery was sold, that the Gypsum Company was in a bad condition financially. The order was made by the Gypsum Company for the machinery on January 17, 1893. The matter ran along until February 2d, when Mr. Gill gave his personal guaranty for the payment of the machinery. During the summer of that year, the Lidgerwood Company was pressing Gill for payment upon his guaranty. Gill thereupon took a bill of sale of the engine and cable to himself. We are satisfied from the evidence that no false representations were made by the officers of the corporation to the Lidgerwood Company, or by Gill, of the financial condition of the corporation. The Lidgerwood Company was advised by Gill, in advance of the sale, that "Bradstreet and Dun give very unfavorable reports of the concern and well they might." Acting upon this report, the company sold upon the written guaranty of Gill. The rule is well settled that a vendor's lien is waived by taking the obligation of a third party. *Washb. Real Prop. § 16*. This rule has been fully sustained by this court. *Sears v. Smith*, 2 Mich. 243; *Wisconsin M. & F. Ins. Co. Bank v. Tyler*, 83 Mich. 496. The Lidgerwood claim cannot therefore be sustained, but that company must be held to have waived it, and, having waived it, the lien is lost. *Au Sable River Boom Co. v. Sanborn*, 86 Mich. 358.

We think the court was not in error in fixing

the priorities between the other claimants. By the decree, the court gave the execution and attaching creditors priorities over the moneys which were paid under the mortgage subsequent to the levies.

The decree of the court below will be modified in respect to the Lidgerwood claim, and af-

firmed as to the other portions. The complainant will recover his costs against the Lidgerwood Manufacturing Company. No other costs will be allowed.

The other Justices concur.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

UNION NATIONAL BANK, *Appl.*,

v.

J. M. BROWN *et al.*

(..... Ky.)

1. The rights of the owner of a patent under laws of the United States are not infringed by a state statute applicable to the sale of patent rights requiring the words "Peddler's note" to be written across the face of all notes executed for articles sold by a peddler or itinerant person.
2. An allegation that a note "is what is denominated under the laws of Kentucky a 'peddler's note'" is a mere legal conclusion, and does not sufficiently aver that the vendor of the article for which the note was given was an itinerant person.

(May 29, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Washington County in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. P. W. Hardin for appellant.

Messrs. Clements & Thurman for appellees.

Burnam, J., delivered the opinion of the court:

The complaint of appellant is based upon a promissory note executed by appellees Brown & Wells to Webb & Camp, which was made negotiable and payable at a bank in this state, and which was indorsed by the payees to one George Bohon, and was by Bohon discounted and assigned to appellant for value, before its maturity, it being a banking institution organized under the national banking laws of the United States. Judgment is resisted by appellee, upon the ground that the note sued on was executed in consideration of the right to sell, in twenty-five counties of the state, exclusively, what was represented to be the "Webb & Camp Patent Automatic Broom Holder," and upon the further consideration that the payees were to furnish promptly, upon order and at agreed prices, such number of the patented articles as might be desired by appellees in the business of selling; and they further allege that payees were never the owners of any such

patent as the note was given for, and that the note was procured from them by false and fraudulent representations as to the ownership of the alleged patent, and by other fraudulent devices. They further alleged that under the statute, the note sued on having been executed for the sale of territory for a patent right, it should have had written across the face of it the words "Peddler's note," and not having such indorsement, the note was null and void under the statute, and that appellant was not a purchaser in good faith without notice and before maturity of the consideration of the obligation sued on. All of the affirmative allegations of the answer were denied by reply. The law and facts were submitted to the chancellor for trial, and he made a separate finding of his conclusions of fact, holding that the proof showed that the note sued on was executed for the right to sell a patent automatic broom holder; that the payees, before maturity and for value, assigned it to Bohon; that the proof further conduced to show that Bohon afterwards assigned the note to plaintiff, after receiving full information of the consideration of the note and of all appellees' alleged defenses; that the note was procured by false and fraudulent representations, without valuable consideration; and that it was a peddler's note, and did not have indorsed across the face of it the words "Peddler's note," as required by law. And the chancellor held that the note was absolutely void, and dismissed the petition of appellant. The appeal is from that judgment, and a reversal is asked on the grounds—First, that § 4223 of the Kentucky Statutes is unconstitutional, because it is in conflict with the patent laws of the United States, being an attempt on the part of the legislature to limit the right of a patentee or his assignee to dispose of a right secured to him by the laws of the national government; second, because the note sued on is, by the provisions of § 483 of the Kentucky Statutes, placed upon the footing of a foreign bill of exchange, and, having been discounted in good faith before maturity by plaintiff, appellees are estopped from denying liability.

First, is the statute, requiring persons who sell patent rights to have written across the face of the notes executed to them in consideration therefor the words "Peddler's note," in conflict with the Federal laws? In our opinion it is not, and the statute is valid, because it is only the exercise of a police power which properly belongs to the state. The right to prescribe regulations for the protection of its citizens against fraud and imposition is not

NOTE.—On the effect of state regulations as to the sale of patent rights, see note to *Com. v. Petty* (Ky.), 29 L. R. A. 788.

taken from the state by the Federal Constitution or by any national statute. On the contrary, it may be considered as having been authoritatively settled that the national government cannot exercise police powers for the protection of the inhabitants of a state. These are local matters, and must be governed and regulated by the state. See *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 598; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 568; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835; *Brechtbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695; *Tod v. Wick Bros.* 88 Ohio St. 370. In the case of *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115, the court uses this language: "It is true that letters patent, pursuing the words of the statute, do, in terms, grant to the inventor, his heirs and assigns, the exclusive right to make, use, and vend to others his invention or discovery, throughout the United States and the territories thereof. But, obviously, this right is not granted or secured, without reference to the general powers which the several states of the Union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police. . . . By the settled doctrines of this court the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily trench upon any authority which has been confided, expressly or by implication, to the national government. . . . This court has never hesitated, by the most rigid rules of construction, to guard the commercial power of Congress against encroachment in the form or under the guise of state regulation, established for the purpose and with the effect of destroying or impairing rights secured by the Constitution. It has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens." Mr. Cooley says: "In the American constitutional system, the power to establish ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government." Cooley, Const. Lim. *574. There is nothing in this statute which discriminates against the sale of a patent right, nor does it usurp any power of the national government or violate any Federal law, but it simply prescribes a method to secure the citizens of the state from being imposed upon by men who have either no authority to sell patent rights or no patent rights to sell; and it would be monstrous to assert that the vendors of patent rights cannot be restrained by reasonable police regulations, and we are therefore of the opinion that the provisions of the statute, being in the nature of a police regulation, are constitutional and void. Nor does this construction in any wise conflict with the adjudications of this court in the case of *Com. v. Petty*, 96 Ky. 432, 35 L. R. A.

29 L. R. A. 786, which is referred to and relied on. There it was held that the act requiring persons selling or offering to sell patent rights, or territory for the use, manufacture, and sale of patent rights, to pay a license tax before making such sale, was unconstitutional and void, because, as stated by the learned judge, "if the legislature has authority to require the patentee or his assignees to procure and pay for this privilege, then there is no limit to the extent of such requirements. The legislature could fix the license fee so high that the patentee could not afford to pay it, as it might exceed the commercial value of the right. By this means the legislature of a state utterly destroys the power which is in Congress by the Federal Constitution to 'promote the progress of science and useful arts.'" In this case there is no discrimination against this particular species of property denounced by the statute, and no attempt to prevent its legitimate and proper sale, and it is a proper police regulation. The state legislature has the right to say what paper may be placed upon the footing of a foreign bill of exchange. It is a privilege that has always been exercised, and is purely a creature of the statute. The legislature would unquestionably have the power to repeal § 483, which defines what manner of paper may be placed upon the footing of a foreign bill of exchange, and deprive promissory notes of all the characteristics and privileges of such bills; and certainly it could not be contended in such a case that a promissory note executed in consideration of a patent right granted by the Federal government would be entitled to any higher or greater privileges than other promissory notes. The statute places no restriction on the sale of a patent right. It only attempts to prevent itinerant persons, who are "here to-day and there to-morrow," from practising frauds upon the ignorant and credulous.

Now, as to the second contention made by the defendants, What are the rights of appellant as the bona fide holder of the paper sued on? It may be stated, as a general rule of law, that one who executes a negotiable promissory note, knowing that it is the subject of barter and sale in the commercial world, and does not put into it any words which would give warning to others not to buy it, is estopped from making defense to same after it has passed into the hands of a bank of this state; but there are exceptions to this general rule, and all the decisions agreed that, when the statute in direct terms declares that a note given in violation of its provisions shall be void, it is so, no matter into whose hands it may pass. This doctrine was laid down in the case of *Vallett v. Parker*, 6 Wend. 615, the court holding that, "wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had the notice of, the consideration." Mr. Daniel, in his work on Negotiable Instruments, draws this distinction very clearly. He says (§ 197): "The bona fide holder for value, who has re-

ceived the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crimes of turpitude which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule . . . that when a statute expressly or by necessary implication declares the instrument absolutely void, its gathers no vitality by its circulation in respect to the parties executing it; though even upon such instruments an indorser may, as we shall hereafter see, be held liable to a bona fide holder without notice. There are a very few cases in which the statute renders such instruments absolutely void; and the most important, if not the only, instances now to be met with, are the statutes against usury and gaming." In the case of *Cochran v. German Ins. Bank*, 9 Ky. L. Rep. 196, the superior court held that "a bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder;" and in the case of *Farmers' & D. Bank v. Unser*, 18 Ky. L. Rep. 996, the court says: "The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that such illegality makes the contract void,"—referring to the cases of *Sondheim v. Gilbert*, 117 Ind. 71, 5 L. R. A. 482; *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 7 L. R. A. 705; *Cochran v. German Ins. Bank*, 9 Ky. L. Rep. 196. "However," the court in that opinion says, "though the note was based on a gambling consideration, the indorsers are liable; for they engaged that the note is a valid and subsisting obligation, binding on all prior parties according to their ostensible relations, and they will be held liable, although the instrument be entirely null and void as between the prior parties themselves, and also as between such prior parties and bona fide holders without notice,"—referring to *Daniel, Neg. Inst.* We therefore conclude that § 4223 violates no constitutional rights of those selling patent rights granted by the national government, and that the legislature had the power to require the words "Peddler's note," to be written across the face of all notes executed for articles sold by a peddler or itinerant person as prescribed in § 4116 of the Kentucky Statutes, and to declare them null and void for failure to conform to this requirement. But the statute only requires the words "Peddler's note," to be written across notes given for articles sold by a peddler or an itinerant person. It does not apply to a vendor who has a fixed place of business. The fact that the vendor was an itinerant person is a necessary allegation to sustain this defense. There is no averment, either in the original or amended answer, that the payees of

the note sued on were itinerant persons, or peddlers, at the time of the sale of the patent right or the execution of the note in contest. The allegation of the petition, that the note "is what is denominated, under the laws of Kentucky, a 'peddler's note,'" is a mere legal conclusion. And without this averment and proof of it, the note is not void under the provisions of § 4223. The demurrer of plaintiff to defendants' answer should have been sustained for this reason. Nor does this fact appear anywhere in the record.

Wherefore the cause is reversed and remanded, with instructions to sustain the demurrer of plaintiff, allow defendants to amend if they desire, and for further proceedings consistent with this opinion.

O. J. Owen BREWSTER, *Appt.*,

v.

C. MILLER'S SONS *et al.*

(.....Ky.....)

1. It is not unlawful for the undertakers of a community to associate themselves together and agree to refuse to render service in their business to one who has refused or failed to pay a bill due to some member of the association for similar service previously rendered.
2. An action for damages cannot be maintained against members of an undertakers' association for refusal to furnish materials or render services at a funeral for one who has refused or failed to pay for such services previously rendered by some member of the association.
3. One has the right to decline to enter into a business undertaking with another person, and any number of persons can enter into an agreement by which they can decline to assume business relations with or enter into any contract with one or more persons.

(June 4, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendants in an action brought to recover damages for defendants' refusal to furnish funeral material to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Kinney, Gregory, & Kinney, with *Messrs. Kohn, Baird, & Spindle*, for appellant:

The refusal of a combination of trades to sell articles dealt in by them induced by an attempt of a member to collect a debt not owing is a legal wrong to the person injured and an action lies against all for an unlawful conspiracy.

Schulten v. Bavarian Brewing Co. 96 Ky. 224; *Carew v. Rutherford*, 106 Mass. 18, 8 Am. Rep. 287.

A conspiracy to do any injurious act is un-

NOTE.—As to the lawfulness of combinations to exclude a dealer from business relations, see *Bohn Mfg. Co. v. Northwestern Lumbermen's Assn.* (Minn.) 21 L. R. A. 337; *Jackson v. Stanfield* (Ind.) 23 L. R. A. 688; *Hartnett v. Plumbers' Supply Assn.* (Mass.) *ante*, 194.

lawful, and an action will lie, though if done by an individual without conspiracy it would be lawful.

Wright, Criminal Conspiracies, Am. note by Carson, 115; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710; *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. Rep. 138, 12 L. R. A. 193; *Fisher v. Schurt*, 78 Wis. 870; *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 76; *Olive v. Van Patten*, 7 Tex. Civ. App. 630.

Any agreement or combination between two or more persons becomes unlawful, and an action will lie for damages, when either the object to be attained is unlawful or the means adopted for the attainment of a lawful object are unlawful.

Com. v. Ward, 92 Ky. 158; *State v. Buchanan*, 5 Harr. & J. 817, 9 Am. Dec. 534; *Com., Chew, v. Carlisle*, Brightly (Pa.) 33; *Com. v. Hunt*, 4 Met. 111; Wright, Criminal Conspiracies, pp. 112, 113, 115, 119; 2 Addison, Torts, 789; Cooley, Torts, 828.

A punishable conspiracy exists at common law when an act is done to the prejudice of the public or an individual.

Com. v. Ward, 92 Ky. 158; Wright, Criminal Conspiracies, Carson's ed. 115, 119.

Both the object and the means adopted were *per se* criminal.

Ky. Stat. chap. 101; *Carew v. Rutherford*, 106 Mass. 13, 8 Am. Rep. 287; *State v. Buchanan*, 5 Harr. & J. 817, 9 Am. Dec. 534; *Com. v. O'Brien*, 12 Cush. 84; *State v. Mayberry*, 48 Me. 218.

At common law all combinations in restraint of trade are indictable.

People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437; *People v. Sheldon*, 66 Hun. 590. Such combinations are denounced by statute in Kentucky.

Ky. Stat. chap. 101.

Special injury resulting from a public wrong gives cause of action on the case for the damage.

3 Lawson, Rights, Rem. & Pr. § 1014.

A conspiracy to do an unlawful act renders each conspirator liable for the consequences resulting though not originally intended.

Messrs. Humphrey & Davis, O'Neal, Phelps, & Pryor, Alfred Selligman, and Helm & Bruce for appellees.

Paynter, J., delivered the opinion of the court:

The plaintiff, Brewster, is a citizen of Louisville. From the allegations of the petition, there is an association in that city known as the "Funeral Directors' Association." The defendants in this action are undertakers, and members of the association, except the defendant the Louisville Coffin Company, which is engaged in the business of manufacturing caskets. On the 10th of December, 1893, the wife of the plaintiff died. He went to the defendant C. Miller's Sons to engage their services, and to buy articles necessary for her burial. They refused to accept employment or furnish the articles necessary for that purpose, because, as they claimed, the plaintiff was indebted to them in the sum of \$52 for burying his father. The defendants other than the coffin company refused to perform the necessary services and

furnish the necessary articles for the burial of plaintiff's wife. This refusal was made because of this claim of C. Miller's Sons, that Brewster was indebted to them for previous services, etc., as stated. This is not a suit for the violation of a contract made by either of the defendants, but because they would not enter into one with the plaintiff, and furnish the services and the materials which he desired. It is alleged that the Funeral Directors' Association is a trust and confederation, and, by reason of the terms and purposes of the trust, combination, and conspiracy, the defendants refused to furnish any of the materials or render services necessary for the burial of the plaintiff's wife, and that the defendants refused for the purpose of enforcing, by duress and oppression, the collection of the debt due C. Miller's Sons. The articles of the association and by-laws, which plaintiff claims make it an unlawful trust and a combination in restraint of trade, are as follows: Article 5 of the constitution reads: "Each and every member of this association who shall, either directly or indirectly, sell, exchange, give, or hire any part of his goods or equipments to or from, or in any way aid or assist, any funeral director or branch establishment, not a member of this association, shall on conviction thereof, after a fair and an impartial trial, be fined for each and every offense as provided in article 6 of this constitution." Section 1 of article 6 reads as follows: "If any member of this association be found wilfully guilty of violating any part of this constitution, by-laws, rules, or regulations, that may now or hereafter be adopted for the government of this association, where the penalty is not specified in the laws, shall, if convicted, after a fair and impartial trial and investigation of the same, be fined \$10 for the first offense, \$20 for the second offense, \$50 for the third offense, and expulsion for the fourth offense." Sections 1 and 2 of article 8 read as follows: Section 1: "All manufacturers and dealers in caskets, coffins, and funeral directors' supplies, of every name and nature whatever, are hereby requested not to sell any articles in our line to any funeral director or other parties, for use within the jurisdiction of this association, unless he or they be members hereof in good standing." Section 2: "If any manufacturer, dealer, or traveling salesman of the same shall not fully and in every respect comply with the requirements of § 1 of this article, then we, the members of this association, hereby agree and pledge ourselves to withdraw our patronage from him and the house represented, and will not purchase goods from them." Sections 1 and 2 of article 9 read as follows: Section 1: "All manufacturers, liverymen, and dealers in our line of goods who signify their intention to abide by the constitution, by-laws, rules, and regulations of this association, who shall hold a judgment or an execution for over three months unpaid against a member of this association, for goods or livery work used in their business as funeral directors, are requested to give this association an immediate written notice thereof, stating all facts in the case." Section 2: "Any member of the association who shall have a judgment or an execution standing against him, as described in § 1 of

this article, without good and sufficient cause, which shall be decided by the members present at any regular meeting, after a fair and impartial investigation, if it be found that the member has met with no unusual misfortune, he shall be expelled, or shall be given not to exceed ninety days to pay the same, and, if not paid at the expiration of the given time, he shall then be expelled." Section 2 of article 10 reads as follows: "Any member who shall be found guilty of expressing his opinion unfavorably on a reasonable and just bill of any other member to any party not a member hereof, shall, if convicted after a fair trial, be fined according to article 6 of constitution." Article 14 of constitution reads as follows: "That there shall be established by the association a delinquent list, upon which shall be recorded the names of all persons who do not pay their bills. The association shall keep this list and furnish members with all names that are handed to be recorded on the same. The members shall each enter in a book for the purpose (which book shall be furnished to each member by the association) all names, amount of indebtedness, date of bills, and F. D. to whom same is owing, as soon as received from the association." Section 2 of article 4 of the by-laws of said Funeral Directors' Association reads as follows: "The delinquent secretary shall receive from the members a complete list of all the parties who fail to pay their bills for the burial of their dead. He shall record all such names in a proper book procured by the association. He shall enter all lists furnished him in his book and immediately send copy of the same to each member of this association, and all members shall be allowed access to the delinquent secretary's book at any time, and to take a copy of the same should they wish to do so. He shall be allowed \$6 for his services." Sections 1, 2, and 4 of article 11 of the by-laws are as follows: Section 1: "Members of this association shall furnish a list to delinquent secretary, from time to time, of all parties who do not pay their bills for the burial of their dead." Section 2: "No member of this association shall wait upon any person who is indebted to any other member of this association until such indebtedness is settled, except it be for the burial of the person so indebted, in which case the undertaker having charge shall use every endeavor to have the old account settled; and any member who shall furnish articles to a person named in the printed 'Delinquent List,' or who shall persist in furnishing goods after having been notified by another member that they are indebted to him, shall be punished by a fine of not less than \$50, or a larger amount, at the discretion of the association." Section 4: "No member of this association shall accept any order for goods or work from anyone who has previously called in another member, and with whom said party could not make satisfactory financial arrangements, without said member of the second part paying all claims of said member of the first part, and taking all chances for collection on his own responsibility, as no protection will be afforded him through the medium of the delinquent list." Sections 1, 2, 6, 7, and 9 of article 12 are as follows: Section 1: "Any member of this association who shall

purchase goods of any manufacturer, dealer, or jobber who is not a member of or recognized by the National Burial Case Association shall be fined in the sum of \$50." Section 2: "Whenever there shall be a member of this association located in a suburban village or town, where there is a local cemetery, said members shall, if they desire, have the association establish a price for hearses and carriages to said cemetery but in no case shall said member or members be allowed to hire hearses and carriages for less than the published price list to any cemetery other than the ones mentioned in said exceptions, and any violation of the above section shall be punished according to article 6 of the constitution." Section 6: "Whenever a member of this association shall be called upon to superintend a funeral for which he does not furnish a case or a casket, a charge shall be made of not less than \$5 for personal services, and a reasonable larger amount shall be charged should the engagement require extra attention; and any neglect to make such charge shall lay the member so doing liable to penalties, as per article 6 of constitution." Section 7: "All members of this association are allowed to make a discount of 5 per cent on all funeral bills when a case or casket is furnished, when said bills are paid within 80 days from the date of burial; and any excess of 5 per cent is positively prohibited, and no discount shall be allowed on bills where no case or casket is furnished." Section 9: It shall be the duty of each member of this association, should he know of any other member of this association who is violating the constitution, by laws, rules, or regulations, to report the same with proof to the executive committee."

It is contended that the association is a violation of § 8915 of chapter 101 of the Kentucky Statutes, which reads as follows: "That if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting or conducting any kind of business in this state, or any partnership company, firm, or individual, or other association of persons, shall create, establish, organize, or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation, or understanding with any other corporation, partnership, individual, or person or association of persons for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles, or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in any pool, agreement, contract, understanding, combination, or confederation having for its object the fixing or in any way limiting the amount or quantity of any article of property, commodity, or merchandise to be produced or manufactured, mined, bought, or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act." Section 8917 of this chapter imposes a penalty, by way of fine or imprisonment, or both, for the violation of § 8915. Section 8918 declares that a contract, agreement, or understanding in violation of provisions of the sections of this act shall be null and void; and

any purchasers of property or article, or of any commodity, from any individual, company, or corporation transacting business contrary to the sections of the act, shall not be liable for the price or payment of such article or commodity or property, and may plead and rely on the act as a complete defense to any suit for such price or payment.

It is hardly necessary to observe that this is not an indictment against the members of the Funeral Directors' Association for the violation of § 8915, nor is it an action to enforce any contract or agreement made in violation of that section or the chapter of which it is a part. This association may be guilty (which we do not decide, as the question does not arise here) of the violation of this chapter of the Kentucky statutes, and yet the plaintiff would not have a cause of action against the members thereof. Although the association might control and fix the price of property, merchandise, etc., and in so doing be guilty of a violation of the statute, yet, if they refused to sell such merchandise or property, it does not follow that one could maintain an action for damages, because of their refusal to sell to him. As we have said, this action asserts a claim for damages, because they would not enter into a business transaction with him. The only question which we have to consider in this case is as to whether the plaintiff is entitled to maintain this action for such refusal. Some of the purposes of the association, as expressed in its articles, could be in violation of this chapter of the Kentucky statute, yet other articles of the association might not be in violation of it, and the purposes, as expressed in them, be entirely proper and legal. The part of the articles which we feel is pertinent to the consideration of the question involved in this case is that which declares that no member of the association shall wait upon any person who is indebted to any other member of the association until such indebtedness is settled, except it may be for the burial of the person so indebted, and that, where a member violates such provision of the laws of the association, he is to be fined a given amount. We think Mr. Addison lays down the correct rule in his work on Torts, when he says, in vol. 2, § 850: "A criminal proceeding by way of indictment lies for the mere act of conspiring; but a civil action is not maintainable unless the plaintiff has been aggrieved, or has sustained 'actual legal damage' by some overt act done in pursuance of the conspiracy." So, even if some of the articles of this association constitute a trust or conspiracy, still, if there was no overt act done in pursuance of such illegal provisions which produced "actual legal damage" to the plaintiff, he could not maintain his action. It would be a question with which the state should deal. We do not think the article of association which we have said was pertinent to this inquiry is in violation of the statute, or an offense at common law. It simply provides that the members of the association are not to render services for or furnish burial material to any person who has become indebted to a member of the association, and fails or refuses to discharge it. One has the right to decline to enter into a business undertaking with anyone. The law does not impose such an obligation upon

anyone. This being true, any number of persons can enter into an agreement by which they can decline to assume business relations with or to enter into any contract with one or more persons. If Brewster was indebted to Miller's Sons, then they had the right to decline to give him an opportunity to increase his indebtedness or to refuse to furnish material for the burial of his wife, unless he paid the claim which Miller's Sons asserted against him. As those who are members of the Funeral Directors' Association, for a good reason, or for no reason, had the right to decline to render services or furnish burial material, and, if they saw proper, to decline to render services because Miller's Sons asserted a claim against Brewster, their refusal creates no legal liability against them. It is immaterial, so far as Brewster is concerned, as to what reasons may have influenced them to decline employment, or to refuse to furnish the burial material which he desired. Miller's Sons might have asserted a claim against Brewster which had foundation in neither morals nor law; yet if the members of the association other than Miller's Sons chose to be influenced by it, and to decline the employment, etc., Brewster has no cause of action against them. This is not an action against Miller's Sons for libel or slander, neither is it one against members of the association for libel or slander, but, as we have said, was for an alleged conspiracy, etc., of the members of the Funeral Directors' Association. There is no claim asserted for damage to his personal character or business reputation. Cooley, Torts, p. 278: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern." Again, on page 688, he says: "The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a right to do another can have no right to complain of." *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, and *Payne v. Western & A. R. Co.* 13 Lea. 507, 49 Am. Rep. 666, are to the same effect. *Bohn Mfg. Co. v. Hollis*, 54 Minn. 225, 21 L. R. A. 337, the court said: "No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts 'unlawful,' or 'illegal,' but in every instance it will be found that these terms were used in the sense merely of 'void' or 'unenforceable,' as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public." It was also held in *Schulten v. Bavarian Brewing Co.* 96 Ky. 224, that it was not unlawful for a number of persons to associate themselves together to protect themselves by lawful acts from dishonest debtors; that an agreement similar to the one in question in this case, that they would not sell to one who was indebted to the association, was lawful, and for which no action could be maintained. It was contended in that case, as in this, that the association was trying to compel the payment of a

debt, by duress, which was asserted against the plaintiff. In *Schulten v. Bavarian Brewing Co.* the court held that there was not a sufficient denial that the plaintiff was indebted, in the sum claimed, to the member of the association, but the court said: "If he was not indebted to the defendant, the Bavarian Brewing Company, then the defendants were guilty of an unlawful act in trying to make him pay something he did not owe, by refusing to sell him beer." The court did not in that case say what would be a legal consequence of an unlawful act in trying to make him pay something which he did not owe. If a conspiracy had existed in that case or in this case to have compelled the party, by duress, to pay a sum which he did not owe, and under such force he had paid it, unquestionably an action could have been maintained to recover the sum so paid. Had the conspiracy succeeded in either case, then the damage sustained would have been the amount which had been wrongfully taken from him. The action would be to recover money tortiously obtained. The case of *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287, cited by counsel for appellant, sustains this conclusion. That was an action to recover money which a party had been forced to pay by an unlawful conspiracy. In that case a mechanic was under the necessity to employ workmen to carry on his business, and by this conspiracy, in order to obtain a sum of money from him, which he was under no legal liability to pay, induced the workmen to leave his employment by deterring or threatening to deter others from entering it, so as to render him reasonably apprehensive that he could not carry on business without paying the money demanded. The court in that case permitted him to recover the money which he had thus paid. The court said in that case: "It is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions."

If it be true, as plaintiff alleges, that the article of the association to which we have called attention was to force him to pay a debt which he did not owe, still no cause of action existed, as he did not pay the money demanded. A

party may engage in the grocery business, selling the necessities of life, and a hungry, starving man might call at his place of business, and seek to buy such articles of food as he needs; and, while we would say it was inhuman for the grocerman to refuse to sell him, yet it could not be said that his refusal was unlawful, and a cause of action could not be maintained against him for such refusal. When one desires to bury his dead, it may be an unfeeling act for an undertaker to refuse to furnish necessary material and necessary services to accomplish it; still his refusal to do so does not impose any legal liability upon him. Undertakers are approached by those in great bereavement, who desire their services to inter their dead. Under such circumstances, they do not feel disposed to demand, in advance, compensation. Regard for the feelings of those so bereaved forbids that they do so. However, if one has on a previous occasion received the services of the undertaker, and his material, and has refused or failed to pay the bill, it is certainly not unreasonable to refuse to permit him to increase his indebtedness or to render him services. To afford mutual protection against such persons, it is not unlawful for the undertakers of the community to associate themselves together, and agree to refuse to render a like service to one who has refused or failed to pay such expenses in the past to some member of the association. There is no allegation that Brewster ever applied to the Louisville Coffin Company for the necessary material to bury his wife, but sought to make them liable, because, as is alleged, it would not sell any of the articles dealt in by it to any funeral director to use in Jefferson county unless he should be a member of the "Funeral Directors' Association of the Fall Cities." There is no law which attempts to regulate as to whom an individual or corporation shall sell articles of merchandise, such as coffins, etc. In this opinion we do not express any views as to whether the members of the Funeral Directors' Association have been guilty of a violation of chapter 101, Ky. Stat., in the matter of regulating and fixing the price of merchandise, etc., but we simply pass upon the question before us, which is as to the right of the plaintiff to maintain this action.

The judgment is affirmed.

MARYLAND COURT OF APPEALS.

Alcaeus HOOPER, Mayor of Baltimore, et al., Appts.,
v.

BALTIMORE CITY PASSENGER RAILWAY COMPANY.

(35 Md. 509.)

A street railway company has the right to use the trolley system without the sanction of the mayor and city council where its charter authorizes it to use "any mo-

tive power and means of traction which the mayor and city council may sanction or which shall be authorized to be made use of in the city . . . by another corporation exercising street-railway franchises thereon" and the legislature has subsequently given express authority to other companies to use the trolley system in that city.

(April 1, 1897.)

A PPEAL by defendants from a decree of the Circuit Court of Baltimore City enjoining them from interfering with plaintiff's at-

NOTE.—As to the kind of power which may be used for street railways, see also *Indianapolis Cable Street R. Co. v. Citizens' Street R. Co.* (Ind.) 8 L. R. 38 L. R. A.

A. 539; also *Re Third Ave. R. Co.* (N. Y.) 9 L. R. A. 124; *Potter v. Saginaw Union Street R. Co.* (Mich.) 10 L. R. A. 176, and cases cited in notes thereto.

tempt to change the motive power of its railway system. *Affirmed.*

The facts are stated in the opinion.

Messrs. Thomas G. Hayes, Thomas J. Elliott, and Williams & Williams for appellants.

Messrs. Arthur W. Machen and Bernard Carter for appellee.

Fowler, J., delivered the opinion of the court:

Nearly four years ago the Baltimore City Passenger Railway Company filed a bill in the circuit court of Baltimore city, for an injunction to restrain the then mayor of the city of Baltimore and others from preventing or obstructing the erection on Baltimore street or any other street in the city of Baltimore, along the lines of any of that company's railway tracks, of suitable iron poles for the use of what is known as the "trolley system." To the bill just referred to the then defendants demurred. But after a full hearing, this demurrer was overruled, and it was held, in conformity with the opinion of the learned judge below, that the plaintiff was entitled to the relief prayed, that is to say, that the Baltimore City Passenger Railway Company had the right under its charter to use the trolley system of propelling its cars on Baltimore street or on any other street in that city on which it had its tracks.

From that decree no appeal was taken and the railway company at once proceeded to introduce the trolley system on its Baltimore street and some other lines. Recently, desiring to discontinue the cable system on its blue line, and in its place to use the trolley system, it was preparing to make the change, and for that purpose, in compliance with certain city ordinances, permission was sought from and given to it by the city commissioner to erect iron trolley poles, but the appellant, as mayor of Baltimore city, refused to allow poles to be erected as requested. Whereupon the railway company filed the bill in this case, which makes substantially the same allegations that are made in the former bill, and also alleges that the appellant intended to make use of the authority of his official position and of his influence with the police of the city to prevent said company from making the desired change in its method of traction and motive power, and that such intended forcible obstruction of the proposed work was unlawful, not only because it was an unjustifiable interference with the rights and privileges of said company granted to it by the legislature, but also because it was contrary to the decree passed in the former case.

The court below ordered the injunction prayed for to issue, and the mayor and the other defendants have appealed.

Although much was said at the hearing as to the binding effect in this case of the decree in the former case, and it was very earnestly contended by the appellee company that these appellants are concluded by it, we will not stop to consider any of the preliminary or technical questions arising out of the attempted application of the doctrine of *res judicata*, for we are all of opinion that conceding, as contended by the appellants, that the former de-

creed has no force or effect whatever in this case, the facts appearing in this bill, and the answer and exhibits, and the laws and ordinances by which the rights and duties of the respective parties are to be determined, fully warrant the decree appealed from. We will proceed to state the grounds of our conclusion.

The Baltimore City Passenger Railway Company, the appellee in this case, is the oldest company of the kind in the city of Baltimore, having been the first one incorporated by the legislature of Maryland (chap. 71 of the Acts of 1861-1862). Ever since its incorporation it has owned and used several railway tracks laid in the streets of that city. Under its original charter the appellee was authorized to use horses as a motive power, but by an amendment thereof, by the act of 1890, chap. 271, it was authorized to use improved methods of traction and motive power different from horses upon its railways, and to increase its capital for that purpose. By the 1st section of this act it was authorized to "use upon any or all of its railway tracks in the city of Baltimore any cable system or other system of propulsion by means of stationary engines, any pneumatic motors, stored electricity motors, and any motive power and means of traction which the mayor and the city council may sanction, or which shall be authorized to be made use of in the city of Baltimore by any other corporation exercising street railway franchises thereon."

Since the passage of the foregoing act almost all, if not all, the street railway companies have been authorized to use the trolley system. And in the case of the traction company the legislature has by the act of 1892, chap. 210, authorized it "to place and use upon any or all of its tracks" the trolley system. Also by an act of the same year, chapter 282, the Baltimore, Hampden, & Lake Roland Company was given authority to propel its cars in certain streets by the same system. It would seem to follow clearly from the act of 1890, chap. 271, and the subsequent action of the city, and the legislature in authorizing the other companies to use the trolley system that the appellee is by the very words of that act empowered to use that system on "any or all of its tracks in the city of Baltimore." But in answer to what appears to be the plain meaning of the act in question, the appellants contend, first, that the act of 1890, chap. 370, which was passed at the same session and approved on the same day as the act of 1890, chap. 271, repealed or modified chapter 271 so that the right to use the trolley system conferred by the legislature upon the appellee company cannot be exercised by it without the consent of the mayor; second, that even if the act of 1890, chap. 271, gave to the appellee the power to use the trolley system on its tracks in Baltimore city, the power so conferred "is limited to a grant of the kind of motive power which may be used, and not to the mode and appliances to be placed in the streets of the city in order to use such power;" and third that express power has been conferred upon the mayor and city council to require all telegraph, telephone, electric light, or other wires to be placed underground after such reasonable notice as they may prescribe.

1. It would seem to be too clear for controver-

say that the appellee has a right by virtue of legislative grant to use the trolley system, whatever that may be. Nor is it to be supposed that the legislature would grant this right, and that, too, in the language in which the grant is made to the appellee, and at the same time place it in the power of the mayor to destroy this right, not by any affirmative action, but merely by refusing to give his assent to the erection of iron poles. The right to use this system is given to the appellee in two ways, first, it may use any system of propulsion by means of stationary engines, and second, it may use any system of propulsion which shall be authorized to be used by any other street-railway company in Baltimore city. We cannot believe that the legislature intended to give to the mayor any such power as is claimed for him here. For, it must be remembered that this is not the case of a corporation upon which the legislature has merely conferred a franchise, the exercise of which in the city of Baltimore may depend upon the consent of the mayor, or of the municipality, but this appellee by virtue of its charter had been for many years before the act of 1890 in the full exercise of its franchises in the streets of Baltimore subject, of course, to the right of the city to regulate the use of its streets.

If, therefore, as we have said, and as seems to us must be conceded, the act of 1890, chap. 271, operated as a legislative grant to the appellee to use that something which is called the trolley system, it necessarily follows that the mayor and city council cannot qualify or abridge that grant, nor, of course, could the mayor alone, by refusing to issue a permit to place the poles, make that unlawful which the legislature had declared to be lawful. In the case of *State, Baltimore, C. & P. B. R. Co., v. Latrobe*, 81 Md. 222, McSherry, Ch. J., delivering the opinion of the court, it is said "if the act to be done be a lawful one and be sanctioned by legislative enactment . . . and if the person or body corporate proposing to do it be duly empowered to perform it, the mayor and city commissioner cannot, nor can either of them, make the act illegal or prevent its performance by refusing to issue a permit."

2. But in answer to this view, it is contended by the appellants that by a fair and reasonable construction of the act of 1890, chap. 271, the legislature conferred upon the appellee only the right to use a certain kind of motive power, and that the legislative grant did not include the mode of construction and appliances to be placed in the street, and therefore the mayor has the right, and it is his duty, under the circumstances of this case, to refuse to permit the appellee to do that which it has no right to do. We think, however, that this view and the distinction on which it is based are more ingenious than sound. It will be observed that the grant to the appellee includes both, "any motive power," as well as "any means of traction," authorized to be used by the other companies. The motive power which the appellee proposes to use and which it is conceded it has been authorized to use is electricity, and the means by which that motive power is to be made available are stationary engines, and overhead wires. This appellee has been for some years using on its blue line what is known and what is called in the act of 1890

"the cable system," which is generally understood to imply a stationary engine and an underground cable, and the "trolley system," which the traction company was authorized to use, and which, therefore, this company has the right to use, is just as generally understood to imply the use of a stationary engine and overhead wires strung on poles. We cannot suppose that when the legislature granted to the appellee the right to use the "trolley system," as it undoubtedly did, it did not intend to include in its grant the right to use overhead wires and suitable poles, which are the distinctive characteristics of that system. If we are correct in the meaning and force we have attributed to the expression "trolley system," it follows that when the legislature gave the traction company permission to use this system on all its tracks in the city of Baltimore it at the same time authorized the use of overhead wires and poles. We cannot suppose that a different meaning is to be attached to these words when construing the grant made to the appellee. Without discussing this question further we think it very clear that the legislature intended to permit the appellee to use the trolley system, and that this system as generally understood, and, therefore, as authorized to be used by the act of 1890, chap. 271, includes electricity as a motive power and overhead wires and poles as a means of traction. Legislative grants either to individuals or corporations are not to be weakened or destroyed by strained or unreasonable constructions of statutes, based upon ingenious suggestions and theories. The right to use the trolley system, granted to the appellee in express terms, is not to be taken from it because, in the opinion of the appellants, some other system may be more desirable and safer, nor because the mayor refuses to do what it is his duty to do, namely, to grant the permit which it was also the duty of the appellee to request. If the trolley system is so dangerous to the public safety and so objectionable as was contended, the legislature, or the municipality, if power has been given to it, and not the mayor alone, should correct the alleged evil.

3. It was also urged that if the mayor or the city had not the power claimed for him, the act of 1890, chap. 270, which gave the city power to require all wires to be placed under ground would be nugatory. But the effect of that act is not in any manner involved in this case. The power conferred by it has not yet been exercised, and the only ordinance which thus far has been proposed to be passed in pursuance thereof "to construct a general system of conduits under the streets for the reception of wires" expressly excepts trolley lines." Doubtless, when the city of Baltimore determines to exercise, through its mayor and city council, the power given it by the legislature, to order all wires to be placed under ground, it will be able to do so without difficulty, but whether this be so or not, we cannot now determine. It is sufficient for the present purpose to say that neither the appellee, nor any of the railway companies using the overhead wires in Baltimore city, have been yet required to place them under ground.

It follows that the decree appealed from must be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Margaret C. SPADE

v.

LYNN & BOSTON RAILROAD COMPANY.

(108 Mass. 283.)

No recovery for fright, terror, alarm, anxiety, or distress of mind, even if these result in physical injury, can be had in an action for negligence, where there are no physical injuries except those caused solely by the mental disturbance.

(May 19, 1897.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for injury from fright alleged to have been caused by its negligence, which resulted in a verdict for plaintiff. *Sustained.*

The facts are stated in the opinion.

Mr. C. K. Cobb, for defendant:

Serious fright of an apparently healthy spectator is not the natural consequence of taking a man by the collar and pulling him a few feet through the door of a car, much less a serious bodily injury resulting from such fright.

Victorian R. Comrs. v. Coultas, L. R. 18 App. Cas. 223; *Ewing v. Pittsburgh, C. O. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 686; *Haile v. Texas & P. R. Co.* 28 U. S. App. 80, 60 Fed. Rep. 557, 23 L. R. A. 774; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 252, 26 L. ed. 1070, 1071; *Renner v. Canfield*, 86 Minn. 90; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607.

Although the defendant might have anticipated fright as the result of its act, it had no reason to anticipate that fright could operate to produce bodily injury or disease.

Haile v. Texas & P. R. Co. 28 U. S. App. 80, 60 Fed. Rep. 560, 23 L. R. A. 774.

The law does not recognize the kind of damage suffered by the plaintiff in this case as the foundation of liability, on grounds of public policy.

Victorian R. Comrs. v. Coultas, L. R. 18 App. Cas. 223; *Ewing v. Pittsburgh, C. O. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 686; *Joch v. Dankwardt*, 85 Ill. 881; *Salina v. Troesper*, 27 Kan. 544; *Johnson v. Wells, F. & C. Co.* 6 Nev. 224, 3 Am. Rep. 245; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 721; *Canning v. Williamstown*, 1 Cush. 451; *Warren v. Boston & M. R. Co.* 163 Mass. 484.

There can be no recovery for mental fright and suffering unaccompanied by any injury to the person.

Canning v. Williamstown, 1 Cush. 451; *Warren v. Boston & M. R. Co.* 163 Mass. 484; *Beven, Neg.* p. 76; *Sedgw. Damages*, § 44; *Ewing v. Pittsburgh, C. O. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 686; *Hale, Damages*, p. 93; *Lynch v. Knight*, 9 H. L. Cas. 577;

NOTE.—As to fright as the basis of a cause of action, see note to *Ewing v. Pittsburgh, C. O. & St. L. R. Co.* (Pa.) 14 L. R. A. 686, also *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 731.
88 L. R. A.

Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109; *Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 808.

Negligence is not actionable, unless it results in damage.

Hale, Damages, p. 11; *Brunsdon v. Humphrey*, L. R. 14 Q. B. Div. 141.

Messrs. Sherman L. Whipple and William R. Sears, for plaintiff:

As the relation between fright and injury to the nervous and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that if negligence caused fright, and such fright in its turn so affects such structures as to cause injury to health, such injury cannot be a consequence which in the ordinary course of things would flow from the negligence, unless such injury accompanied such negligence in point of time.

Bell v. Great Northern R. Co. L. R. Ir. 26 C. L. 428.

Unless there is a distinction between a mental and nervous shock, then "nervous shock in animals, apart from physical contact like nervous or mental shock in human beings, will not give ground for action." But it has been held that a negligent act, without actual physical contact, which frightens a horse and causes him to bolt so that he is injured, is a ground of action.

Beven, Neg. p. 78, and cases cited in note 3; *Pugh v. London, B. & S. C. R. Co.* [1896] 2 Q. B. 248.

The leading text-writers are nearly unanimous in condemning the decision in the case of *Victorian R. Comrs. v. Coultas*, L. R. 18 App. Cas. 223.

Sedgw. Damages, 8th ed. §§ 860, 861; *Sutherland, Damages*, 2d ed. §§ 21-23; *Clerk & Lindsell, Torts*, 2d ed. 116; 12 Law Quar. Rev. 808.

Allen, J., delivered the opinion of the court:

This case presents a question which has not heretofore been determined in this commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: Whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear, or mental distress, occasioned by the negligence of another, which does not result in bodily injury, but that, when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person,

but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston & M. R. Co.* 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground; and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not, therefore, a case of mere fright, and resulting nervous shock. The case calls for a consideration of the real ground upon which the liability or nonliability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and, to a greater or less extent, disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotion caused by imminent danger, though some are less affected than others. It must also be admitted that a timid or sensitive person may suffer, not only in mind, but also in body, from such a cause. Great emotion may, and sometimes does, produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence; and, if compensation in damages may be recovered for a physical injury so caused, it is hard, on principle, to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects. It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different, and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered. Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties,—not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look

to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And, in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveler is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travelers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But as a general rule a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Alsop v. Alsop*, 5 Hurlst. & N. 584, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennox*, 155 Mass. 70; *White v. Dresser*, 185 Mass. 150, 46 Am. Rep. 454; *Hillebroun v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 181; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 803; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Jones v. Fields*, 57 Iowa, 817; *Renner v. Canfield*, 86 Minn. 90; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, L. R. 9 Prob. Div. 105; *Hobbs v. London, & S. W. R. Co.* L. R. 10 Q. B. 11, 122.

The law of negligence, in its special application to cases of accidents, has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and, if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright, and that this would open a wide door for unjust claims, which could not successfully be met.

These views are supported by the following decisions: *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 84 L. R. A. 781; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666; *Haile v. Texas & P. R. Co.* 9 C. C. A. 184, 23 U. S. App. 80, 60 Fed. Rep. 557, 28 L. R. A. 774. In the following cases a different view was taken: *Bell v. Great Northern R. Co.* L. R. Ir. 26 C. L. 428; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203; *Fitzpatrick v. Great Western R. Co.* 12 U. C. Q. B. 645. See also Beven, Neg. 77 *et seq.* It is hardly necessary to add that this decision does not reach those classes of action where an intention

to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox*, and *Fillebrown v. Hoar*, already cited; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. In the present case no such considerations entered into the rulings, or were presented by the facts.

The entry therefore must be: *Exceptions sustained.*

NEW HAMPSHIRE SUPREME COURT

Nathan P. HUNT, Receiver of People's Fire Insurance Company,

NEW HAMPSHIRE FIRE UNDERWRITERS' ASSOCIATION.

GRANITE STATE INSURANCE COMPANY, Intervener.

(.....N. H.)

1. The liability of a reinsurer is not lessened by the insolvency of an intermediate insurer which has become unable to pay the loss, but the reinsurer's liability is for the entire amount of the loss against which they agreed to indemnify the prior insurer.
2. A reinsurer may be required to pay the amount of the loss which it is liable for directly to the insured or the party ultimately entitled to the money, when the prior insurer which it has indemnified has become insolvent.

(July 26, 1885.)

ACTION by the receiver of the People's Fire Insurance Company to recover an amount of reinsurance upon a loss which that company had in turn reinsured for the Granite State Insurance Company. *Judgment for the intervener.*

The Boston & Maine Railroad Company took a policy with the Granite State Insurance Company for \$25,000, that company reinsured one third of the risk with the People's Fire Insurance Company, and the New Hampshire Fire Underwriters' Association reinsured one half of the risk of the People's Company. The defendant's contract provided that loss, if any, was to be settled and paid *pro rata* with the reinsured and at same time and place and upon the same terms and conditions. A loss to the amount of \$2,800 having occurred, the Granite State paid the amount. The People's Fire Insurance Company having become insolvent, its receiver instituted this suit to compel payment

of the reinsurance of its risk, and the Granite State Company intervened claiming that the amount of the defendant's liability should be paid to it.

Further facts appear in the opinion.

Mr. David Cross, for plaintiff:

It makes no difference whether the plaintiff shall hereafter have the ability to pay and shall pay the whole, or a per cent, and the defendant is liable to pay the amount owed by it without regard to the ability of the People's Company.

Actual payment of the loss by the reinsured is not a condition precedent to payment by the reinsurer, and a right of action begins as soon as the legal liability as to the amount is determined.

Wood, Ins. § 87; Blackstone v. Alemannia F. Ins. Co. 56 N. Y. 106; *Biddle, Ins. § 384; Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *Gantt v. American Cent. Ins. Co.* 68 Mo. 503; *Fame Ins. Co.'s Appeal*, 83 Pa. 396; *Norwood v. Resolute F. Ins. Co.* 4 Jones & S. 552.

In *Illinois Mut. F. Ins. Co. v. Andes Ins. Co.* 67 Ill. 362, 16 Am. Rep. 620, the question was the extent of the liability of the reinsurer to the insured. The insurer was insolvent, and had paid 10 cents on the dollar, and the court held that to be the extent of the reinsurer's liability.

Hone v. Mutual Safety Ins. Co. 1 Sandf. 137.

But in *Consolidated Real Estate & F. Ins. Co. v. Cashow*, 41 Md. 74, it is decided that the reinsurer is liable to pay the whole amount of reinsurance without regard to the amount paid by the original insurer.

See also *Biddle, Ins. § 1408.*

Messrs. Leach & Stevens for defendant.

Carpenter, J., delivered the opinion of the court:

There is no suggestion that the action is brought for the benefit of the Granite State.

NOTE.—As to reinsurance, see also *Fancuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.* (Mass.) 10 L. R. A. 423, and note thereto; also *German-American Ins. Co. v. Commercial F. Ins. Co.* (Ala.) 16 L. 88 L. R. A.

R. A. 291; *Union Ins. Co. v. American F. Ins. Co.* (Cal.) 28 L. R. A. 692; *Chalarton v. Insurance Co. of N. A.* (La. Ann.) 36 L. R. A. 742.

The question presented is whether the defendants are bound to pay to the People's Company the entire amount of the loss against which they agreed to indemnify the People's, or only such a part thereof as the insolvent People's may ultimately pay. The defendants received a full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss. *Blackstone v. Alemania F. Ins. Co.* 56 N. Y. 106. The premiums received by them, and the sum to be paid by them in case of loss, were intended to be, and in theory of law are, precisely equivalent. *King v. State Mut. F. Ins. Co.* 7 Cush. 1, 9, 54 Am. Dec. 688. Their position is, in legal effect, the same as it would be if the People's, for the purpose of paying the loss, had deposited with them the full amount of it in money. But the further question whether the money due on the contract equitably belongs and should be paid to the People's or to the Granite State arises on the face of the case. For convenience of consideration, a simpler parallel case may be taken. The People's insure A's house for \$10,000, and immediately reinsure for the same amount with the defendants. The house is burned, and shortly after the People's become insolvent, and, as may be supposed, unable to pay any part of their indebtedness. The defendants, willing to perform their just obligations, file a bill of interpleader against A and the People's, and pay the \$10,000 into court. To which party—A, who has lost that amount, or the People's, who have lost nothing—does the money, in equity, belong? The particular terms of the policy issued by the defendants are not material. It must be assumed that by it the defendants merely stipulate to indemnify the People's to the extent of the sum named, against loss by reason of the destruction of A's house by fire, because they have no power to make any contract of insurance except contracts of indemnity. In *Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 174, Jarib Herrick, as principal, and John W. Herrick, as surety, were indebted to the plaintiffs upon a promissory note. January 27, 1877, Jarib gave John W. a mortgage of real estate conditioned to indemnify him against loss by reason of his having signed the note. In 1878, Jarib obtained his discharge in bankruptcy. His assignee sold the land, subject to the mortgage, to the defendant S. In 1879, John W. died, insolvent. No part of the note being paid, the plaintiffs brought their bill in equity against Jarib, the administrator of John W., and S., praying that the mortgage be assigned to them, and prevailed. The condition of the mortgage was not that Jarib should pay the note, but that he should save his surety harmless. The surety paid, and could pay, nothing. The condition, according to its literal terms, was not, and apparently never could be, broken. The court said that equity disregards mere form, and held that the transaction was, in substance, an appropriation of the mortgaged property for the payment of the debt in case it was not otherwise satisfied by the mortgagor. The purchaser at the assignee's sale took the property with notice. In equity it belonged to the plaintiffs for the purpose of satisfying their debt, and to the extent

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necessary for that purpose. Their right did not depend upon privity of contract. In fact, there was none. It did not appear that the plaintiffs had any knowledge of the mortgage until they filed their bill. It was immaterial that the relation of principal and surety existed between the mortgagor and mortgagee. The result would have been the same had they been joint principals, or if the mortgage had been given by the surety to the principal. It was equally immaterial that the mortgagee was bound to pay the debt, except that his liability was essential to the form of the security given. The result would have been the same if Jarib had given a deed of the same property to a stranger on condition that the grantee indemnify and save him harmless from his liability on the note. In short, the decision rested wholly upon the broad ground that in equity and good conscience the mortgaged property should be applied to the satisfaction of the plaintiff's debt. The facts, in all material respects, and the judgment of the court, in *Holt v. Penacook Sav. Bank*, 62 N. H. 551, and *Barton v. Oroydon*, 63 N. H. 417, were the same as in *Keene Five Cents Sav. Bank v. Herrick*. These cases establish the propositions that a creditor, for the satisfaction of his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment, and that an appropriation or pledge of property by the debtor for the purpose of indemnifying against the debt any person liable upon it is equitably equivalent to a provision for its payment. The principle of the first proposition is often applied in actions at law. *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 827; *Reed v. Paul*, 181 Mass. 129; *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Berry v. Gillis*, 17 N. H. 9, 48 Am. Dec. 584; *Hodgdon v. Merrill*, 26 N. H. 18. If A, for a good consideration, agrees with B to indemnify him against his indebtedness to C, A, as between him and B, becomes the principal debtor. The debt is, in equity, his debt, and not B's. Having received a full consideration for his undertaking, he is morally and equitably as much bound to pay the debt to C as he would be if B had delivered to him and he had accepted the amount of the debt in gold coin, in trust for its payment. If, for technical reasons, the law is powerless to enforce the duty, equity is subject to no such weakness. *Philbrick v. Shaw*, 61 N. H. 856. It will not permit him to retain the money, the consideration of his agreement, and escape its performance on the flimsy pretext that, until B is compelled to pay the debt, or a part of it, he has fulfilled the letter of his obligation. He may be compelled at law to pay the debt if B is solvent, and in equity, at least, he is not relieved from the duty by the accident of B's insolvency. Whether the agreement may be revoked at any time before C is informed of and assents to it need not be considered. It is enough for present purposes that it cannot be annulled after C intervenes and asserts against B his claim for its performance. An insurance contract is a contract of indemnity. "It does not differ from a bond of indemnity, or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks, to which the obligee or creditor would otherwise be ex-

posed. The only difference is in names and the form of the instrument, the consideration for an insurance being always called a premium, and the instrument containing the terms of the contract, a policy." 1 Phillips, Ins. 2d ed. 2. By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not, in law, directly liable to the insured. As between the two, he is the principal obligor. In the case supposed (as in the actual case), as long as the People's are solvent there is no difficulty or question. A recovery of them the full amount of his loss, and they recover the same sum of the defendants. The contracts of both companies are performed. There is no occasion for this circuitry. The sole duty of the defendants under their contract is to hold the People's harmless. They have the right to pay directly to A the amount of his loss. By so doing they fully perform their contract. The People's obligation to A is discharged. But, whichever method is adopted, A is indemnified, and the People's, assuming that the same premium is paid for the insurance and for the reinsurance, neither gain nor lose by the transaction. The plaintiff claims that, by the mere accident of the People's insolvency and inability to pay more than say 10 per cent of their liabilities, the defendants' contract is materially modified. They are no longer at liberty to perform it by paying directly to A the amount of his loss. It is not now enough that, in compliance with the literal terms of the contract, they protect the People's from loss. They must, it is said, pay the full amount of the loss to the People's, and A, in common with their

other creditors, is entitled to 10 per cent only of the sum justly due to him. In other words, the People's, for the sole reason that they can pay 10 per cent only of their indebtedness, are, it is claimed, justly entitled to realize out of A's loss of \$10,000, which, by their contract, they are bound to pay, a net profit of \$9,000. They are to profit by their losses. It is for their interest—for the interest of every one of their creditors—that all the property insured by them, and by them reinsured in a solvent company, be destroyed by fire. Such a result equity will not tolerate. It is not good law or good morals that one should profit by the destruction of his neighbor's property (1 Story, Eq. Jur. § 498), especially if he has himself agreed to make the loss good. "A contract to tempt a man to transgress the law . . . is void by the common law." *Collins v. Blanton*, 2 Wils. 847, 850.

The People's, under their contract with defendants, are entitled to protection against loss by reason of the destruction of the insured property, and to nothing more. They cannot object to a judgment or decree which has that effect. The defendants cannot object to a judgment that they pay the money to the insured, because it is to them immaterial whether they pay it to him or to the insurer. Upon the filing of a proper bill in equity by the Granite State, there will be a decree in their favor, or they may, upon reimbursing the plaintiff for all expenses hitherto incurred by him in the prosecution of this action, take judgment therein for their use. *Herckenrath v. American Mut. Ins. Co.* 8 Barb. Ch. 63, and the later cases which have followed it, have been considered, and their doctrine is not approved.

Case discharged.

All concur.

NEW JERSEY SUPREME COURT.

NEW YORK & GREENWOOD LAKE
RAILWAY COMPANY

v.
NEW JERSEY ELECTRIC RAILWAY
COMPANY.

(.....N. J.....)

*1. The same character or degree of care to avoid collision must be exercised by those operating an electric car along a public highway, in approaching and going over a steam railroad crossing of such highway, as is required to be exercised by one driving or operating any ordinary vehicles along and over such railroad crossing; and they must look and listen for the approaching train, and, if such care be not exercised, the electric railway company will be liable to the steam railroad company for injuries arising thereto by reason of collision, un-

*Headnotes by LIPPINCOTT, J.

NOTE.—As to care in running electric car over railroad crossing, see also *Cincinnati Street R. Co. v. Murray* (Ohio) 30 L. R. A. 508.
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less the negligence of the servants of the railroad company contributed to the accident.

2. The steam railroad has the right of way over such crossing, to run at such high rate of speed as it chooses, and ordinarily it exercises all the care required when the whistle of the locomotive is sounded or its bell is rung at the distance required by the statute from the crossing, and the sound of the bell or whistle continued until the crossing is passed; but this it is bound to do, and, if the neglect to so sound such whistle or ring such bell contributes to the collision and injury, the railroad company will be prevented from a recovery for injuries arising thereto by reason of the collision.

3. The fact that the electric company and the railroad company have an agreement with each other providing for a derailing switch on the tracks of the electric railway, as a precaution against collision at such crossing, and providing also, in addition thereto, that before an electric car shall be permitted to pass over such crossing the conductor of the electric car who shall be operating such derailing switch shall look in both directions, and

listen for the approach of the railroad train, will not excuse the railroad company from giving the statutory signals as a warning of such approach; and where the neglect to give such signal, in an action on the part of the railroad company against the electric company, appears as contributing to the collision, the railroad company cannot recover, notwithstanding the negligence of the conductor of the electric car in operating the derailing switch, and his neglect to look in both directions, and to listen for the approach of the train.

4. Questions of dispute of matters of fact relating to the negligence of the one party and the contributory negligence of the other are properly submitted to the jury.

(June 7, 1897.)

ON RULE by plaintiff to show cause why a new trial should not be granted after verdict in favor of defendant in an action brought to recover damages for losses which were alleged to have been caused to plaintiff by defendant's negligence. *Discharged.*

The facts are stated in the opinion.

Messrs. Cortlandt Parker and Cortlandt Parker, Jr., for plaintiff:

As between this electric railway company and the railroad company, the sounding of the bell or blowing of the whistle was of no importance.

These signals are to be given to comply with the statute and for the benefit of ordinary travelers on the highway.

When the prescribed audible signals are given in conformity with the statute, the company is absolved from negligence so far as concerns this kind of audible warning.

New York, L. E. & W. R. Co. v. Leaman, 54 N. J. L. 202, 15 L. R. A. 428.

If one or both the conductor and motorman had been killed or injured, their negligence was so plain that no action for damage on account of their injury could have been maintained. The court would have said that they were each of them clearly guilty of negligence; that although they might say they looked, yet that they either lied or did not look attentively.

Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; *Pennsylvania R. Co. v. Leary*, 56 N. J. L. 705; *Delaware, L. & W. R. Co. v. Hefferan*, 57 N. J. L. 149; *Goodenough v. Pennsylvania R. Co.* 55 N. J. L. 596.

Mr. William B. Gourley for defendant.

Lippincott, J., delivered the opinion of the court:

The defendant is the operator of an electric street railway running from Paterson to Passaic and Rutherford, and along the Little Falls road in the county of Passaic, in this state. The railroad of the plaintiff crosses the Little Falls road, which is a public highway, at a place called "Singac," in the county of Passaic, and also crosses the electric street railway of the defendant, which runs along said road at this point. On the 2d day of September, 1895, a locomotive, hired from another railroad company, and a train of cars, both operated by the plaintiff, and an electric car of the defendant company, came into collision at this crossing. The track of the plaintiff at or about this point was torn up and injured, and the

plaintiff was compelled to redeem the tickets of its passengers on such train. It now sues the defendant for the costs of the repairs to the track, such of its cars as were injured, and the money lost in the redemption of the tickets of its passengers, on the ground that the collision was caused by the negligence of the motorman and conductor of the electric car in driving upon the crossing. The evidence shows that there was at the time of this accident, on the track of the electric railway, about 50 feet from the rails of the steam railway, what is called a "derailing switch." If the electric car passes that switch while it is in its usual condition, the car is derailed. In order that the car can proceed beyond this point and pass over the tracks of the steam railroad, the switch must be closed, and in order to close it the conductor of the electric car is required to go forward, cross over the tracks of the steam railroad to a lever placed in the ground there, and by raising the lever close the switch, so that the motorman can run his car along and over the tracks of the steam railroad. The proof shows that the conductor in charge of the electric car on the day in question, at a point beyond the derailing switch, left the car, and walked across the tracks of the railroad, stooped down, and raised the lever which closed the switch, and when that was done the motorman moved his car past the derailing switch, and up to the tracks of the steam railroad, and in attempting to get across the car was struck by the locomotive. This derailing switch and its operation are provided for by agreement in writing between the plaintiff and defendant, but it is not perceived in what manner the case can at all be controlled by such agreement, and these particular facts are stated as a part of the evidence and circumstances in the case as bearing upon the question of whether the conductor or motorman, or either of them, were negligent in their duty in approaching and going over the railroad tracks with the car, and, if so, whether the accident arose from such negligence. The plaintiff contended that such negligence existed, and that recovery should be had. The contentions of the defendant were: First, that all the care required by law was exercised by the conductor and motorman in approaching the crossing; and, second, that the plaintiff company itself was in default of its duty in approaching this crossing by reason of the negligence of the engineer in failing to sound the whistle or ring the bell on the locomotive, 900 feet from the crossing, and to continue such whistling or ringing until the crossing is passed. These contentions of the plaintiff and the defendant gave rise to much disputed evidence on both sides. There was evidence tending to show that the only precaution on the part of the motorman and conductor to avoid collision was the operation of the machinery of the derailing switch, and, outside of the exercise of that precaution, those in charge did not look or listen, or use other proper precautions to avoid danger from the approach of the locomotive. Some of the evidence shows that an approaching train can be seen from the derailing switch, and from the lever thereof, over 2,000 feet away. At least the facts were such on this point that it was proper to leave them to the jury for their de-

termination. There was also evidence of such a character as required the trial justice to submit to the jury the question whether contributory negligence had been established on the part of the plaintiff; that is, whether the whistle of the locomotive was sounded, or the bell rung, as required by the statute, as the train approached the crossing. 2 Gen. Stat. p. 2669, §§ 6, 17; *New York, L. E. & W. R. Co. v. Leaman*, 54 N. J. L. 202, 15 L. R. A. 426. From the record it appears that the jury found that the accident resulted from the negligence of the conductor and motorman in charge of the electric car, and also that the negligence of the engineer in charge of the locomotive contributed to the accident, and a verdict, therefore, was returned in favor of the defendant.

It is needless to go into a discussion of the evidence in this cause, as it is such as to lead the court to the conclusion that the verdict of the jury is not contrary to the evidence, nor against the weight of it, and the court will not determine the comparative negligence of which the parties were respectively guilty. *Wilds v. Hudson River R. Co.* 24 N. Y. 430; *New Jersey Exp. Co. v. Nichols*, 88 N. J. L. 489; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180. A question of fact fairly arises upon the plaintiff's negligence, and it was necessary to submit it to the jury. *Delaware, L. & W. R. Co. v. Shelton*, 55 N. J. L. 342. *Delaware, L. & W. R. Co. v. Hefferan*, 57 N. J. L. 149.

No error of the trial justice in the admission or rejection of evidence has been pointed out, and an examination of the case reveals none. Neither was the verdict against the charge of the court to the jury. The plaintiff selects an excerpt from the charge in respect to contributory negligence, and insists that it was erroneous. The trial justice in speaking to the jury of the responsibility placed upon the railroad company to ring the bell or sound the whistle of the locomotive continuously for 800 yards from the crossing of the highway, said: "If the jury believe that the conductor or motorman of the electric car did not see the approaching train, and they would have seen it, or heard such a signal, if it were given, and avoided the accident in case the bell was rung or the whistle blown for that distance, the Greenwood Lake Road (the plaintiff) cannot recover." This was, in effect, charging that the plaintiff, in approaching this crossing, was bound to give the statutory signals, and a failure to do so, if it caused or contributed to the accident, was contributory negligence, and would prevent a recovery. It is not perceived that this excerpt of the charge was erroneous. The court had already fully charged the duties devolving upon the conductor and motorman of the electric car, that they were bound to look, and bound to listen for the approaching train, and take other precautions in order to avoid collision, in addition to the duty of exercising the protection of the derailing switch; and that if they saw it, or heard it, or under the circumstances ought to have seen it or ought to have heard it, and did not avoid its danger, they were negligent and responsible, and by the part of the charge to which this exception is taken the responsibility of giving the signals required by the statute is 38 L. R. A.

imposed upon the plaintiff, and if the failure to give such contributed to the injury, the plaintiff could not recover. The duty to give this signal was imposed upon the plaintiff company in approaching and crossing this highway as a warning to all persons—pedestrians or those operating vehicles—about to cross, to avoid the dangers. The crossing was in fact a highway, and the duty of the railroad was an imperative one in view of that fact. It could not disregard this duty because an electric car was one of the vehicles of carriage using the highway, any more than it could avoid its duty towards a coach or carriage in the use of the highway. If the prescribed signal had been given, then the fact that it was not heard would be of no materiality, for the whole duty of the plaintiff would have been performed, and it would not be responsible for any of the results, whatever they might be. The statute imposes the duty, and the omission is negligence. Wherever the statute is obeyed, the duty is absolutely performed, and it would be abnormal to permit the railroad company to select any class of persons or vehicles in the use of the highway towards whom it could neglect its statutory duty. There can be no contention here that the defendant was not in the lawful use of the highway in running its electric cars thereon, under the same principles of law which govern the use of the highway by natural persons for kindred purposes. *Ottens' Coach Co. v. Camden Horse R. Co.* 83 N. J. Eq. 267, 86 Am. Rep. 542; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374. The trial court committed no error in treating the case, in matters of legal principle, as if it was the ordinary case of a traveler or a driver of a vehicle in the lawful use of the highway.

But the plaintiff further contends against the legality of this instruction of the trial court to the jury on the ground that its responsibility is limited by an express agreement in writing between the parties as to the operation of electric cars over the crossing. The facts appear to be, as shown in the case, that provision was made in the contract dated May 24, 1894, for the operation of the derailing switch in the manner described, and that, if any train approached within such distance as would render it unsafe for the electric car to proceed, then no such car should pass or attempt to pass such crossing until such approaching train, car, or engine, had passed over such crossing, or come to a full stop before reaching it. This agreement is itself a full answer to the plaintiff's contention, as between the electric car and the approaching train, that the statutory signals should not be given. The statute provided they should be given, and this agreement in no wise provides for any default in this duty, which at all times and under all circumstances was an obligatory one. The agreement does provide that the conductor of the electric car should look in both directions for an approaching train. This imposes no greater duty upon the conductor than the general principles of law had already imposed upon him. Neither did the agreement provide that the plaintiff should be free from liability to the defendant for neglect to exercise the care required by the statutes of this state; and even by the terms of the agree-

ment, reasonably interpreted, they were bound to exercise all the precautions required by law for the safe passage of the defendant's car over the crossing. Although this agreement did provide that the train of the plaintiff should have the right of way, still this agreement goes for little in this respect, for all steam railroads have this same right upon their own private way and roadbed over highways in respect to all travelers thereon, and to run at such high rate of speed as may be consistent with the safety of the passenger. This right of way does not excuse a violation of the statute prescribing signals, nor furnish any reason against such default being used as evidence of negligence. The conclusion is, as a matter of law, that the plaintiff company was bound to give the statutory signals at this crossing as a warning, as well to those

operating the electric cars, as to ordinary travelers, irrespective of this agreement between the parties, and that there was no error in the trial court in submitting the dispute of fact whether they had been given to the jury as bearing upon the question of whether the contributory negligence of the plaintiff contributed to the accident. It will be noticed that the declaration in this cause does not aver any neglect on the part of the defendant company to comply with the express agreement as a basis of recovery, and therefore the question whether the agreement is one forbidden by the statute or public policy is not here at all discussed or determined, and it is not perceived in what manner that question can have any bearing upon the determination of this cause. *The rule to show cause is discharged.*

OHIO SUPREME COURT.

STATE of Ohio, *ex rel.* Frank S. MONNETT, Attorney General,

Walter D. GUILBERT *et al.*

(.....Ohio.....)

- *1. The remedy by due course of law guaranteed by § 16 of the Bill of Rights extends to all the adversary rights of persons in property, and requires that, before there is a judicial determination affecting such right, process to obtain jurisdiction of the person claiming it shall be issued and served, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable. The act of April 27, 1890, entitled "An Act to Provide for the Registration of Land Titles in Ohio," etc. (92 Ohio Laws, p. 220), is repugnant to this section of the Constitution.
- *2. Said act is repugnant to § 19 of the Bill of Rights, because it attempts to authorize the taking of private property for uses that are not public, and without compensation.
- *3. Said act is repugnant to § 1 of article 4 of the Constitution, because it attempts to confer judicial power upon the county recorder.

APPPLICATION for a writ of mandamus to compel defendants to perform certain duties required by a statute for the registration of land titles. *Denied.*

Statement by Shauck, J.:

The petition alleges that the defendants, who are state officers, are, by the act of April 27, 1890, entitled "An Act to Provide for the Registration of Land Titles in the State of Ohio, and to Simplify and Facilitate the Trans-

fer of Real Estate" (92 Ohio Laws, pp. 220-262, inclusive), charged with the duties of preparing a uniform system of blank books appropriate to carrying out the purposes of the act, and of furnishing such books to the probate judges and other officers in the several counties of the state, and that they refuse to perform the same. It prays for a peremptory writ of mandamus commanding the performance of said duties. The case is submitted on demurrer to the petition.

Messrs. Edward H. Fitch and Guy Mallon for petitioner.

Messrs. R. A. Harrison and J. K. Richards, for defendants:

The holder of a tax title, under existing law, is denied by this act the equal protection of the law.

Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L. R. A. 886; *State, Schwartz, v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218.

The provision for an appeal is a conclusive admission that the recorder is given judicial power, and that the proceeding before him is adversary in character.

Musser v. Adair, 55 Ohio St. 466, and cases cited, especially *Ex parte Logan Branch at Logan of State Bank*, 1 Ohio St. 433.

The state has no more power to enter into the business of insuring land titles than it has to go into the business of insuring anything else.

Reeves v. Wood County, 8 Ohio St. 333; *Gilpin v. Williams*, 25 Ohio St. 283; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 886.

The act in question contravenes several provisions of the Constitution of this state:

1. Because, although it is "a law of a general nature," it has not "a uniform operation throughout the state."

2. Because it authorizes proceedings instituted and judgments rendered therein, to establish alleged titles of petitioners under it, and to extinguish the titles and claims to such lands

*Headnotes by the Court.

NOTE.—As to the constitutionality of a Torrens land title law, see also *People, Kern, v. Chase* (Ill.) 86 L. R. A. 103.

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of all other persons, without due course or process of law.

3. Because it confers judicial power upon county recorders of deeds.

4. Because the "assurance fund" feature authorizes the taking of private property for private purposes, without the owner's consent.

5. Because it impairs the obligation of contracts, contrary to a provision of the Constitution of this state as well as a provision of the Constitution of the United States.

The states are inhibited from depriving any person of property without "due process of law," and from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States as to property.

Const. Amend. 14, § 1.

The term "due process of law" has long been in use in judicial decisions and among law writers as implying correct and orderly proceedings, which are "due" because they observe all the securities for private right which are applicable in the particular case.

Civil Rights Cases, 109 U. S. 8, 27 L. ed. 836.

It was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave the Congress free to make any process "due process of law."

Den, Murray, v. Hoboken Land & I. Co. 59 U. S. 18 How. 276, 15 L. ed. 374. To the same effect, *Allen v. Armstrong*, 16 Iowa, 508; *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499.

The law of the land, in bills of right, does not mean merely an act of the legislature, for that construction would abrogate all restrictions on legislative authority. The clause means, that statutes which would deprive a citizen of the rights of person or property without a regular trial, according to the course and usage of the common law, would not be the law of the land in the sense of the Constitution.

Hoke v. Henderson, 4 Dev. L. 15, 25 Am. Dec. 677; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 374; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Salt Creek Valley Turnp. Co. v. Parks*, 50 Ohio St. 568, 28 L. R. A. 769; *Adler v. Whitbeck*, 44 Ohio St. 539.

The object of the guaranty was, in part at least, to interpose the judicial department of the government as a barrier against aggressions by any other department.

Wynchamer v. People, 18 N. Y. 378; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274.

The American Constitutions are conservatory instruments rather than reformatory; they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

Weimer v. Bunbury, 80 Mich. 213; *Hagar v. Reclamation Dist. No. 103*, 111 U. S. 701, 28 L. ed. 569.

A proceeding *in rem* is a proceeding to determine the status of the particular thing itself, 38 L. R. A.

which is confined to the subject-matter, *in specie*, in the *rem*.

Jurisdiction of the *res* is obtained by seizure under process, whereby it is held to abide such orders as may be made by the court concerning the property seized.

Cross v. Armstrong, 44 Ohio St. 623.

There are certain conditions and means under and by which the *res* is brought under the control of the court:

1. The court must have jurisdiction over the subject-matter, and actual dominion over the thing.

2. A petition or information must be filed in a court of competent jurisdiction asking the seizure of the thing, setting forth a right of action against the thing or the owner of the thing attached, and praying for judgment of condemnation or sale for the debt.

3. Notice must be given to the owner of the thing of its seizure, and the nature of the proceedings against it, or notice to the world, where the action is purely against the thing.

4. Opportunity for intervention and defense by the owner of the thing must be given.

McVeigh v. United States, 78 U. S. 11 Wall. 267, 20 L. ed. 81.

5. A judicial finding of the facts alleged in the information or petition and a judgment of condemnation or sequestration are necessary.

6. The conclusiveness of the decree rests upon the sufficiency of the notice and regularity of the proceedings.

7. Seizure of the property may be by process issued from the court or by its being placed in the custody of some officer of the court or by law under the control of the court.

8. Under the divisions named, where a title to, a right in, or the determination of some right pertaining to, real property within the jurisdiction, the proceedings become *in rem* on the filing of the petition sometimes, and always on the filing of the petition and service of notice. It is said that this rule may sometimes operate with harshness, especially where the notice is constructive, as in many cases, but general convenience requires it.

Murray v. Ballou, 1 Johns. Ch. 576.

The distinction between actions *in personam* and proceedings *in rem* is this: The first is an adversary proceeding against some person or persons who are made defendants. The second is against some particular thing, and so against whom it may concern—"all the world."

Cooper v. Reynolds, 77 U. S. 10 Wall. 316, 19 L. ed. 932.

In judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law;" but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

A suit to establish or determine title to a specific parcel of land, or the legal effect of the judgment in which is to establish or determine such title, but in which the property is not actually seized by legal process therein, is in its

nature in personam, and cannot, therefore, be transformed, by a mere legislative declaration, into a proceeding in rem, so as to dispense with personal notice of the pendency and purpose of the suit to defendants who are residents of the state in which the action is brought.

Brown v. Levee Comrs. 50 Miss. 437.

The legislature may provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court after actual notice by service of summons to all known claimants and notice by publication to all other persons.

Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691.

To a bill of peace or any other judicial proceeding which will have the legal effect of determining the interest or claim to property which is the subject-matter of the suit, unless the proceeding is one strictly and purely in rem, the individual adversely interested must be made a party defendant; and if he is a resident of the state in which the property is located, he must be actually served with process; but if he be a nonresident, a substituted service is, from necessity, admissible.

Cooley, Const. Lim. 5th ed. 499; *Glover v. Ruffin*, 6 Ohio, 255; *Pillsbury v. Dugan*, 9 Ohio, 117; *Adams v. Jeffries*, 12 Ohio, 253, 40 Am. Dec. 477; *Paine v. Moorland*, 15 Ohio, 442, 45 Am. Dec. 585; *Sheldon v. Newton*, 3 Ohio St. 500; *Benson v. Cilley*, 8 Ohio St. 604; *Holloway v. Stewart*, 19 Ohio St. 472; *Cupp v. Seneca County Comrs.* 19 Ohio St. 178; *Miller v. Graham*, 17 Ohio St. 1; *Ewing v. Higby*, 7 Ohio pt. 1, p. 198, 28 Am. Dec. 638; *Ewing v. Hollister*, 7 Ohio, pt. 2, p. 138; *Moore v. Starks*, 1 Ohio St. 869; *National Bank v. Lake Shore & M. S. R. Co.* 21 Ohio St. 221; *Cross v. Armstrong*, 44 Ohio St. 623; *Thompson v. The Julius D. Morton*, 3 Ohio St. 27, 59 Am. Dec. 658; *Shepherd v. Ware*, 46 Minn. 174; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101; *Langdell*, Eq. Pl. 2d ed. §§ 43, 184; *Massie v. Watts*, 10 U. S. 6 Cranch, 148, 8 L. ed. 181; *Orton v. Smith*, 59 U. S. 18 How. 263, 15 L. ed. 898; *Vandever v. Freeman*, 20 Tex. 334, 70 Am. Dec. 891; *Felch v. Hooper*, 119 Mass. 52; *Ager v. Murray*, 105 U. S. 128, 132, 26 L. ed. 942, 944; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918; *Remer v. McKay*, 54 Fed. Rep. 482; *Bennett v. Fenton*, 41 Fed. Rep. 283, 10 L. R. A. 500; *Huling v. Kaw Valley R. & Improv. Co.* 180 U. S. 559, 32 L. ed. 1045; *Harvey v. Tyler*, 69 U. S. 2 Wall. 828, 17 L. ed. 871; *Day v. Micou*, 85 U. S. 18 Wall. 160, 21 L. ed. 862.

The act in question is a law of a general nature, but does not operate uniformly and equally upon all the inhabitants of the state, and is therefore void.

Kelley v. State, 6 Ohio St. 269; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Lewis v. Webb*, 3 Me. 336; *Vanant v. Waddel*, 2 Yerg. 260; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517.

Among the inhibitions of the Constitution of the United States, ordained for the purpose of securing such immunities, is that which prohibits the states from passing any law impairing the obligation of contracts.

Const. art. 1, § 10.

This prohibition is aimed at the legislative

power of the state, and not at the decisions of its courts or the acts of administrative or executive boards of officers.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 31 L. ed. 607.

The impairing of the obligation must be made by a provision of the Constitution of the state, or by some act passed by the legislature of the state, in order to warrant the intervention in behalf of the individual against the same.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516.

The term "contract" is held to mean a legal and binding agreement in respect to property, either expressed or implied, executory or executed, between private parties, or between the state and a private party; or a grant from one party to another; or a grant, charter, or franchise from a state to a private party or parties.

The term "obligation" is held to mean the existing body of law, defining, regulating, securing, and giving sanction to the contract.

Bronson v. Kinzie, 42 U. S. 1 How. 811, 11 L. ed. 148; *M'Cracken v. Hayward*, 43 U. S. 2 How. 668, 11 L. ed. 897.

The chief element in the obligation is the existing remedy provided by law for its enforcement.

Walker v. Whitehead, 83 U. S. 16 Wall. 314, 21 L. ed. 357; *Tennessee, Bloomstein, v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 798; *Louisiana, Ranger, v. New Orleans*, 102 U. S. 203, 26 L. ed. 232; *Louisiana, Nelson, v. Police Jury*, 111 U. S. 716, 28 L. ed. 574.

Any alteration of the substance of the contract, or of the law governing the contract at the time it was entered into, would be, in popular definition, an impairment.

Green v. Biddle, 21 U. S. 8 Wheat. 1, 5 L. ed. 547; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Hawkins v. Barney*, 80 U. S. 5 Pet. 457, 8 L. ed. 190; *Sohn v. Waterson*, 84 U. S. 17 Wall. 596, 21 L. ed. 737; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365.

The act is invalid, because it vests judicial power in the county recorder, in violation of article 4, § 1, and the sections conferring this power cannot be rejected without impairing the integrity of the law.

Musser v. Adair, 55 Ohio St. 466; *Ex parte Logan Branch of Logan of State Bank*, 1 Ohio St. 433; *State, Insurance Co., v. Moore*, 42 Ohio St. 103; *State, Atty. Gen., v. Hawkins*, 44 Ohio St. 98; *De Camp v. Archibald*, 50 Ohio St. 618.

The assurance feature of this law is in contravention of article 1, § 19, which declares "private property shall ever be held inviolate, but subservient to the public welfare."

McCoy v. Grandy, 3 Ohio St. 463; *Reeves v. Wood County*, 8 Ohio St. 346; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 23, 29 L. R. A. 886.

Shauck, J., delivered the opinion of the court:

It is admitted that the alleged duty is charged upon the defendants by the terms of the act cited. Whether the act is constitutional is the only question raised by the demur-

rer. A complete analysis of the 168 sections of the act would not be practicable. Present purposes will be best subserved by the briefest statement of its provisions, which will bring into view those whose validity is denied upon constitutional grounds. It provides for what is usually called the Torrens system of land titles, with some modification. It requires assignees and trustees for the benefit of creditors to take such steps as will bring the lands in their hands within its operation. It authorizes other trustees and executors and all other persons claiming to be the owners of land to take such steps. It provides that all lands once brought within its operation shall so remain. In its general scope, it provides that, as to all lands within its operation, the registration of title shall be substituted for the system of registering deeds heretofore in operation in the state, and that every registered title shall at once become indefeasible in the hands of the purchaser for value from the registered owner. The proceedings by which such registration is to be accomplished and all claims of interest in the lands adverse to the registered owner cut off are the subjects of the earlier sections of the act.

The application must be made in writing filed with the probate judge or the clerk of the court of common pleas in the county where the land is situate. The substance of the application is prescribed as follows:

"Sec. 7. Every application must contain an accurate description of the land, the amount, nature, and kind of every encumbrance; the full name and postoffice address of the persons owning the land adjoining the land sought to be registered; if occupied, the full name and postoffice address of the occupant; the kind of estate he holds and when it will terminate, and all easements and inferior estates to the fee simple, either in law or equity, of every kind, must be clearly stated, with the full names and postoffice addresses of the persons holding such estates. The application shall contain such further statements as is (are) required by this act, or may be required by the court in which the application is filed, for the purpose of carrying out the provisions of this act."

Forms of application are prescribed by the act.

The provisions as to notice are as follows:

Sec. 12. Immediately on the filing of such application, the court shall cause the applicant to give notice by publication in some newspaper of general circulation in said county, for the period of four consecutive weeks, inserted once a week, to all whom it may concern.

Sec. 18. The notice required by § 12 shall be in substantially the following form:

Form 3.

To whom it may concern:

You are hereby notified that _____ of _____, in the county of _____ and state of Ohio, did, on the _____ day of _____, A. D. 189-, file with the _____ court of said county, his application to register his title in and to the following described lands (here briefly describe the same, giving township, lot, etc., in substance as in application), and that _____ be certified as the registered owner thereof. And

that on the _____ day of _____, A. D. 189-, at _____ o'clock, — m., at the said court, in the _____ of _____, in said county, said application will be heard, and order taken in respect thereto, as asked in said application.

You are hereby further notified that if you have or claim any estate or interest in, or any lien upon said lands, or know of any reasons why such lands should not be registered, or wish to file objections thereto, you are required to then and there appear and assert your claim, and file your objections to the registry of said land, or the said lands will be ordered registered and brought under the provisions of the act of the general assembly of Ohio, passed the _____ day of _____, A. D. 189-, and thereafter dealt with under said act as registered land, and you will thereafter be forever debarred and stopped from setting up any claim thereto or therein except under the provisions of said act. _____, Applicant.

Sec. 14. Immediately on the first publication of said notice the publisher shall file with the court as many copies of the notice as the court may require for service, and said court shall cause the applicant, or some other competent person, to serve each person named in said application, resident of the county, with a copy of said notice. And persons named in said application, residents without the county, must be served by sending a copy of said notice to their address by mail. Proof of service shall be made by the sworn affidavit of the person making the same, and filed with the court; such proof must show that such service was made personally or by mail, at least twenty-one (21) days before the day so fixed for the hearing of the application.

Referees may be appointed to determine questions arising on applications. Surveys and abstracts may be required, and the "court may establish rules for procuring correct abstracts from responsible parties."

The duties of the courts and the requirements of persons notified are prescribed in sections 28 and 38, as follows:

"Sec. 28. Upon the hearing of an application to register land, the court or referee shall carefully examine the same, together with all records, papers, and surveys pertaining to the title of said applicant, as required by this act, and if the statements therein are found by the court to be true, and that the applicant is the owner thereof, and has the fee-simple title to the land therein described, and that all of the provisions of this act have been complied with and that the applicant is entitled, under this act, to have the title of said land registered, the court shall order that said lands be registered and brought under the provisions of this act, and thereafter dealt with as registered land."

"Sec. 38. Every person notified, either personally, or by the publication of the notice required by § 12 of this act, of a filing of an application to register lands, who has or claims to have any estate, right, title, or interest in, or lien upon the land in the application described, or any part thereof, adverse to the applicant, and that is not fully admitted in the application, shall, on or before the day set for the

Hearing of the application, set forth in writing their respective claims, giving the nature and particulars thereof. Such written statement shall be signed, sworn to, and filed in the court on or before the day last aforesaid."

Sections 84 and 85 prescribe the procedure if an adverse claimant appears; and the right to take an appeal or prosecute error is prescribed as follows:

"Sec. 86. The party or parties aggrieved by the finding, judgment, order, or decree of the court, provided in §§ 84 and 85, and 88 and 89, may appeal, or prosecute error, direct either from the court of common pleas, or probate court, in such manner as is provided by law, to the circuit court, which court shall have final jurisdiction in such cases, and no petition in error therefrom shall be allowed to be filed or prosecuted."

The orders of the court made upon the application are to be entered upon the land registration docket, and it "shall be conclusive evidence in all courts of the state of the facts therein stated, except as otherwise provided in this act." The order, with all papers, etc., is then to be transmitted to the recorder by whom the land is registered, upon "the register of land titles."

The general results of registration are defined in the following sections:

"Sec. 73. The registered owner of any estate, or interest, in land brought under this act, shall, except in case of fraud to which he is a party, or of the person through whom he claims, without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted on the last register of title in the recorder's office, and free from all others, except: First. Any subsisting lease, or agreement for a lease, for a period not exceeding three years, where there is an actual occupation of the land under the lease. The term 'lease' shall include a verbal letting. Second. All public highways shall be deemed to be excluded from the certificate. Third. Any tax or special assessments for which the sale of the land has not been had at the date of the certificate of title. Fourth. Such rights of action as are followed by this act. Fifth. Liens, claims, or rights arising or existing under the laws of the United States, which the statutes of Ohio cannot require to appear of record upon the register.

"Sec. 73. Except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner, or any previous registered owner, was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest in the land.

"Sec. 74. In the case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act, provided that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for valuable consideration,

or of any person bona fide claiming through or under him.

"Sec. 75. If a deed or instrument is registered which is forged, or executed by a person under legal disability, such registration shall be void, provided that the title of a registered owner who has taken bona fide for a valuable consideration shall not be affected by reason that he claims title through some one, the registration of whose right or interest was void, as provided in this section.

"Sec. 76. No unregistered estate, interest, power, right, claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for valuable consideration, or of any person bona fide claiming through or under him.

"Sec. 77. Knowledge of the existence of any unregistered estate, interest, power, right, claim, contract, or trust shall not be evidence of want of bona fides so as to affect the title of any registered owner.

"Sec. 78. After the land has been registered, no title thereto adverse, or in derogation of the title of the registered owner, shall be acquired by any length of possession. Nor shall any interest in registered land be acquired except in accordance with the provisions of this act. No land once brought under and made subject to the provisions of this act shall ever be withdrawn therefrom.

"Sec. 79. The register of title of any land, and the certificate of title, and duly certified copies thereof, shall, except as herein otherwise provided, be received in all courts as evidence of the facts therein stated, and, except where attacked for fraud, as in this act provided, as conclusive evidence that the person named therein as owner is entitled to the land for the estate or interest therein specified.

"Sec. 80. All dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, encumbrances, and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act, and to such amendments and alterations as may hereafter be made; and whenever a memorial has been entered as permitted by this act, the recorder shall carry the same forward upon the register, and all certificates of title, until the same is canceled upon the register, as authorized by this act. The bringing of land under this act shall imply an agreement, which shall run with the land, that the same shall be subject to the terms of that act, and all amendments and alterations thereof.

"Sec. 81. The decree of the court ordering registration shall be in the nature of a decree *in rem*, and shall be final and conclusive as against the right of every and all persons, known and unknown, to assert any estate, interest, claim, lien, or demand, of any nature or kind whatever, against the land so ordered registered, except as provided in this act.

"Sec. 82. Any person not having actual notice of the proceedings to register land as provided in this act, may at any time within five years from the date of the entering of the decree of registration, but not thereafter, bring an action in the court where such decree was

entered, to establish his right, claim, or demand against such land: provided, however, before such action shall proceed, it must be made to appear to the court that the person bringing such action, or those under whom he claims, had no actual notice thereof in time to appeal and file his objections, or assert his claim.

"Sec. 88. The action provided for in the last preceding section shall in no way affect or disturb the rights of any person in said land, acquired subsequent to the registration thereof, bona fide and without knowledge, and for a valuable consideration."

The lands of a deceased owner, whether testate or intestate, shall pass to his personal representatives, "and the same shall be administered in like manner as personal property." Sections 91 to 104, inclusive, contain other provisions with reference to transmission and administration. Sections 105 to 111, inclusive, provide for mortgages, leases, and encumbrances on registered lands. And §§ 112 to 128, inclusive, regulate judgment and other statutory liens, partition, and judicial sales, and pre-cribe the duties of receivers and master commissioners.

Section 124 is as follows: "Assignees, or trustees for the benefit of creditors, and commissioners of insolvent debtors, holding title to unregistered land from the assignor, shall make application as provided under this act to bring such land under the register of title."

The act in terms confers upon the recorder authority with respect to the discharge of mortgage and other liens and the correction of errors, and provides for appeals from his decision regarding such errors as follows:

"Sec. 125. When any registered mortgage, encumbrance, or charge is satisfied in whole or in part, it shall be the duty of the mortgagee, encumbrancee, assignee, or other person authorized by law to discharge the same, to forthwith file with the recorder a certificate of satisfaction, in whole or in part, as the case may be, executed according to law, and the recorder shall enter such satisfaction upon the register. In case of the failure of the mortgagee, or other person, to certify such satisfaction, then the mortgagor, or other person entitled to such discharge, may ask proof of the same before the recorder; notice thereof, either actual or constructive, having been given to the person holding the security, and upon the recorder being satisfied that such mortgage or other charge has been satisfied, as claimed, he shall enter such satisfaction on the register, and indorse the same upon the certificate of title."

"Sec. 128. When any lien shall cease to be operative in law, by reason of limitation of time, proof of the same may be made, on proper application being filed with the recorder, and the persons shown to be interested notified of such application in the manner provided by this act. If the recorder shall be satisfied that the lien is without force in law, by reason of lapse of time, he shall enter such discharge upon the register, and the same shall be prima facie evidence thereof."

"Sec. 181. Whenever it appears that there is an error or omission in any certificate or memorandum or memorial, or that any memorandum or memorial has been made, entered,

and indorsed, or certificate entered or issued by mistake, the recorder may, on his own motion, or upon the application of any person interested, summon all persons registered as interested in the lands to which such certificate, memorandum, or memorial has been made relates, to appear at an appointed time, and produce their certificate of (or) registered instruments, and if at the appointed time the recorder shall find such error or omission or mistake to exist, and that no rights of bona fide purchasers or lien holders for value, have intervened whereby his or their estate or interest shall be impaired by the correction of such error, omission, or mistake, he shall, if no appeal is taken as provided in the next section, correct such error or mistake, or supply the omission, and may direct the cancellation of any certificate or registered instrument or any memorandum or memorial entered upon the registration book, or indorsed upon the registered instrument or certificate, by mistake.

"Sec. 182. Any person aggrieved by the finding of the recorder for or against the existence of such error, omission, or mistake may appeal from the decision of the recorder to the court of common pleas or probate court, on giving bond to the acceptance of the recorder as provided by law in other cases for appeal, within ten days of the date of such finding, and the recorder shall make out and deliver to the clerk of the court of common pleas or probate court immediately a transcript of his proceedings in such matter, and shall make a notation of such appeal upon the register of title. When such appeal is determined, the court shall forthwith cause a certified copy of such judgment or decree to be filed with the recorder, and the judgment of the court shall be final and conclusive."

The material provisions of the act concerning the "Assurance Fund" are:

"Sec. 144. Upon the first bringing of land under the operation of this act, as hereinbefore provided, and upon the issuance of a certificate of title pursuant to section (143) one hundred and forty-two, there shall be paid to the recorder one tenth of one per cent of the value of such land as appraised for taxation for the purpose of an assurance fund under this act. All sums of money so received as provided in this section shall be paid on the first Monday of each and every month to the county treasurer of his county."

Section 145 prescribes how the fund shall be invested.

"Sec. 146. Any person deprived of land or of any estates or interest therein in consequence of fraud, or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings, or by the registration of any other person as owner of such lands, estate, or interest, or in consequence of any error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum in the register of titles, or by being omitted in proof of heirship or certificate thereof as provided in section (98) ninety-eight of this act, may, at any time within four years from the date of the discovery of such fraud, error, omission, mistake, or misdescription, bring an action in any court of competent jurisdiction for the re-

covery of the damages so by him sustained, against the person or persons committing such fraud, or responsible for such error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum on the register of title. In any such action the county treasurer must be made a defendant, and all persons against whom the plaintiff claims the right to pursue for damages must be made defendant to the action. And if this be not done, such persons shall thereby be discharged for liability for damages in the premises.

"Sec. 147. If such action be for the recovery of loss or damage only through an omission, mistake, or misfeasance of the recorder or any deputy or clerk of the recorder in the performance of their respective duties under the provisions of this act, the recorder alone need be made a defendant with the county treasurer; but if such action be brought for loss or damage arising from the fraud or wrongful act of some person or persons other than the recorder, his deputies or clerks, then such action shall be brought against only the county treasurer, and such person or persons aforesaid. In any such action the defendant or defendants, other than the county treasurer, shall be primarily liable when recovery is had, and final judgment shall not be entered against the county treasurer, until execution against the other defendants shall be returned unsatisfied, in whole or in part, and the officer returning the execution shall certify that the amount still due on the execution cannot be collected except by a resort to the assurance fund. The court being satisfied of the truth of such return, made upon proper showing, shall order the amount of the execution and costs, or such part as shall remain unpaid, to be paid by the county treasurer out of the assurance fund. It shall be the duty of the prosecuting attorney of the county, or the county solicitor, if there be one, to appear and defend all suits that may affect such assurance funds.

"Sec. 148. Nothing in this act contained shall be so construed as to leave subject to action for recovery of damages, as aforesaid, any bona fide purchaser, mortgagee, or other holder of a lien, charge, or interest, for a valuable consideration, on land brought under this act, on the plea that his vendor, mortgagor, or person creating such lien, charge, or interest, may have been registered as proprietor through fraud, error, or omission; or may have derived from or through a person registered as owner through fraud, error, or omission.

"Sec. 149. In case the person primarily liable as provided in § 150, and against whom such action for damages is directed to be brought, as aforesaid, shall be dead or cannot be found within this state, then, in such case, it shall be lawful to bring such action for damages against the county treasurer of the county in which the land may be situate, as defendant, for the purpose of recovering the amount of the said damages and costs against the assurance fund. In such case, if final judgment be recovered, the county treasurer, upon the receipt of a certificate of the court, before which said action was tried, shall pay the amount of such damages and costs as may be awarded, and charge the same to the account of the assurance fund. All actions

involving the assurance fund shall be brought in the county where the land is situated.

"Sec. 150. Whenever any money has been paid by any county treasurer out of the county assurance fund, as in this act provided, the county treasurer of such county may bring an action and institute proceedings in any court of competent jurisdiction against the person or persons primarily liable for such damages and costs, to reimburse such assurance fund; or should such person or persons be dead, such treasurer may proceed against his or their estates. It shall be his duty to bring such action or institute proceedings in every case where there may be a reasonable probability of reimbursing such assurance fund in whole or in part."

Section 151 limits the action authorized by §§ 146 and 147 to ten years.

Whatever may be thought of the burdens of fees and costs which the act lays upon the estate of deceased persons and insolvents, or of its probable effect to disturb titles that are now well settled, it must be deemed a valid enactment, unless, in some of its substantial provisions, it transcends the limitations which the Constitution has placed upon the exercise of legislative power, or invades some guaranty which it has erected to the ownership and enjoyment of property.

Counsel for the defendants deny the validity of the act upon the following grounds: Because it provides for cutting off vested interests in property without due course of law, in violation of § 16 of the Bill of Rights; because it provides for the taking of private property for private purposes without the owner's consent, in violation of § 19 of the Bill of Rights; because it provides for the exercise of judicial power by the recorder, in violation of § 1 of article 4 of the Constitution, which vests all such power in the courts of the state; because, being a law of a general nature, and not having a uniform operation throughout the state, it violates § 26 of article 2 of the Constitution; and because it impairs the obligation of contracts in violation of § 28 of article 2 of the Constitution of the state, and § 10 of article 1 of the Constitution of the United States.

The constitutional guaranty involved by the first objection is of a remedy *per legem terras*, as it was expressed in Magna Charta, or according to the law of the land, or by due process of law, or by due course of law, as it is expressed in equivalent phrases in the several Constitutions of the American states. It is no longer questioned that the guaranty operates as a limitation upon both judicial and legislative authority. In *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493, Chief Justice Gibson concisely declared its purpose to be "to exclude arbitrary power from every branch of the government." Cooley, Const. Lim. 492. The precise objection urged against the act in this regard is that it provides for the divesting of rights in property by the proceeding to register without the issuance and service of summons according to the law of the land. The act does not require a petition or bill such as is appropriate in suits between adversary parties, nor does it require or contemplate that a summons or equivalent preliminary process

shall issue from the court advising those who claim an interest in the land to be registered that their alleged interests are to be the subject of adjudication in the proceeding. Both by the terms of the act and by the form which it prescribes, the only notice required is to be given by the applicant. In the notice so required to be given, no one claiming an interest adverse to that of the applicant is to be named, although the names, places, of residence, and alleged interests of all who may claim adversely are known. The terms of the act require that the court shall cause the applicant, or some other competent person, to serve each person named in the application, resident of the county, with a copy of the printed notice. All persons named in the application, resident without the county though within the state, shall be served by sending copies of such notice to their addresses by mail. Only those who are named in the application are required to be served even in this manner. Reference to § 7, providing what the application shall contain, and to its form as prescribed in § 8, shows that the persons to be thus named and served are the owners of the land adjoining that sought to be registered, the occupant of the land to be registered if it is occupied, and the holders of easements and estates inferior to the fee simple. One known to claim the title in fee simple adversely to the applicant need not be named in the application, nor receive a copy of the notice, though his place of residence may be within the county, and known. As to him, the only requirement is that he may have a chance to see a notice signed by the applicant, addressed "To whom it may concern," containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county. That this is sufficient notice to those who are interested in the adjoining property is not denied.

Is it such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion? It is said that it is, because the proceeding to register land under the act is *in rem*. Whether it is *in rem* or *in personam* is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings *in rem*, and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the proceeding to register does not, in any substantial respect, differ from a suit *quia timet* to settle title. It bears the least possible analogy to a proceeding *in rem*. The *res* is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and partakes, therefore, less of the nature of a proceeding *in rem* than does the foreclosure of a mortgage. The land is not a thing of shifting situs, like a ship, against which obligations may accrue to day in one jurisdiction, and to-

morrow in another. The status of the land is not changed by registration. The substantial thing determined by registration is that the person who makes the application has a right of property in the land, to the exclusion of all other persons. The judicial force of the proceeding is wholly expended in a conclusive determination of the rights of persons in the land. Except when the land is occupied by one who claims adversely to the applicant, the questions determined in registration are such as both before and since the adoption of the Constitution have been determined by courts of equity; and their decrees, much more distinctly than the judgments of courts of law, operate upon persons.

To authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. Judicial process, in its largest sense, comprehends all the acts of the court, from the beginning of the proceeding to its end. In a narrower sense, it is "the means of compelling a defendant to appear in court, after suing out the original writ, in civil, and, after indictment, in criminal cases." Bouvier. In every sense, it is the act of the court. This act does not contemplate process. The notice which it prescribes is the notice of the law of admiralty. The process required by the law of the land is the process of the common law. In *Webster v. Reid*, 52 U. S. 11 How. 437, 18 L. ed. 761, the court considered the validity of judgments rendered in proceedings under an act which attempted to authorize the quieting of titles in suits against defendants to be designated as "owners of the half-breed lands lying in Lee county," and notices to be given by publication. Justice McLean, in the opinion, said: "These suits were not a proceeding *in rem* against the land, but *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments therefore are nullities." *Brown v. Levee Comrs*, 50 Miss. 471.

That the legislature may provide for a substituted service of judicial process when it is required by necessity is not doubted. If, in a suit to adjudicate the rights of persons in property within the state, a defendant resides without the state, such necessity is apparent, for the process of the state has no efficacy beyond its borders. Other cases of necessity are recognized. The principle is that the state may provide for the adjudication of all adversary rights of persons in property within its borders, and, to the end that such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be made. In such case nothing more is required by the law of the land than that the substituted service shall be such as, in the exercise of legislative discretion, shall be found most apt to accomplish the purposes of actual service. *Shepherd v. Ware*, 46 Minn. 174. Surely, these views will surprise no one who is familiar with the legislative history of the state.

Section 55 of the Civil Code enacted in 1853 is now in force as § 5035 of the Revised Statutes. It provides: "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." The subsequent sections of the chapter relate to the service of the summons so required to be issued. Their provisions for a substituted or constructive service relate wholly to cases in which actual service is impracticable. In these respects the provisions of the Code continue the former practice pursued since the organization of the state. We know of no instance prior to the passage of this act in which there was a departure from the views clearly stated by Judge Cooley, *Const. Lim.* [6th ed.] 452: "In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law." If it is borne in mind that the questions here considered concern the adversary rights of persons in property, it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain, or the right of taxation.

Perhaps a more extended consideration than was necessary has been given to this particular question, since the provisions of the act and the briefs suggest the consciousness of those who framed it and those who defend it that it does not meet the constitutional requirement as to due process of law. In one of the briefs submitted for the plaintiff, it is said: "The act contemplates no adjudication as to title. The applicant cannot be adjudged to have a good title as against B or C, or unknown parties, in which a right of ownership appears. If there is any cloud upon his title, if there are any adverse interests, or the possibility of conflicting rights, he is relegated to other courts and other proceedings to try such issues. The court considers only the status of the *res*. If the applicant is not found to be the undisputed owner of the property in fee simple, his title is not registered." This view of the act is opposed to its provisions and obvious import. In the prescribed notice "To whom it may concern" is the authorized declaration that those thus notified "will be thereafter forever debarred from setting up any claim," etc. Not recurring to other provisions of the act which provide for the indefeasibility of the registered title, § 74 makes it indefeasible in one who has purchased for a valuable consideration from one who has procured registration by fraud. Section 75 imparts the same character to the title of such a purchaser from one who has secured registration by forgery of a deed of the real owner; and § 76 provides that "no unregistered estate shall avail against the title of a registered owner taking bona fide," etc. How is it to be known that the applicant

is the "undisputed owner" until adversary parties are served with process, and afforded an opportunity to say for themselves whether they dispute the claim of the plaintiff or applicant? However effective the separation of disputants may be in the prevention of street broils, in the judicial determination of their disputes the law of the land requires that they be brought together.

The provisions of the act with respect to an "assurance fund" attract attention in this connection. Those for whose indemnity this fund is raised are described in § 146: "Any person deprived of land or of any estates or interest therein in consequence of fraud or misrepresentation in bringing such land under the operation of this act, having had no notice of the proceedings, or by the registration of any other person as owner of such lands, estate, or interest, or in consequence of any error, omission, mistake, or misdescription in any certificate of title, or in any entry or memorandum in the register of titles, or by being omitted in proof of heirship or certificate thereof as provided in section (98) ninety-eight of this act may" resort to the fund within the time and in the manner specified. It is not likely that the legislature has thought itself authorized to provide for making whole those who have been defeated in judicial proceedings of an adversary character, involving only private rights, and conducted according to the law of the land. The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law. When the provisions of the Constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden. Section 19 of the Bill of Rights ordains: "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases, where private property shall be taken for a public use, a compensation therefor shall first be made in money or first secured by a deposit of money."

This act is said to be a rebuke to those who have inherited from feudal times the conceit that property in lands is especially sacred. That property in lands has been more secure than property in chattels has resulted necessarily from the fact that they are not the subject of conflagrations or larceny. Some contribution to the equality of insecurity of property of the two classes may be found in those provisions of the act which look to the administration and distribution of the lands of deceased persons as though they were chattels. But property in all of its subjects is equally sacred under the protection of this section of the Bill of Rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners of lands and chattels that, unless they are required for a public use, they may retain them *in specie*, placing upon

them any estimate that may be suggested by judgment, sentiment, or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. This section of the Bill of Rights was so construed by this court in *McCoy v. Grandy*, 8 Ohio St. 463, upon reasoning that has ever since been deemed entirely satisfactory.

In another aspect this scheme is violative of the same section of the Bill of Rights. If the use were public, the section would require an assured compensation to the owner of the property taken in every event, and, unless in a public exigency or for the construction or repair of free roads, it would require such compensation to be first made. In this act there is no provision for compensation to be first made. The owner's recourse is to a subsequent action to be instituted by himself, and subject to a limitation. Nor is there any provision for an assured compensation at any time. The owner's resort is to an assurance fund which we are told has been estimated to be sufficient to indemnify those who would be wrongfully deprived of their lands under the provisions of the act. It can scarcely need comment to show that this is not a compliance with the constitutional requirement.

In yet another aspect the scheme is violative of the same section of the Bill of Rights. Whether the assurance fund would be adequate or inadequate, it is, in part at least, to be derived from forbidden sources. The real estate in the hands of an assignee for the benefit of creditors belongs to the assignor and his creditors. These lands, by the terms of the act, are subjected to a charge or contribution payable through the recorder to the treasurer of the county. That is, to the extent of such assessments, this property is to be taken by public authority, and without the consent of the owners. For what public purpose? Primarily, the purpose is to indemnify private persons whose lands have been wrongfully taken from them under the provisions of the act. If the act were otherwise constitutional, the ultimate benefit would accrue to those who, as the result of registration (which gives conclusive effect to mistake, fraud, or forgery), have acquired lands which belong to others. That this is in no sense a public purpose seems clear. Considering the purposes for which government is instituted, and the high conception of individual right which prevailed at the time of the adoption of the Constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the Constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may, by law, authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself. The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial, and executive. He who affirms the existence of the power in question must be

able to find it embraced in one of these divisions; and since the insuring of titles does not essentially differ from any other insurance, nor, indeed, from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizens in every vocation.

It is further urged that the act is void because it attempts to confer judicial power on the recorder. Counsel agree that power of that character cannot be conferred upon a ministerial officer, but in support of the act it is urged that the powers indicated are ministerial, and not judicial. The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged, and, after a hearing, to enter a discharge upon the register; to make an entry that a lien has become inoperative in law by reason of limitation of time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact; to correct memorials made or issued by mistake, if the rights of bona fide purchasers or lienholders for value have not intervened. It is true that the power to ascertain and decide is not necessarily a judicial power, and it is frequently exercised by ministerial officers and legislative bodies. Whether the power to hear and determine is judicial depends upon the nature of the subject of the inquiry, the parties to be affected, and the effect of the determination. While it is not supposed that any definition of judicial power, sufficient for all conceivable cases, has ever been attempted, it is clear that "to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." Cooley, Const. Lim. 109. Recurring to the duties of the recorder under the act, he is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights, but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens including such questions of disability as may arise, to decide the questions of law and fact that may arise in determining whether mistakes have intervened; and who are bona fide purchasers; and then to, make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from decisions of the recorder. This is not supposed to include all the judicial powers which the act assumes to confer on the recorder, but it is sufficient for present purposes.

Nor is this objection to the act avoided by the provisions which contemplate a review of or appeal from the action of the recorder. It would, perhaps, be found upon a careful consideration of his powers that they are not all embraced within the provisions for review or appeal. But the assumption that they are so embraced would not validate the act in this re-

spect. The recorder, as a ministerial officer, is incompetent to receive a grant of judicial power from the legislature. His acts in the attempted exercise of such powers are necessarily nullities. They cannot be effective to impose any obligation or burden upon a citizen, or to deprive him of any right. The act plainly contemplates that the person against whom the recorder decides in the exercise of any of the powers sought to be conferred must either submit to the adverse decision, or take upon himself the burden of an appeal. In view of the constitutional provision on the subject, he cannot be forced to this alternative. If these are judicial powers, it is admitted that they cannot be vested in the recorder. If they are not judicial, the provisions for an appeal are void, since as was said by this court in *Ex parte Logan Branch at Logan of State Bank*, 1 Ohio St. 432, "we have no idea of an appeal except from one court to another." An examination of *People, Kern, v. Chase*, 165 Ill. 527, 36 L. R. A. 105, will show that in some of its aspects the act under consideration, though differing from the act passed by the legislature of Illinois to accomplish the same purpose, is within the principles upon which that act is held void.

The views expressed touching the guarantees of the Bill of Rights are in accord with those of eminent lawyers who have considered

methods for simplifying the records of titles, and diminishing the labors of searching them. The general system in the contemplation of this act has been thought impracticable, because questions of vested rights must remain open for want of due process. There have accordingly been recommended legislative enactments to shorten and simplify conveyances, to remove disabilities, to shorten the limitation of actions, to provide for general indexes for townships and wards or other small districts so as to restrict the area of search, and other like remedies operating prospectively, and having due regard to vested rights. However the general system proposed by this act may have operated where no system of registration previously existed, and the conserving influences of Constitutions are not enjoyed, it seems, in its prominent features, to be inapplicable where constitutional provisions, paramount to legislative enactments, protect vested rights, and restrict the state to the exercise of functions that are governmental in their nature. No discussion of the wisdom of the act would be appropriate here, nor do we deem it necessary to consider other questions affecting its validity. Such questions are presented, but those decided seem sufficient to dispose of the subject.

Demurrer sustained.

MICHIGAN SUPREME COURT.

Henry TURNER

FIDELITY & CASUALTY COMPANY of
New York, *Plff in Err.*

(.....Mich.....)

1. A letter from an insurer to a claimant asking that the matter be allowed to rest un-

til the adjuster of the company can see the claimant or his attorney constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of claim and beginning an action on the policy.

2. Delaying action for insurance for more than one year and a half after a letter from the insurer asking that the matter may rest until an adjuster calls is not fatal, although nothing more is heard about the adjuster

NOTE.—What constitutes total disability of insured.

- I. Ability to do some small act.
- II. Inability to do anything.
- III. Ability to attend to part of the business.
- IV. Ability to work in other occupation.
- V. Disability of particular members.
 - a. Eyes.
 - b. Hands.
 - c. Feet.
- VI. Lunacy.
- VII. Sickness.
- VIII. Old age.
- IX. Death.
- X. "Immediately" construed.
- XI. "Per week" construed.
- XII. Other matters.
- XIII. Summary.

I. Ability to do some small act.

The cases of *LOBDILL v. LABORING MEN'S MUT. AID ASSO.* and *TURNER v. FIDELITY & CASUALTY Co.* hold that total disability exists although the insured is able to perform a few occasional acts, but is unable to do any kind of work connected with his occupation. This is in accord with the 88 L. R. A.

other authorities on this question, although the distinction is very finely drawn in some cases and largely turns on the clause in the policy defining the application of the indemnity to the injury and to the occupation, and defining the disability.

In *LOBDILL v. LABORING MEN'S MUT. AID ASSO.*, where the plaintiff was insured from injury wholly and continuously disabling him from transacting any and every kind of business pertaining to his occupation as a merchant, and he dislocated his thumb and injured his head, producing nervous prostration, a recovery was allowed, although on one or two occasions he handed some small article to a customer and took the change. It was held that total disability did not mean absolute physical inability to transact any business pertaining to the occupation of merchant, and it was sufficient if the injuries were such that common care and prudence required him to desist from transacting any such business in order to effectuate a cure; that the ability to perform an occasional act pertaining to such occupation would not render the disability partial provided that he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation.

and the delay continued for nearly a year after the limitation of the time for action, which was waived by the letter, had expired.

3. The fact that a man goes to his office every day for a short time without doing any work or business there does not show that he is not wholly disabled from prosecuting any and every kind of business pertaining to his occupation, where his business consists of making loans on personal security.

4. The question whether or not a person is wholly disabled so as to prevent him from doing any and every kind of business pertaining to his occupation is for the jury, where the evidence shows that he went to his office every day but was unable to do any kind of work.

(April 27, 1897.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

In *TURNER v. FIDELITY & CASUALTY CO.*, where the plaintiff was insured as a banker and real-estate dealer under a policy providing against injuries "which shall, independently of all other causes, immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated," and his business consisted generally in personal security loans, and his injury was such that his arm was entirely disabled although he went to his office for a short time but was unable to do any kind of work, and did no business at all, but employed others to do it for him, it was held that the question of total disability was one for the jury, and they were instructed that the clause meant, not that he might not do some one thing in regard to it, but that he must be prevented from doing any and every kind of business pertaining to that occupation. A recovery was allowed.

So, a recovery was allowed under a policy providing for injuries which "shall immediately, continuously, and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation" where the insured, who is a barber, occasionally attempted to do certain portions of his work, but whenever he attempted to do so suffered additional great bodily pain,—bodily discomfort; that it rendered him so weak that in a short time he had to sit down. *Hohn v. Interstate Casualty Co.* (Mich.) 4 Det. L. N. 777.

This case approved the cases of *LOBDILL v. LABORING MEN'S MUT. AID ASSO.* and *TURNER v. FIDELITY & CASUALTY CO.*

And where the occupation under which the plaintiff was insured was that of a billiard saloon keeper, the words "immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured" did not require proof that the accident wholly disabled him from the doing of every and any kind of act necessary to be done in the prosecution of his business, but it was sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business. *Young v. Travelers' Ins. Co.* 80 Me. 244.

In this case it was said that it was sufficient if the injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest so long as it was reasonably necessary to effectuate a speedy cure.

88 L. R. A.

Messrs. Hanchett & Hanchett, for plaintiff in error:

The plaintiff is presumed to have known the terms and conditions of his policy, and he is bound by the limitation clause.

Lantz v. Teutonia F. Ins. Co. 96 Mich. 445; *Law v. New England Mut. Acci. Asso.* 94 Mich. 286; *Voorheis v. People's Mut. Ben. Soc.* 91 Mich. 469; *Peck v. German F. Ins. Co.* 102 Mich. 52; *Holladay v. Phenix Ins. Co.* 7 U. S. App. 325, 51 Fed. Rep. 715, 2 C. C. A. 463; *Allibone v. Fidelity & C. Co.* (Tex. Civ. App.) 32 S. W. 569; *Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Loomis*, 142 Ill. 560; *Love v. United States Mut. Acci. Asso.* 115 N. C. 18; *Garrelson v. Hawkeye Ins. Co.* 65 Iowa, 463; *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769.

The language of the letter in no way estops the company from insisting upon the limitation clause.

Security Ins. Co. v. Fay, 22 Mich. 467, 7 Am. Rep. 670; *Steel v. Phenix Ins. Co.* 47 Fed. Rep. 863; *Jewett v. Home Ins. Co.* 29 Iowa, 562;

And under a policy with the clause "shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits," a solicitor and registrar of a county court was entitled to recover where he sprained his ankle severely and was confined to his bedroom for some weeks, being unable to go down stairs, and was prevented from passing his accounts as registrar and from attending at various places at which he was required to complete purchases for his clients. It was held that the sense intended to be conveyed was "that if the person insured should be wholly disabled from carrying on his business as he usually carried it on, the company would be liable." It was said that the ability to receive his clients in his room would not prevent a recovery. *Hooper v. Accidental Death Ins. Co.* 5 Hurst. & N. 546, 29 L. J. Exch. N. S. 340, 8 Week. Rep. 616.

And where a policy providing for total disability described the assured by "occupation and employment an iceman (prop.)," and the application says: "My occupation is fully described as follows: iceman, proprietor,"—it was held that there was a total disability within the meaning of the policy, although the assured notwithstanding his injuries was able to give general directions to persons who took his place as an iceman for the delivery of ice during the period of his disability. It was also held that the occupation or employment of the plaintiff as an iceman, adding the words "as proprietor," did not describe him as only engaged in the management of a business, but was broad enough to include a practical and laboring man engaged in the actual delivery of ice in his own behalf. *Neafie v. Manufacturers' Acci. Indemnity Co.* 35 Hun, 111.

"Total disability" was held to include the confinement of a physician to his bed as the result of an injury, although during that time he administered to some patients certain medicines within his reach but never left his bed. *Wolcott v. United L. & Acci. Ins. Asso.* 55 Hun, 98.

II. Inability to do anything.

Where the evidence is clear that the insured is unable to do anything, a recovery of course follows.

And under a clause providing "immediately, totally, and continuously disable from doing anything in and about his usual occupation," it was held that it was clear that the insured was for a short time absolutely disabled to do anything whi-

May, Ins. § 507; *Wheaton v. North British & M. Ins. Co.* 76 Cal. 415; *Ames v. New York Union Ins. Co.* 14 N. Y. 253; *Garrido v. American C. Ins. Co.* (Cal.) 8 Pac. 512; *Garretson v. Hawkeye Ins. Co.* 65 Iowa, 468; *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L. R. A. 769.

Plaintiff's own testimony shows that he was on hand, attending to business every day. He could have directed the business, and undoubtedly did direct the business.

The mere fact that he says he did nothing is not sufficient to warrant the jury in finding that he was able to do nothing. His physician says that he was only partially disabled. The testimony being undisputed, the court should not have permitted the jury to find that he was totally disabled.

Lyon v. Railway Pass. Assur. Co. 46 Iowa, 631; *Rhodes v. Railway Pass. Ins. Co.* 5 Lans. 71; *Hooper v. Accidental Death Ins. Co.* 5 Hurlst. & N. 546; *Sawyer v. United States Casualty Co.* (Mass.) 8 Am. L. Reg. N. S. 233; *Saveland v. Fidelity & C. Co.* 67 Wis. 174,

58 Am. Rep. 863; *Merrill v. Travelers' Ins. Co.* 91 Wis. 329; *Ford v. United States Mut. Acci. Relief Co.* 148 Mass. 153; *Bean v. Travelers' Ins. Co.* 94 Cal. 581; *Young v. Travelers' Ins. Co.* 80 Me. 244; *Pennington v. Pacific Mut. L. Ins. Co.* 85 Iowa, 468; *United States Mut. Acci. Asso. v. Millard*, 43 Ill. App. 148.

Messrs. Beach & Gavit, for defendant in error:

The clause that action must be commenced within twelve months is only valid as a contract, and may be waived.

Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202.

The positive act of the company intending to induce postponement is not necessary, and where the evidence upon this point is conflicting, waiver is a question for the jury. Mere silence, however, is no waiver, though it may be evidence to go to the jury.

2 May, Ins. § 488, and cases cited.

The law does not favor clauses of limitation in policies of insurance, and they are strictly construed and allowed to be readily waived.

ever pertaining to his occupation in the strictest sense in which the appellant claims the phrase was used. For the time thus lost he was entitled to be paid. *Globe Acci. Ins. Co. v. Helwig*, 13 Ind. App. 539.

And under a policy providing "against loss of life or personal injury: against loss of life in the sum of . . . after sufficient proof that the assured . . . shall have sustained personal injury . . . and such injuries shall occasion death within ninety days from the happening thereof . . . ; against personal injury . . . which shall not be fatal: but which shall absolutely and totally disable him from the prosecution of his usual employment,"—the company was liable where the testator had his arm crushed on December 11, and was totally disabled from the prosecution of his usual employment till the succeeding March 12, on which day he died from the result of the accident. The fatality of the accident was not a defense, and it was held that there were two classes of injuries provided for, one where the life was lost within ninety days, and one for those injuries not fatal, in the sum of \$10 a week for a period not exceeding altogether twenty-six weeks, and that the two provisions were to be construed together and the intent was that if an injury happened within the meaning of the policy, it was insured against as coming within one class or the other. *Perry v. Provident L. Ins. & Invest. Co.* 103 Mass. 242. In this case the plaintiff had previously failed in an action for the death amount.

III. Ability to attend to part of the business.

It is generally held that where the insured is able to do some line of work connected with his business he cannot recover, although there are two cases which hold that if a person is unable to perform substantially all his duties a recovery can be had.

No recovery could be had under a policy providing for indemnity for injuries, "which shall, independently of all other causes, immediately, wholly, and continuously disable him from transacting any and every kind of business pertaining to his occupation above stated," where the superintendent of a burial-case company was injured so that his knee had to be put in plaster, but at no time was he prevented from attending to some part of his business. The clause was held to be a bar to a recovery unless the disability was so complete as to prevent the insured from doing any part or kind of business pertaining to his occupation. *Spicer v. Commercial Mut. Acci. Co.* 4 Pa. Dist. R. 271.

ness pertaining to his occupation. *Spicer v. Commercial Mut. Acci. Co.* 4 Pa. Dist. R. 271.

This case declined to follow the case of *Young v. Travelers' Ins. Co.* 80 Me. 244, on the ground that in that case the court held such clause to mean "wholly disable him from the prosecution of any part of his business," and that this was equivalent to partial disability only.

And under a policy with the clause "under classification preferred (being a capitalist by occupation) . . . which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated," instructions "that if plaintiff's occupation was such a business as a person classed as a capitalist might reasonably follow," and there was a total disability "from transacting any and every kind of business pertaining to his said occupation, the verdict should be for him, and 'that the fact that he is described as a capitalist was to be regarded as the class in which he was insured, but not as necessarily determining his occupation for the purpose of deciding whether or not he was totally disabled. Capitalists may follow various occupations, and if plaintiff was injured while pursuing any occupation not more hazardous than is usual among men classed as capitalists, and so injured as to deprive him of the ability to transact any business which a capitalist might reasonably be expected to follow, they should find for plaintiff,'"—were clearly erroneous as the policy did not class the plaintiff as a capitalist, but insured him in a preferred class because he is a capitalist by occupation, which was a very different matter. It was held that the statement that the plaintiff might recover if totally disabled from transacting any business which a person classed as capitalist might reasonably be expected to follow was erroneous, as there is no business which a capitalist might not as reasonably be expected to follow as anyone else; but the error was immaterial as the evidence showed the plaintiff was totally disabled from transacting any business. *Bean v. Travelers' Ins. Co.* 94 Cal. 581.

And where an injury appeared at first to be slight but in about a week became very painful and so continued for a long time, during which the arm was carried in a sling, and sleep could only be had in a chair, but the assured was at no time prevented from going to his factory and superintending his business, no recovery could be had under a

German F. Ins. Co. v. Carrow, 21 Ill. App. 631; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 299, 84 L. ed. 408, 414.

A mere temporary ailment or indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render the policy or certificate void.

Purditzky v. Supreme Lodge, K. of H. 76 Mich. 428; *May, Ins.* § 296.

The contract of insurance was indemnity to plaintiff for loss of time for being wholly disabled from prosecuting his business as specified in the policy, and he was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in this prosecution.

Young v. Travelers' Ins. Co. 80 Me. 244; *May, Ins.* § 522; *Hooper v. Accidental Death Ins. Co.* 5 Hurlst. & N. 546; *Utter v. Travelers' Ins. Co.* 65 Mich. 545; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 583; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 3 Det. L. N. 609.

policy providing that for bodily injuries "which . . . shall immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is rated" he "shall receive . . . for such period of continuous total disability." This clause limits relief to a case of total disability which wholly prevents him from prosecuting his business. The court said that if there was any doubt it would be made clear by another condition in the policy limiting the relief "to the money value of his time or weekly wages." It was further held that a clause stamped on the back of the policy giving a schedule and providing "the payment of weekly relief whether totally or partially disabling . . . shall be in full satisfaction," meant that for injuries set out in the schedule there attached they will assume a total disablement for the time specified whether partial or total, but this was not one of the enumerated injuries. *Gracey v. People's Mut. Acci. Ins. Asso.* 21 Pitts. L. J. N. S. 25.

And under a policy describing the assured as "by occupation, profession, or employment a leather cutter and merchant," providing an indemnity if injured so as to "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured," it was held that the plaintiff was insured as a leather cutter and merchant and to be "entitled to recover a weekly indemnity, he must be wholly disabled from the prosecution of any and every kind of business pertaining to . . . the twofold occupation of leather cutter and merchant." *Ford v. United States Mut. Acci. Relief Co.* 143 Mass. 153, 1 L. R. A. 700.

There was no liability on a policy providing "that indemnity is to be paid for loss of time resulting from bodily injuries which shall . . . immediately, wholly, and continuously disable from the transaction of any and every kind of business pertaining to his profession as an attorney at law," where the injury did not wholly and continuously disable the assured from the transaction of any kind of business pertaining to his profession, although the attorney was so injured as to prevent the use of his hand for twenty-six weeks, and he suffered pain and could not write, but attended his office, advised clients, accepted employment and commenced suits. *United States Mut. Acci. Asso. v. Millard*, 43 Ill. App. 148.

A finding for the company was not reversed 88 L. R. A.

Long, Ch. J., delivered the opinion of the court:

This is an action to recover a weekly indemnity under an accident policy issued by the defendant to the plaintiff on the 8th day of January, 1889, and subsequently renewed from year to year, the last renewal certificate covering a period from January 8, 1894, to January 8, 1895. On February 10, 1894, while the plaintiff was carrying wood on a wheelbarrow, he slipped and fell, dislocating his right shoulder. He claims an indemnity under the policy for a total disability for a period of ten weeks. At the time the policy was issued and at the time of the accident, the plaintiff was engaged in the business of loaning money on personal security and real estate. He was insured as a banker and real-estate dealer. He made two claims under this policy, the first one being made on March 12, 1894. Nothing was done in respect to this claim. Afterwards, and on June 21, 1894, the plaintiff made a second statement of claim, which was forwarded to the company by Camp & Brooks, his attorneys. In regard to this letter, the defendant

where the policy provided compensation for an accident "which absolutely and totally disabled him from prosecuting his usual employment," and the surgeon selected by the insured testified that "such a hernia as this does not necessarily prevent a man from attending to his business by wearing a truss properly adjusted, who could go to and attend to his business," and the evidence was conflicting as to the effect of the injury. *Potter v. Accident Ins. Co.* 29 Ind. 210.

Under a policy providing for relief "while totally disabled and prevented from the transaction of all kinds of business," an instruction though he may have been able to do some parts of the accustomed work thereof, he may yet recover so long as he cannot to some extent do all parts and engage in all such employments, was erroneous, as almost total soundness and ability instead of total disability were made the condition of plaintiff's right to recover and of defendant's liability. So, an instruction that "the words 'all kinds of business' should receive a practical construction and with reference to the party insured, and if he was qualified to engage in any business which he could do under the injury, then it would be his duty under the contract so to do, but the fact that there may be some business or occupation in which he could engage, would not prevent a recovery unless it was an occupation or business which he was qualified to engage in as an occupation, and transact in the usual way," was erroneous. The court said that this construction meant that defendant would indemnify on account of loss sustained by being partially disabled from some kinds of business, and was erroneous. *Lyon v. Railway Pass. Assur. Co.* 46 Iowa, 631.

In *Hollobaugh v. People's Ins. Asso.* 138 Pa. 595, where the plaintiff sustained a severe injury in the muscles of his left arm which totally incapacitated him from following his regular occupation until February 8, and from that date until April 13 incapacitated him from such occupation in part although he was at no time confined to his house and was able to visit an oil well as superintendent, and did so on several occasions, giving directions as to what should be done to the wells, made purchases of supplies, paid the workmen, made reports to his employer, but was compelled to hire other persons to perform the principal part of his duties, it was held his injury was neither a "partial permanent," nor "total permanent disability" within the terms of the policy.

wrote the following letter, dated July 2, 1894:

"Your favor of June 23d, inclosing claim blank regarding the above for an alleged injury stated to have been received February 10, duly to hand. I beg to say that we have already received a claim blank from Mr. Turner for an alleged injury stated to have been received February 10. We have already notified you that we fail to recognize any liability in that matter, and return the claim blank herewith. One of our adjusters will be in Saginaw shortly, and we will have him call upon you, and discuss this matter with you. We think he will be able to show you that there is a breach of warranty in Mr. Turner's application, and therefore no liability on the part of the company under the policy Mr. Turner holds. Kindly allow the matter to rest until our adjuster can see you, and oblige."

Nothing more was done by either party until this suit was commenced, February 4, 1896.

The first assignment of error relates to the refusal of the court to direct a verdict for the defendant, on the ground that the suit was not

commenced within one year from the date of the injury. The policy provides that "unless affirmative proof of death or duration of disability is so furnished within seven months, and any legal proceeding for recovery hereunder is begun within one year from the time of such accident, all claims based thereon shall be forfeited to the company." The claim of plaintiff is that the letter above quoted, written to Camp & Brooks, constitutes a waiver of this clause of the policy. On the other hand, it is contended that inasmuch as, during the time from the receipt of the letter to the commencement of suit, no adjuster of the company called upon plaintiff or his attorneys, and there was no communication of any kind between them on the subject of the adjustment of the claim, the plaintiff was not justified in waiting a year and a half before bringing suit; and, again, that the statement in the letter, requesting him to let the matter rest, would not warrant or justify the plaintiff in permitting the year to go by without bringing his suit if he desired to protect his rights; that the plaintiff might have been justified in waiting a

Where the policy provided that "if the insured shall sustain bodily injuries, . . . which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to his occupation," the right to recover was restricted to the time of total disability "from the prosecution of any and every kind of business pertaining to his occupation," and the submission to the jury on the theory that a recovery could be had where the insured was "rendered wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent," was error. *Saveland v. Fidelity & C. Co.* 67 Wis. 174, 58 Am. Rep. 863. In this case the plaintiff was confined to his home for a week, and afterwards by means of great exertion was enabled to get to his buggy and superintend a small part of his business as grocer.

This case distinguished the case of *Sawyer v. United States Casualty Co.* (Mass.) 8 Am. L. Reg. N. S. 233, for the reason that there the clause was "totally disable him from the prosecution of his usual employment." The court said that case "never reached the supreme court of that state, nor do we find it referred to in any subsequent case in any court," and it followed *Hooper v. Accidental Death Ins. Co.* 5 Hurst. & N. 546, 29 L. J. Exch. N. S. 340, 8 Week. Rep. 616, where the clause was "wholly to disable him from following his usual business occupation or pursuits," and in neither of those cases was the language of the policy so broad as in the case at bar.

And where the policy had the clause, "be so bodily and physically injured as to be immediately totally and continuously disabled from doing anything in and about his usual occupation," and the assured for seven weeks went to his office in a buggy and sat for an hour or so per day with his feet propped on a pillow, opening letters and discussing business but was disabled from performing many of his duties, and employed an extra man, but during most of the time was able to perform some of them, it was held that the court was not called upon to determine whether or not to bring the insured within the terms of the policy; it should have been such as to disable him from doing any and every thing pertaining to his occupation. *Globe Acci. Ins. Co. v. Helwig*, 13 Ind. App. 539.

But under a policy insuring against loss of time resulting from bodily injury through external, violent, or accidental means, which should immediately and wholly disable him "from transacting any and every kind of business pertaining to his occupation," defined by a printed manual of the company providing that "when a member is deprived by accidental injury covered by the policy of the power to perform substantially all the duties of the occupation under which he is insured, he is wholly disabled within the meaning of the policy and entitled to indemnity," a recovery was allowed where the assured could not walk without crutches for eight or ten months after the accident, and was not able to engage in any manual labor for more than a year thereafter, while his regular duties were to buy goods of agents and sell them to the people, and repair furniture such as chairs and tables, also to trim caskets and make picture frames, although it appeared that after his injury he was daily in attendance at his furniture and undertaking store, with the exception of two or three days immediately after the injury, and that he kept the books of the company which were brought to him for that purpose during the whole time he was confined at the house. *Baldwin v. Fraternal Acci. Asso.* 31 Misc. 124.

And this case further held that where the manual of the company stated that "the restriction as to occupation applies only to those who follow such occupation as a trade or means of livelihood," a clause in the policy providing that "members of a higher classification accidentally injured while engaged in polo, base-ball games, or bicycling, will receive only the indemnity as herein provided for such games," applied only to professionals and not to a man riding a bicycle from his place of business to his dwelling house.

And the words "absolutely and totally disable him from the prosecution of his usual employment," were held to mean "wholly unable to do his accustomed labor; that is, to do substantially all kinds of his accustomed labor to some extent." "Substantially" was explained as follows: "If you find that at a certain time the plaintiff was able to do all such work to such extent as he ordinarily was accustomed to do, then his right to recover ceases, although you may find he was still unable to perform some kinds of extraordinary labor which before the accident he sometimes did."

Sawyer v. United States Casualty Co. (Mass.) 8 Am. L. Reg. N. S. 233. It was said in this case that if a farmer was able to milk cows, but unable to do

reasonable time after receiving the letter before taking action, but not in waiting the time he did, as the letter held out no hope or promise of an adjustment, but merely asked that an opportunity might be given the company to explain why liability was denied. This clause in the policy, however, was one which could be waived by the company. It cannot be construed as a limitation fixed by law. While the plaintiff was not bound to wait before bringing suit, yet it is apparent that he did wait at the request of the company. He testified that the reason he did not begin his action within the twelve months was because of the receipt of the letter of July 2. Such clauses in policies of insurance, while held valid as contracts, may be waived by the company. The law does not favor clauses of limitation in policies of insurance, and they are strictly construed, and it does not require the positive act of the company inducing postponement; but where the evidence is conflicting, the question of waiver is one for

the jury. We think, however, in this case, that there is no conflict in the evidence, and that the letter was positive in its terms, asking that the matter be allowed to rest until the adjuster of the company could see the plaintiff or his attorneys. As was said in *Bonessant v. American F. Ins. Co.*, 76 Mich. 658: "Forfeiture is not favored either in law or equity, and a provision for it in a contract will be strictly construed, and courts will find a waiver of it upon slight evidence, when the equity of the claim is, under the contract, in favor of the assured." See also *Lyon v. Travelers' Ins. Co.*, 55 Mich. 146, 54 Am. Rep. 354; and cases there cited; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; 2 May, Ins. § 488; *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 34 L. ed. 408.

It is next contended that the plaintiff's own evidence and the evidence of his attending physician does not support the finding that he was totally disabled in the sense intended by the policy, and that the court should so

other work, he could recover, and that if a merchant could post his books at home, but was unable to attend his place of business, he could recover.

IV. Ability to work in other occupation.

The effect of a disability when the insured is still able to work in some other occupation depends on the terms of the contract defining the disability.

Under a benefit association article with the clause "totally and permanently disabled from following his or her usual occupation," defined by another section of the article, to be "such a permanent and disabling sickness as shall render the member helpless to the extent of permanently preventing the member from following any occupation whereby he or she can obtain a livelihood," an answer which set up that the insured was able to follow occupations which were not of a like character as that of a barber, which was the plaintiff's occupation, was held to be a good answer. *Albert v. Order of Chosen Friends*, 34 Fed. Rep. 721.

"Total inability to labor," contained in the constitution and by-laws of a railroad relief association the object of which was to relieve its members during the time when they were unable to work by reason of injury or sickness, was held to mean that if a member was injured in such a way that he could no longer earn a livelihood at the particular labor at which he was employed at the time of the accident, yet was capable of earning as much or more money in some other employment, it was not the object of the association that he should remain idle and draw benefits all his life. It was held that a recovery could not be had where a railroad employee had his arm cut off and was taken back in the employ of the railroad about two months after the accident and remained until a second discharge, the first of which was for drunkenness, and the second for inattention to his duties. *Baltimore & O. Employees Relief Assn. v. Post*, 122 Pa. 597, 2 L. R. A. 44.

Under a policy classing the assured as "a retired" which might be assumed to mean "gentleman," and providing for injury which shall "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he receives membership," a recovery was denied where the injury was received while operating a buzz saw and the assured was required to carry the hand in a sling depriving him of the use of the same to a greater or less extent during a period of some months. The court said: "Can it be said that a man with his hand in a sling, and suffering a degree of discomfort from

a painful wound in that member, is wholly disabled and prevented from the prosecution of every kind of business pertaining to the condition of a retired gentleman," adding that he might still keep an eye upon his investments, collect and disburse his income, attend the meeting of the board of directors, superintend repairs of his property. Operating a buzz saw was not deemed incident to the occupation or condition of a retired gentleman. *Knapp v. Preferred Mut. Acci. Assn.*, 53 Hun. 84.

But under a policy providing "for the immediate continuous, and total loss of such business time as may result from his injuries," where the plaintiff was insured as a railroad employee and the premium was paid by an order on the railroad company and the policy recited that the insured "is by occupation local fireman under classification engineers," it was held that the company was liable where the injury only disabled the assured and prevented him from following his occupation and performing his duties, and resulted in a total loss of his business time. The reference in the policy to "the loss of such business time" was to the occupation of the assured and the loss of time in such business, meant the loss of time in the business of a fireman, and did not refer to other pursuits. *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa, 463.

This distinguishes the case of *Lyon v. Railway Pass. Assur. Co.*, 46 Iowa, 631, as in that case the obligation provided against disability "from the transaction of all kinds of business."

And under a policy providing for indemnity "should a member become disabled from following his usual or some other occupation," a brakeman, whose foot was crushed by the cars and was afterwards amputated, and which rendered him unable to follow the work of a brakeman, but who afterwards obtained employment by the company in watching a tower and in watching a milk car, could recover. It was held that the expression "some other occupation" was not the equivalent of "all other occupations." It was further held that this clause meant that a recovery could be had if the assured was disabled from following his "usual occupation" caused by an injury received while engaged in his usual occupation. *Neill v. Order of United Friends*, 73 Hun. 255.

Under a certificate by which the applicant made the constitution of the society the basis of the contract, and which provided that "a total or permanent disability to perform or direct any kind of labor or business . . . shall entitle a member holding a certificate of endowment so disabled . . . to the

have instructed the jury. The policy provides an indemnity of the sum of \$50 per week "against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated." Upon this point the plaintiff testified substantially that the fall entirely disabled his arm to the shoulder, and that it remained in that condition ten weeks; that his business consisted generally in personal security loans, and that during that time he did no business at all; that he could not dress himself without help, and that he had help during the whole time; that he did not do any work or business during that time, but had a man to do it for him; that he went to his office every day for a short time, but was unable to do any kind of work. We

find nothing in the record which shows, or tends to show, from the testimony of the plaintiff or his attending physician, that the plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation. At least, it was a question for the jury to determine, and the court submitted it in these words: "I think that a fair interpretation of that clause is, not that he must be so disabled as to prevent him from doing anything pertaining to the business, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to his occupation; not that he might do some one thing in regard to it, but that he must be wholly disabled, so as to prevent him from doing any and every kind of business pertaining to that occupation. I submit to you as a question of fact to find whether he was so disabled, and for what length of time, under this policy." In the case of *Young v. Travelers' Ins. Co.* 80 Me. 244, a policy in the

payment of one half of the endowment to which he would be entitled at death" an amendment providing that "a member who by reason of a disability incurred after admission to endowment membership, becomes unable to direct or perform the kind of business or labor which he has always followed, and by which alone he can thereafter earn a livelihood, shall be deemed entitled to disability benefits," was held to apply, and a recovery was had, where a switchman was totally disabled from performing the duties of a switchman upon the railroads in which for many years he had been engaged. It was held that "whether he can now earn a livelihood by some other business was a question of fact which, had it not been waived, should have been submitted to the jury." In this case the hand was injured in coupling cars, which necessitated the amputation of the fingers of the right hand. *Hutchinson v. Supreme Tent K. of M. of the World*, 68 Hun. 355.

In this case it was said that total disability "must be determined from the facts and circumstances disclosed in each case. That which would be total disability in one case might not be in another. The loss of a hand by a lawyer might interfere but slightly in the transaction of his business, or in the performance of his work, whilst to a man who had learned a particular trade, by which he had always earned his living, and was entirely ignorant of all other trades or business, it might prove to be a much more serious disability. Ordinarily, the loss of the fingers of the hand does not constitute total disability from the performance of any kind of labor or business."

Under a contract with the words "totally and permanently disabled from following his or her usual occupation," where an illiterate laborer was ruptured requiring so large a truss that it could not be worn without great danger of serious injury, it was held that in determining whether the plaintiff was disabled to such an extent as to prevent him from pursuing some other avocation in which he could earn a livelihood, his former occupation, his education and business experience, his natural abilities, and his age should be considered. *McMahon v. Supreme Council O. of C. F.* 54 Mo. App. 468.

See also *Gahagan v. Morrissey*, 6 Pa. Dist. R. 135, *infra*, V. b.

V. Disability of particular members.

a. Eyes.

A contract of a benevolent society providing that "a member who shall find himself incapable

of working by reason of sickness or accident shall receive," applied to total blindness resulting from an accident to one eye, which injury gradually extended to the other eye. *Mogé v. Société de Bienfaisance St. Jean Baptiste*, 167 Mass. 298, 35 L. R. A. 734.

And under a policy defining "permanent total disability" to be "a complete and irrevocable loss of sight in both eyes," and "permanent partial disability" to be "a complete and irrevocable loss of sight in one eye," where the assured had only one eye at the time of obtaining the policy, which fact was known to the agent, and he afterwards lost the sight of the other eye, this was held to be "a complete and irrevocable loss of sight in both eyes," and a total disability. *Bawden v. London, E. & G. Assur. Co.* [1892] 2 Q. B. 534.

So, where the certificate provided that in case of permanent disability by the loss of both eyes the company will pay for the "total and permanent loss of the sight of both eyes the whole of the principal sum named," the company was liable, although the insured had but one eye at the time of the application, which fact was not stated in his application but was known to the soliciting and general agent. It was held that there was no doubt that the policy was taken under the belief that the words "total and permanent loss of the sight of both eyes" were equivalent to the loss of eyesight. *Humphreys v. National Ben. Assn.* 139 Pa. 264, 11 L. R. A. 564.

But a recovery was denied for a total and permanent loss of one eye where the by-law providing for such disability was not adopted until some time after the insurance was effected, and it was not pleaded or proved that a similar by-law was in existence when the policy was issued. It was further held that the finding of facts that there was such a by-law at the time of incorporation, which was not sustained by pleading or proof, did not avail. *Maynard v. Locomotive Engineers' Mut. L. & Acci. Ins. Assn.* 14 Utah, 458.

b. Hands.

Where the policy provided for loss of time "from any one injury for other than injuries resulting in the loss of one or both hands, feet, or eyes, causing immediate, continuous, and total disability; or if such injuries shall cause the loss of one foot or one hand, within ninety days will pay such member \$585," the question whether the tearing off of three fingers wholly and a part of the other, and cutting the hand and destroying the joint of the thumb, was the loss of one hand, "causing immediate, continuous, and total disability of the same within the

eract language of this policy was considered by the supreme court of Maine. That court used this illustration: "Suppose a barber, who can use his razor and shears in his right hand only, and can use his left to wipe his customer's face, comb and dress his hair and receive pay and make change, by an accident is wholly deprived of the use of his right hand so that he can neither shave his customer nor cut his hair; can it be said that he is not wholly disabled from prosecuting of his business as a barber?" It was held by that court that there is a difference between being able to perform any part of his business and any and every kind of business pertaining to his occupation. If this language in the policy is ambiguous and susceptible of two constructions, then the question must be solved in favor of the insured: for it is well settled in this state that where a stipulation or exception to a policy, emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured; and it should be framed with such

deliberate care that no form or expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, should be found on the face of it. *Utt v. Travelers' Ins. Co.* 65 Mich. 545; *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* (Mich.) 8 Det. L. N. 669.

It is further contended that the attending physician having testified that, in treating this dislocation, he discovered that the plaintiff had sustained an injury at some time to that shoulder, which produced, as he called it, "traumatic rheumatism," and a part of the pain was due to that, therefore the company should not be called upon to pay for an injury the inconvenience of which resulted partly and indirectly from disease or bodily infirmity previously existing. We think that question was fully and fairly submitted to the jury and need not be discussed.

The judgment will be affirmed.

The other Justices concur.

meaning of the contract of insurance, was a question of fact for the jury, who found that such loss of the hand was entire. The court said that if the hand was injured so as to become useless as a hand the defendant became liable for its use under the contract. *Lord v. American Mut. Acci. Assn.* 89 Wis. 19, 26 L. R. A. 741.

In *Sneek v. Travelers' Ins. Co.* 81 Hun. 831, under a policy providing indemnity for injuries "if loss by severance of one entire hand" should result, where the plaintiff's hand was cut off three fourths of an inch back of the knuckle joint and just back of the second bone of the thumb, it was held that to bring the case within the provisions of the question "the loss must be of the entire hand. Of course this means substantially the entire hand, both in respect to its structure and its use. In this case upon the undisputed evidence, there was not such a loss in either respect."

But on a subsequent appeal in the same case (88 Hun. 94), after plaintiff had testified substantially that he had no use of the injured member as a hand, and never had since the accident, although admitting that upon the former trial he had probably testified that he could use it to place under and against objects for the purpose of lifting and pushing, it was held that "the term 'entire hand' is to be taken in its general acceptance and ordinary meaning." The court said that "it would seem to be an extremely narrow and technical construction of this contract to say that only a physical removal of every particle of that portion of the human anatomy known as the hand would entitle the insured to recover under the clause of the policy now under consideration." And it was held that the trial court erred in holding that the plaintiff had not suffered the loss "by severance of one entire hand," and in holding that he was not entitled to recover. (This in effect overrules the prior decision.)

Under a policy providing for indemnity for "loss of a hand at and above the wrist joint" the insured "shall be considered totally disabled," it was held that the loss of the use of the hand was covered by the policy, and a recovery was allowed although the insured was afterwards employed by the company in another line of work as a yard switchman. *Gahagan v. Morrissey*, 6 Pa. Dist. R. 135.

A recovery was allowed where a bank cashier lost his hand by falling against a band saw some time after he had used the same, which injury was claimed to have been caused by stepping on some-

thing and stumbling and falling against the saw. The instructions were to the effect that under a clause providing that "the member is required and agrees to use all due diligence for his personal safety and protection," no recovery could be had if the insured was negligent, and that under a clause that the insurance shall not cover "voluntary exposure to unnecessary danger" the member's going into a planing mill was not such an exposure, but that whether such an exposure took place in the mill was a question for the jury. The jury were also instructed that under a clause providing that the certificate should be void "as to all accidents occurring [to the insured] when engaged in any profession, employment, or exposure not [herein] rated . . . as a preferred occupation," if the injury occurred while he was in the act of using the saw and such act was incident to his ordinary avocation he still could recover, and that he would not change his avocation by doing an occasional act connected with some other avocation. The jury were also instructed that if the plaintiff voluntarily exposed himself to unnecessary danger he could not recover. *Hess v. Preferred Masonic Mut. Acci. Assn.* (Mich.) 8 Det. L. N. 906.

In *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249, where a stock driver lost his hand in attempting to climb on a train, the question was whether the clause of the policy providing against "voluntary exposure to unnecessary danger, entering or trying to enter or leave a moving conveyance using steam as a motive power," prevented a recovery.

For loss of hand, see also *Hutchinson v. Supreme Tent, K. of M. of the World*, 68 Hun. 365.

c. Feet.

Under a policy with the clause "suffers the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand or one entire foot," it was held that an injury from a bullet in the spine producing an immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet was a loss of two entire feet within the meaning of the policy. *Sheenan v. Pacific Mut. L. Ins. Co.* 88 Wis. 507, 9 L. R. A. 684.

But no recovery was allowed under a policy providing for injuries which shall "wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation," and providing for permanent partial disablement, viz., the loss of one foot, where the in-

MINNESOTA SUPREME COURT.

S. C. LOBDILL, *Resp't.*,

v.

LABORING MEN'S MUTUAL AID ASSOCIATION of Chatfield, Minnesota, *App't.*

(.....Minn.....)

"The defendant insured the plaintiff against loss of time effected through external, violent, and accidental injuries 'wholly and continuously disabling him from transacting any and every kind of business pertaining to his occupation of merchant.' Held:

1. That the evidence justified the jury in finding that he was "wholly disabled" within the meaning of the policy.

2. Total disability does not mean absolute physical inability to transact any kind of business pertaining to the occupation of mer-

*Headnotes by MITCHELL, J.

sured was severely and painfully injured, and without artificial support would probably become helpless and unable to use his limbs from paralysis of spinal nerves affecting a foot, but with the use of a plaster jacket the foot could be used constantly. *Stevens v. People's Mut. Acci. Ins. Assn.* 160 Pa. 132, 16 L. R. A. 446.

And under a clause providing for compensation for "one entire hand and one entire foot" no recovery could be had for the loss of one foot where the assured did not also lose one hand. *Gentry v. Standard Life & Acci. Ins. Co. (C. P.)* 8 Ohio Dec. 114.

VI. *Lunacy.*

Under the rules of a friendly society providing that he shall receive eight shillings per week during any sickness or accident that may befall him, and another rule providing for a member sending a certificate if his illness should continue for more than a month, and another that when any member falls sick he shall send a written report to the steward, where the society was formed under 18 & 19 Vict. chap. 63, § 9, subs. 2, providing for the relief or maintenance of members in old age, sickness, or widowhood, it was held that lunacy was the effect of a diseased mind or body, and should come within the meaning of sickness. *Burton v. Eyden*, 28 L. T. N. S. 408, L. R. 8 Q. B. 295, 42 L. J. M. C. N. S. 115, 21 Week. Rep. 503.

VII. *Sickness.*

Under a clause providing against "falling sick" a recovery was not allowed where the incapacity resulted from old age. *Dunkley v. Harrison*, 56 L. T. N. S. 860.

But see next subdivision as to old age.

And the provision in a constitution and by-laws of a benefit society allowing benefits "in case of sickness" and providing that "when any member — takes sick" he shall be entitled to such benefits, "if it be so that he is not able to attend to his daily labor," was held not to include a case of a permanent bodily injury which did not affect the general health of the person. In this case the insured was crippled as to one leg, and was "unable to perform severe manual labor, and in all probability will forever continue to be unable to perform the duties of a coachman or to perform severe manual labor." This was held not to be sickness. *Kelly v. Ancient Order of Hibernians*, 9 Daly, 239.

And no recovery was allowed for sickness where 88 L. R. A.

chant. It is sufficient if his injuries were such that common care and prudence required him to desist from transacting any such business in order to effectuate a cure.

3. Inability to transact some kinds or branches of business pertaining to his occupation as merchant would not constitute total disability within the meaning of the policy, provided he was able to transact other kinds or branches of business pertaining to such occupation.

4. But ability to occasionally perform some trivial or unimportant act connected with some kind of business pertaining to such occupation would not render his disability partial, instead of total, provided he was unable to substantially, or to some material extent, transact any kind of business pertaining to such occupation.

5. The fact that he occasionally performed some act connected with his business as a merchant would not necessarily

the policy provided "for confinement to the bed, caused by sickness in the sum of \$6.40 per week," where the insured was confined to the bed only one day. *Gainor v. St. Lawrence L. Asso.* 21 Misc. 27.

But the term "sickness" was held to apply where the insured became affected with lunacy, which was held to be the effect of a diseased mind or body. *Burton v. Eyden*, 28 L. T. N. S. 408, L. R. 8 Q. B. 295, 42 L. J. M. C. N. S. 115, 21 Week. Rep. 503.

In *Dodds v. Canadian Mut. Aid Asso.* 19 Ont. Rep. 70, it was said that total disability might arise from various causes, such as illness.

VIII. *Old age.*

Where the disability was caused by bronchitis and asthma aggravated by old age, it was held that "the words 'total disability' used in the certificate are there used without any limitation whatever, either as to the duration of the disability, or as to the cause from which it shall arise, or as to the doing of what there shall be the disability. Total disability may be temporary or it may be permanent; it may arise from various causes, such as illness, old age, or accident; and there may be total disability to do some things and not others. Construing, however, the words 'total disability' used in the certificate to mean permanent total disability or total disability for life, the evidence showed beyond dispute that the plaintiff was totally disabled permanently and for life from doing manual labor." *Dodds v. Canadian Mut. Aid Asso.* 19 Ont. Rep. 70.

Under a rule of a friendly society providing that a member "falling sick, lame, or blind, or being otherwise disabled from work, shall be entitled to receive relief for and during sixteen weeks, if his illness continues so long," a member could not recover where his incapacity resulted from old age. *Dunkley v. Harrison*, 56 L. T. N. S. 860.

Grantham, J., said that if physical sickness was produced by old age it might be different.

IX. *Death.*

Under a policy providing for weekly indemnity in respect to bodily injuries effected through external, violent, or accidental means, and also stipulating that in case of death the company will pay the principal sum where the injured was killed instantly, no recovery could be had for indemnity for disability, as death was not the kind of disability to which the policy referred. *Hall v. American Employers' Liability Ins. Co.* 96 Ga. 413.

prove that he was not totally disabled within the meaning of the policy. The frequency and nature of these acts would ordinarily be for the consideration of the jury in determining whether he was totally disabled as above defined.

(June 16, 1897.)

APPEAL by defendant from an order of the District Court for Fillmore County denying a motion for a new trial after verdict in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. A. Fosness, McConnell & Schweizer, and Burdett Thayer for appellant.

Messrs. C. D. Allen and Gray & Thompson for respondent.

Mitchell, J., delivered the opinion of the court:

The defendant, an accident insurance company, issued its policy to plaintiff, whereby it insured him as a merchant by occupation, under classification preferred, "in the sum of \$25 per week, against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected through means aforesaid

So, where the policy provided for the case of death or the case of total disability from labor by accident, and provided that for bodily injuries which shall "immediately and wholly disable and prevent him from the prosecution of any and every kind of business, . . . he shall be indemnified against loss of time caused thereby, in the sum of \$10 per week, for such period of continuous total disability, . . . not exceeding, however, twenty-six consecutive weeks," and the insured was killed almost instantly, his administrator could not wait twenty-six weeks and bring an action on the theory that the insured was totally disabled within the meaning of the policy and was in some way entitled to indemnity for a period not to exceed twenty-six weeks at the rate of \$10 per week. *Dawson v. Accident Ins. Co.* 88 Mo. App. 355.

See *Perry v. Providence L. Ins. & Invest. Co.* 103 Mass. 242, where it was claimed that death prevented a recovery for injury resulting in death.

Where the policy provided for payment for bodily injuries resulting in death, and also for indemnity for bodily injuries immediately and wholly disabling the assured, and he continued to work for two weeks after the injury, and there was no evidence of total disability, notice of the accident at the time it occurred was not a necessary condition of a death claim where the policy omitted to provide for such notice. *McFarland v. United States Mut. Accl. Asso.* 124 Mo. 204.

X. "Immediately" construed.

Under a policy providing for indemnity "from bodily injury effected during the term of such insurance . . . which should, independently of all other causes, immediately and wholly disable," it was held that "immediately" means that the disability must have ensued so closely upon the accident that he was wholly disabled from proceeding and transacting the business of his occupation regularly and in its due and proper course. Where total disability did not occur until about two months after the accident a recovery could not be had. *Merrill v. Travelers' Ins. Co.* 91 Wis. 329.

And no recovery was allowed where the insurance was against loss of time resulting from bodily injuries effected through external, violent,

[external, violent, and accidental] *wholly and continuously disabling said member from transacting any and every kind of business pertaining to the occupation above stated.*" Plaintiff alleged that on May 21, 1895, and during the life of the policy, he was accidentally thrown from his bicycle, and violently thrown forward on his face, thereby dislocating the thumb of his right hand, breaking loose some of his teeth, and so injuring or jarring his head and neck as to affect his spine and nerves to such an extent as to produce severe nervous prostration, by reason of which injuries he was wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation as a merchant for seventeen weeks. The principal contest is as to the construction of that part of the policy which we have italicized, and particularly the term "wholly disabled." Accident insurance being of comparatively recent origin, the policies do not seem to have acquired any settled form, and the decisions construing them are comparatively few, and do not seem to have agreed on any very definite meaning to be given to the term "total disability." Such authorities as there are will be found quite fully cited in *Bacon, Ben. Soc. § 501*, and *Niblack, Mut. Ben. Soc. §§ 401 et seq.* See also 4 *Harvard, Law Rev.* p. 180.

and accidental means, which should "Independently of all other causes, immediately, wholly, and continuously disable" him "from transacting any and every kind of business pertaining to his occupation" where thirty days had elapsed from the time the injury was received before the insured was disabled so that he could not attend to his business. This decision turned upon the construction of the word "immediately." *Williams v. Preferred Mut. Accl. Asso.* 91 Ga. 698.

So, where five days elapsed from the time of the injury to the disability, under a policy providing against bodily injuries "which shall, independently of all other causes, immediately, wholly, and continuously disable him from transacting any and every kind of business pertaining to his occupation as above stated," it was held that the declaration should show, not only that the plaintiff was wholly and continuously disabled, but also "immediately." *Preferred Masonic Mut. Accl. Asso. v. Jones*, 60 Ill. App. 108.

And no recovery was allowed under a policy for only one day providing for "loss of time from the time of the accident and injury, which totally disabled and prevented from all kinds of business by reason of bodily injuries effected during the term of the policy through violent or accidental means," where an injury was received, but there was no total disability until a second injury, which happened sixteen days subsequently and by aggravating the first rendered him totally disabled. *Rhodes v. Railway Passengers Ins. Co.* 5 Laus. 51.

But a recovery was allowed under a policy providing for injuries which "shall immediately, continuously, and wholly disable and prevent him from performing any and every kind of duty pertaining to his business" where it was contended that the disability was only partial from the 3d until the 11th of January, and was not immediate, continuous, and total. A verdict for the plaintiff was affirmed where the instruction was that if "the total disability commenced on the 11th, and he was totally disabled for five weeks after that, then he would not be entitled to recover, for the reason that there was only a partial disability from the 3d until the 11th," and the evidence showed that the attempt by the assured to do occasionally portions

The cases which have placed a construction upon the term "total disability" might seem to be divided into two classes, *viz.*, those which construe it liberally in favor of the insured, and those which construe it strictly against him. Among those of the first class may be cited, *Hooper v. Accidental Death Ins. Co.* 5 Hurlst. & N. 545, 556; *Young v. Travelers' Ins. Co.* 80 Me. 244; *Turner v. Fidelity & C. Co.* (Mich.) 4 Det. L. N. 85; and of the second class, *Lyon v. Railway Pass. Assur. Co.* 46 Iowa, 631, and *Sareland v. Fidelity & C. Co.* 67 Wis. 174, 58 Am. Rep. 863.

Any apparent conflict in the decisions may, however, be mostly reconciled in view of differences in the language of the policies, and of the different occupations under which the parties were insured. As is well said in *Wolcott v. United Life & Acci. Ins. Assn.* 55 Hun, 98: "Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged." One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or a professional man might by the same injury be only disabled from transacting some kinds of business pertaining to his

occupation. In policies of this character the aim of the insurer usually is to get as large premiums as possible by incurring the least possible liability; and, on the other hand, after an accident occurs, the usual aim of the insured is to recover the greatest amount of indemnity for the least possible injury. All that the courts can do is to construe the contract which the parties have made for themselves; but in doing so they should give it a reasonable construction, so as, if possible, to give effect to the purpose for which it was made. There are a few propositions applicable to the construction of the policy under consideration, which, under the evidence, are decisive of this case. The first is that total disability does not mean absolute physical inability on the part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself. *Young v. Travelers' Ins. Co.* 80 Me. 244. The second is that under the particular terms of this policy, to wit, "from transacting any and every kind of business pertaining to the occupation

of his work as a barber were so painful that he had to desist. *Hohn v. Interstate Casualty Co.* (Mich.) 4 Det. L. N. 777.

And under a policy providing that "insurance shall not cover disappearances, nor injuries of which there is no visible, external mark upon the body of the insured" an injury which "was visible soon after the accident, and as a consequence of the injury" was covered by this clause. *Pennington v. Pacific Mut. L. Ins. Co.* 85 Iowa, 468.

XI. "Per week" construed.

Where the policy provided for "total disability (confinement to the bed) caused by sickness, in the sum of \$6.47 per week," it was held that the total disability insured against must be evidenced by actual confinement to bed. It was further held that under a provision "that seven full days confinement to bed shall constitute a week's sickness, . . . and no indemnity will be paid for a less period," no recovery could be had where it was conceded that the plaintiff, although suffering from malaria during the period sued for, was confined to the bed only one day. *Gainor v. St. Lawrence Life Assn.* 21 Misc. 27.

XII. Other matters.

The insurance company was not exonerated where the assured was disabled, although his employer gratuitously gave him compensation. *Globe Acci. Ins. Co. v. Helwig*, 13 Ind. App. 539.

Where the medical examiner of the benefit association refused to certify to the proofs of disability, but the fault was that of the defendant's own agent, the company could not set up as a defense an omission caused by the negligence of its agent. *Young v. Grand Council, A. O. of A.* 63 Minn. 506.

Where the policy said when "permanently disabled from following his or her usual or other occupation, by reason of disease or accident," a report may be made by a board of three physicians and on approval of the supreme medical examiner the member shall be entitled to one half the benefit, provided that where the disability is caused by accident and is patent to the eyes of all, the examination by the board of physicians may be dispensed with, a demurrer was sustained to the third 88 L. R. A.

paragraph of the answer which pleaded that the injury was received in an affray, and therefore was not accidental. It was further alleged in the answer that appellee was not thereby permanently disabled from following his usual occupation. The discussion of the case was upon the argument that the injury came from an affray, and not an accident; but as it happened in Kentucky, and there was no allegation what the statute was there, it was presumed that the common law applied, and that there was no fault on the part of the insured. *Supreme Council, O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298.

In *Howe v. Provident Fund Soc.* 7 Ind. App. 586 where the application provided for indemnity in the same ratio that "my weekly income bears to the amount of the weekly indemnity insured for," and the indemnity insured for was \$25 a week and the income was only \$15 a week, a recovery was limited to the amount of the income.

In *Eaton v. Atlas Acci. Ins. Co.* 89 Me. 570, it was admitted that the insured was totally disabled, and the questions in that case were whether the company was liable for an injury received while returning from a funeral on Sunday on a bicycle by a road which was longer than the direct road, and whether the claim should be paid at a fifth-class rate because the injury occurred while insured was engaged for pleasure or recreation in amateur bicycling, and whether under a clause providing "for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous" the insured should be entitled to receive only such amount as the company pay for such increased hazard.

XIII. Summary.

In the foregoing cases the clauses of the various policies which were construed were as follows:

"From transacting any and every kind of business pertaining to his occupation"—a recovery was denied in *Spicer v. Commercial Mut. Acci. Co.* 4 Pa. Dist. R. 271; *Gracey v. People's Mut. Acci. Ins. Assn.* 21 Pitts. L. J. N. S. 25; *Ford v. United States Mut. Acci. Relief Co.* 148 Mass. 153, 1 L. R. A. 700; *Bean v. Travelers' Ins. Co.* 94 Cal. 581; *Knapp v.*

above stated" (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. For example, the occupation of a retail country merchant (as plaintiff was) embraces various departments or kinds of business, such as keeping the books, making out accounts, and settling with customers; waiting on customers, and doing up their purchases in packages; also the handling and arranging of goods in the store. If an injury disabled the insured merchant from transacting one or more of these branches of the business, but left him able to transact others with due regard to his health, he would not be totally disabled within the meaning of this policy. But, fourth, the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation. To illustrate this proposition by reference to the evidence in this case, it appears, as we shall assume, that on one or two occasions where the plaintiff went into his store when down town

for other purposes he handed out some small article to a customer, and took the change for it. This would not necessarily prove that he was able to attend to the business of waiting on customers, and that he was not "wholly disabled" within the meaning of the policy. He might be able, on temporary visits to the store, to occasionally perform a trifling act of this nature, and yet be substantially and essentially unable to transact any kind of business pertaining to his occupation of merchant. The frequency and nature of these acts would be for the consideration of the jury in determining whether he was totally disabled, but would ordinarily be by no means conclusive on that question.

It only remains to apply these principles or rules to the evidence. The evidence was, as might be expected, conflicting; but that introduced on part of the plaintiff reasonably tended to show that the dislocation of his thumb was by no means the most serious of his injuries; that by his fall he so injured his head and neck as to produce severe nervous prostration, which so seriously affected his general health and strength as to render him unable to transact, to any material or substantial extent, any part of his business as merchant; that due regard to his health required him to wholly desist from

Preferred Mut. Acci. Asso. 53 Hun. 84; Stevens v. People's Mut. Acci. Ins. Asso. 150 Pa. 132, 16 L. R. A. 446.

But a recovery was allowed in *Young v. Travelers' Ins. Co.* 80 Me. 244; *Baldwin v. Fraternal Acci. Asso.* 31 Miss. 124; *LODDILL v. LABORING MEN'S MUT. AID ASSO.*; *TURNER v. FIDELITY & CASUALTY CO.*; *Cohn v. Interstate Casualty Co. (Mich.)* 4 Det. L. N. 777.

"Any and every kind of business pertaining to his profession as an attorney at law,"—a recovery was denied. *United States Mut. Acci. Asso. v. Millard*, 43 Ill. App. 143.

"From following his usual business occupation,"—a recovery was allowed in the following cases: *Hooper v. Accidental Death Ins. Co.* 5 Hurlst. & N. 548, 29 L. J. Exch. N. S. 840, 8 Week. Rep. 618; *McMahon v. Supreme Council, O. of C. F.* 54 Mo. App. 468; and denied in *Albert v. Order of Chosen Friends*, 84 Fed. Rep. 721.

"His usual employment,"—a recovery was allowed in the following cases: *Perry v. Provident L. Ins. & Invest. Co.* 103 Mass. 242; *Sawyer v. United States Casualty Co. (Mass.)* 8 Am. L. Reg. N. S. 233; and denied in *Potter v. Accidental Ins. Co.* 29 Ind. 210.

"Anything about his usual occupation,"—was not decided in *Globe Acci. Ins. Co. v. Helwig*, 13 Ind. App. 539.

"From following his or her usual or some other occupation,"—a recovery was allowed in *Neill v. Order of United Friends*, 78 Hun. 255.

"Any occupation,"—a recovery was denied in *Albert v. Order of Chosen Friends*, 84 Fed. Rep. 721.

"Unable to direct or perform the kind of business or labor which he has always followed,"—a recovery was allowed in *Hutchinson v. Supreme Tent, K. of M. of the World*, 88 Hun. 355.

"From the transaction of all kinds of business,"—a recovery was denied in *Lyon v. Railway Pass. Assur. Co.* 46 Iowa, 631.

"Loss of such business time,"—a recovery was allowed in *Pennington v. Pacific Mut. L. Ins. Co.* 85 Iowa, 468.

Occupation of "ice-man (propr.)"—a recovery was allowed in *Nease v. Manufacturers' Acci. Indemnity Co.* 55 Hun. 111.

88 L. R. A.

"Total disability,"—a recovery was denied in the following cases: *Hollobaugh v. People's Ins. Asso.* 138 Pa. 595; *Baltimore & O. Employees' Relief Asso. v. Post*, 122 Pa. 597, 2 L. R. A. 44; and was allowed in *Wolcott v. United States Life & Acci. Ins. Asso.* 55 Hun. 98; *Dobbs v. Canadian Mut. Aid. Asso.* 19 Ont. Rep. 70.

"Incapable of working by reason of sickness or accident,"—a recovery was allowed. *Mogé v. Société de Bienfaisance St. Jean Baptiste*, 167 Mass. 298, 35 L. R. A. 736.

"Sickness,"—a recovery was allowed. *Burton v. Eyden*, 28 L. T. N. S. 408, L. R. 8 Q. B. 295, 42 L. J. M. C. N. S. 115, 21 Week. Rep. 533.

"Falling sick, lame, or blind, or being otherwise disabled from work,"—a recovery was denied. *Dunkley v. Harrison*, 56 L. T. N. S. 660.

"Confinement to bed,"—"per week,"—a recovery was denied. *Gaimor v. St. Lawrence Life Asso.* 21 Misc. 27.

"Loss of sight in both eyes,"—recovery was allowed. *Bawden v. London, E. & G. Assur. Co.* [1892] 2 Q. B. 534; *Humphreys v. National Ben. Asso.* 139 Pa. 264, 11 L. R. A. 564.

"Total and permanent loss of both eyes,"—a recovery was denied. *Maynard v. Locomotive Engineers' Mut. L. & Acci. Asso.* 14 Utah, 458.

"Bodily injuries,"—a recovery was denied. *Hall v. American Employers' Liability Ins. Co.* 96 Ga. 413; *Dawson v. Accident Ins. Co.* 38 Mo. App. 355.

"Loss of one hand,"—a recovery was allowed. *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741.

Loss of "two entire feet,"—a recovery was allowed. *Sheauean v. Pacific Mut. L. Ins. Co.* 83 Wis. 507, 9 L. R. A. 684.

"Immediately,"—a recovery was denied: *Merrill v. Travelers' Ins. Co.* 91 Wis. 329; *Williams v. Preferred Mut. Acci. Asso.* 91 Ga. 608; *Preferred Masonic Mut. Acci. Asso. v. Jones*, 60 Ill. App. 106. A recovery was allowed. *Hohn v. Interstate Casualty Co. (Mich.)* 4 Det. L. N. 777.

"Visible external mark upon the body,"—a recovery was allowed. *Pennington v. Pacific Mut. L. Ins. Co.* 85 Iowa, 468.

L. T.

attempting to do so, and that he was so advised by his physician; that when at home he went down town several times a week to receive medical treatment from his physician, and to get shaved; that when he did so he would frequently go into his store, and sit down for a brief time, but when there took no part or interest in the transaction of the business except the trivial acts on two or three occasions, already referred to; that upon the advice of his physician he went to Chicago to consult a medical specialist; that when he returned, his health not appearing to be improved, his family took him off on two occasions on a summer outing; and that it was not until the last of September or the first of October that he was sufficiently recovered to give any considerable attention to any part of his business. This evidence, in our judgment, justified the jury in finding that he was, for the full seventeen weeks, wholly disabled, within the meaning of the policy, from transacting any and every kind of business pertaining to his occupation as a merchant.

The requests to charge referred to in the assignments of error were properly refused, for the reason, if no other, that they all assumed that if the plaintiff on some particular date performed some single act connected with his business,—as, for example, handing a customer a package of garden seeds, or a dozen of nails,—it necessarily followed that he was not “wholly disabled” at that date within the meaning of the policy.

In his application for this insurance the plaintiff stated the value of his time to be \$25 a week. It cropped out on the trial that he held like insurance for like amounts in three other companies. As no point was made on the trial but that he was entitled to recover, if at all, \$25 a week during his total disability on the policy in suit, the question of the effect of the other insurance on the amount he is entitled to recover is not before us.

Order affirmed.

City of TOWER, *Appt.*,

v.

TOWER & SOUDAN STREET RAILWAY
COMPANY *et al.*, *Defts.*,

and

Arthur H. CRASSWELLER, Receiver; *et al.*,
Respts.

(.....Minn.....)

*1. The city of Tower, through its common council, granted to a street railway, its successors and assigns, the right and privilege of constructing, maintaining, and operating a line of street railways on any and all of its streets and public highways for a period of twenty years, the cars on said railway to be propelled by horses, mules, steam, electric, or other motor, for the purpose of transporting passengers and freight. The grant was made upon various conditions. The 12th section of the

*Headnotes by BUCK, J.

NOTE.—As to municipal power to impose conditions when giving consent to railway in street, see *Galveston & W. R. Co. v. Galveston (Tex.)* 38 L. R. A. 33, and note.

38 L. R. A.

ordinance reads as follows: “This franchise is granted upon condition that the company faithfully fulfil the requirements herein expressed, and should the company fail therein or wilfully abandon such road, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road.” The railway company became insolvent, and neglected and ceased to operate the road for more than one year. Held, that the word “road,” as used in said section of the ordinance, has the same import as if it read “railroad.”

2. Held, also, that the word “forfeiture,” as used in said ordinance, did not signify a nonenforceable penalty nor liquidated damages, but authorized the court, upon default of the conditions of the grant, to declare, in a proper action, an absolute forfeiture of the railway franchises, including rails, ties, roadbed, and things granted.

3. Railway franchises and grants are usually made for the benefit of the public, and where public interests are involved in the things and conditions granted, and it is impossible or impracticable to recover compensation when the conditions are broken by the grantee, and the facts clearly appear, the grantor has the right to resume, through the declarations of the courts, the corporate franchises and things forfeited, if the grant so provides.

(Canty, J., dissents.)

(June 11, 1897.)

APPEAL by petitioner from an order of the District Court for St. Louis County sustaining a demurrer to a petition filed to determine the right to certain steel rails which had been laid in petitioner's streets. *Reversed.*

The facts are stated in the opinion.

Mr. W. G. Bonham for appellant.

Messrs. Draper, Davis, & Hollister, and H. J. Grannis, for respondent, American Loan & Trust Company:

If there is no obligation in the nature of the contract on the part of the railway company to operate the road for a definite period, its failure to do so cannot subject it to damages, liquidated or otherwise.

Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311; 1 Sutherland, Damages, p. 475.

While the railway company was acting within the limits of the grant, the city council could not rescind or revoke the rights conferred by the ordinance.

Nash v. Lowry, 37 Minn. 261; *Citizens' Street R. Co. v. City R. Co.* 56 Fed. Rep. 746; *State, Kansas, v. Corrigan Consol. Street R. Co.* 85 Mo. 282, 55 Am. Rep. 361; *Citizens' Street R. Co. v. Memphis*, 53 Fed. Rep. 715.

The rights and privileges conferred, although given to a particular company, constitute a mere license until accepted and acted upon by the company. At any time prior to such acceptance the ordinance may be revoked. When the company accepts and acts upon the ordinance, contract rights are created which protect it in the exercise of the privileges conferred by the grant, subject, however, to be defeated by noncompliance with the terms thereof.

Atchison Street R. Co. v. Nave, 38 Kan. 744; *Galveston City R. Co. v. Galveston City Street R. Co.* 63 Tex. 529; *Chicago City R. Co. v. People, Story*, 78 Ill. 541.

The word "forfeit" or "forfeiture," when used in a contract, imports a penalty, unless it is clearly apparent from the other terms of the contract that such is not the intention of the parties.

Van Buren v. Diggs, 52 U. S. 11 How. 461, 13 L. ed. 771; *Taylor v. Sandiford*, 20 U. S. 7 Wheat. 15, 5 L. ed. 385; *Colwell v. Lawrence*, 38 N. Y. 71. See also *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 228.

Even in doubtful cases the rule is that the sum named as a penalty shall be construed to be such, unless that construction is overcome by a clear intention to the contrary, derived from the other parts of the agreement.

Beach, Contr. § 626; Wallis v. Carpenter, 18 Allen, 19; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Cheddick v. Marsh*, 21 N. J. L. 463; *Shreeve v. Brereton*, 15 Pa. 175.

The rails laid in the streets of the city of Tower by the railway company did not become a part thereof, and the city has no right to said rails by virtue of their being so laid.

Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co. 20 N. J. Eq. 61; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.* 32 Barb. 858; *Citizen's Coach Co. v. Camden Horse R. Co.* 33 N. J. Eq. 267, 36 Am. Rep. 542.

By a forfeiture of the franchises the private property of the railway company was not affected.

People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255; *People v. National Trust Co.* 82 N. Y. 283; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961.

Mr. John Jenswold, Jr., for respondent Crassweller.

Buck, J., delivered the opinion of the court:

The plaintiff is a municipal corporation in the county of St. Louis, and one of the defendants is a corporation created and existing under the laws of this state. The defendant Crassweller is its receiver, and the American Loan & Trust Company, defendant, claims some interest in the property hereinafter referred to. On the 18th day of March, 1890, the common council of the plaintiff corporation, having the power so to do, passed an ordinance granting to and authorizing the defendant Tower & Soudan Street-Railway Company, its successors and assigns, the right and privilege of constructing, maintaining, and operating a line or lines of street railway on any and all streets, avenues, alleys, and bridges or public highways of said city for a period of twenty years from and after the passage of the ordinance, the cars thereon to be propelled by horses, mules, steam, electric, or other motor, as the company might determine, for the purpose of transporting passengers and freight. The grant was made upon various conditions, among others that it should have in operation a continuous line of railway from and to certain specified points, and the 12th section of the ordinance reads as follows: "This franchise is granted upon condition that the company faithfully fulfil the requirements herein expressed, and should the company fail therein or wilfully abandon such road, and neglect or refuse to operate it, then this franchise to be-

come null and void. Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road." There were certain other conditions in the ordinance beneficial to each party, not necessary to enumerate. But the railway company, prior to the day of the passage of the ordinance applied to said city to issue its bonds to aid in the construction of said railway, and on the day when said ordinance was so granted the legal voters of said city voted to issue bonds of the denomination of \$6,000 to said railway company in aid of the construction of said railway, and which bonds were duly delivered to and accepted by said company as part consideration for said railway company's agreement to construct, maintain, and operate said street railway for a period of twenty years from and after the date of said grant. Said railway company constructed its line of railway according to its agreement and the conditions of said ordinance, and operated the same until about the 4th day of March, 1894, when said company, without any fault on the part of this plaintiff and against the protests of its officers, wholly ceased, neglected, and refused to operate said road; and thereupon, on the 26th day of November, 1895, plaintiff's city council passed an ordinance declaring the franchise of said Tower & Soudan Street-Railway Company to be null and void on account of its failure to operate said railway after March 4, 1894, and for its wilful abandonment of the same. Part of the road of said railway company consists of 11,500 yards of steel T rails, of the value of \$2,300. The railway company becoming insolvent, the defendant Crassweller was appointed its receiver, and plaintiff, having received due authority from the court, brought this suit against him and the other defendants named, for the purpose of having the title to said steel rails determined, and prayed judgment that all the rights of the defendant Tower & Soudan Street-Railway Company under the contract hereinbefore set forth be forfeited, and that plaintiff be adjudged entitled to the absolute ownership and possession of said steel rails free and clear of all claims, demands, and liens of any and all the defendants in this action. The receiver and the trust company interposed demurrers to the complaint upon the grounds that upon the face of said complaint it did not state facts sufficient to state a cause of action. The court sustained the demurrers, and the plaintiff appeals.

The two material questions raised and discussed were: (1) Does the word "road," as used in § 12 of the ordinance, refer to the franchise, or does it include the steel rails forming a part of the roadbed? and (2) does the word "forfeit" in said section provide for a penalty of such a nature that it is nonenforceable as such against the railway company?

Upon the first question very little need be said. The word "road," as used in § 12, includes the roadbed, with the ties, rails, and all that constitutes a completed superstructure on which cars transported passengers or property, or both. By reference to our statutes upon the subject of railroads, it will be found that in numerous instances the word "road" is used in the same sense and with the same meaning as

"railroad." Of course, whether the word "road" is used as synonymous with, or the equivalent of, "railroad," depends upon its context. In the section above quoted it has the same import as if it read "railroad."

Upon the second question counsel have discussed the question as to whether the sentence, "Said company agree that they will forfeit said road to the city of Tower in one year after said company cease to operate said road," was to be construed as nonenforceable penalty or as liquidated damages which could be recovered. We do not agree with either counsel, but think that the ordinance shows a grant upon conditions which, if broken by the grantee, create a forfeiture. The demurrer admits that the conditions were broken, and the law adjudges the forfeiture. The nonuser went to the very essence of the contract between the city and the railway company. The privileges granted and consideration furnished by the city to the company had in view the construction and continued operation of the railway for a period of twenty years, and upon these conditions the consideration and special privileges were granted to the company. The complete suspension of the operation of the railway for more than one year brought about this forfeiture of their corporate rights. Upon these conceded facts there was no discretion in the trial court as to the course it should have pursued, and it should have overruled the demurrers instead of sustaining them. This was not a state franchise, but a grant of authority from the city of Tower resting in contract, and redress for violations of such contract, as in other violations where public interests are involved, should be had by the usual remedies. The rule as to forfeiture, in cases of this kind, should be regarded in its nature analogous to forfeitures frequently determined where the state is concerned as a party, and brings suit against a corporation for violation of its chartered privileges. The case of *State, Hahn, v. Minnesota C. R. Co.* 36 Minn. 246, is an illustration of this rule. There the state granted to the railway company all the rights, franchises, and property of the Minneapolis & Cedar Valley Railroad Company, which was incorporated by the act of the territorial legislature in 1856, by which act it was authorized to construct and operate a certain railway, and by a subsequent act it was endowed with the lands granted by an act of Congress to aid in the construction of the line of railroad which by its charter it was authorized to build. It failed to comply with the conditions upon which its franchises were granted. Gen. Stat. 1878, chap. 76, § 11 (Gen. Stat. 1894, § 5899), then provided that, whenever any railroad corporation shall for one year suspend the lawful business of such corporation, such company or corporation shall be deemed to have forfeited the rights, privileges, and franchises granted by any act of incorporation or acquired under the laws of this state, and shall be adjudged to be dissolved; and the court held that, under this statute, there was no room for any discretion on the part of the court, when the facts clearly appeared, to refuse judgment of forfeiture, and that the terms of the statute admitted of no excuse or explanation, but were mandatory, 88 L. R. A.

and that the government might resume its corporate franchises for a misuser or nonuser thereof. In the case of *Farnsworth v. Minnesota & P. R. Co.* 92 U. S. 49, 23 L. ed. 530, the court held that where a grant of land and connected franchise is made to a corporation for the construction of a railroad by a statute which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act, without judicial proceedings to ascertain and determine the failure of the grantee. In the opinion it is also stated that where there is a mere contract between the parties a court will relieve when compensation can be given, but that a forfeiture will be upheld on considerations of public policy, as well as from the impossibility of obtaining compensation from the railroad company for its default, on the same principle upon which courts of equity refuse relief against forfeitures incurred under the by-laws of corporations for nonpayment of stock subscriptions. In regard to the rule that forfeitures are regarded with disfavor the court further said: "But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law." The case of *Sparks v. Liverpool Waterworks Co.* 13 Ves. Jr. 428, illustrates this doctrine. The company there was incorporated to supply the town and port of Liverpool with water; and the property in and the profits of the undertaking were vested in the company in such shares and subject to such conditions as should be agreed upon. By articles of agreement, a committee of the company was authorized to call upon the shareholders for the several sums payable by them on their respective shares; and it was, among other things, provided that, in case any shareholder made default in the payment of his calls for twenty-one days after the time appointed, and for ten days after subsequent notice addressed to his then or last usual place of abode, his share or shares should be absolutely forfeited for the benefit of the other members of the corporation. The plaintiff was the owner of certain shares of stock in the company upon which payment had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted through his failure to receive personal notice of the call, it having been sent to his town residence while he was absent in the country, and not having been forwarded to him. For the nonpayment upon the call his shares were declared forfeited. Immediately upon receiving information of the call, on his return to the city, he gave directions for its payment, and on the following day the amount was sent to the bankers of the company. The committee of the company, however, informed him that they could give him no relief, as they had acted according to the laws of the company, from which no deviation

could be made. The plaintiff thereupon filed a bill for relief against the forfeiture, on the grounds of accident, and that compensation might be made, and no injury be sustained by the company, his counsel also insisting upon the invalidity of the by-law as unreasonable, exorbitant, and uncertain; but the court dismissed the bill, for the reason that the enterprise was a public undertaking, requiring for its successful prosecution punctuality of payment from the shareholders. Consideration of public policy forbade the granting of relief; for, as the court observed, "If this species of equity is open to the parties engaged in these undertakings, they could not be carried on." The recovery of damages was not sought in the cases cited, and it is apparent that it would have been impracticable, if not impossible, to have adopted any rule of damages, and the same doctrine would apply to this case. There was no dispute in those cases but what the conditions were violated, and hence, applying the statutory law except in the case last cited, the things granted were forfeited by its express provisions. It was the legislative rule, not that damages should be recovered in the way of a money judgment, but that, if there was a noncompliance with the terms of the grant, there should be a forfeiture of the thing granted. That the legislature has the power to attach limitations and restrictions upon its grants, to the extent of a forfeiture of the thing granted, is undoubted. Railroad franchises and grants are made for the benefit of the public, and where the conditions upon which they are allowed to be created are voluntarily violated by the company, it places itself in a position where its grant may be annulled by a forfeiture as provided in the law.

In the case at bar, the ordinance having been accepted by the railway company, it became its charter, and between the parties a contract, and from the very nature of the public business to be carried on, if it suspended operations for one year, its road was to be forfeited. The remedy was not by way of damages, for that might still leave the company in existence, but insolvent, as in this case, and with perhaps a doubtful claim to the exclusive privileges granted by the ordinance, and thus greatly embarrass the city dealing with other companies who might seek the privilege of constructing in said city another railway over the same route. Here the conditions of the grant having been violated, the forfeiture arises by the express terms of the contract, and at the end of the time limited the road was to be forfeited to the city. Even if the city did not have the absolute right to declare the rights and franchises of the company forfeited and terminated, and take immediate possession of the "road" and all things embraced within the meaning of that term, yet there can be no doubt of its power to maintain an action of this kind, and if, by answering, the defendants can show on the trial any legal or equitable defense, that is a matter for further adjudication.

88 L. R. A.

The counsel for the respondents strenuously contend in their brief that the parties did not intend that the railroad company should make compensation to the city in case of default by nonuser, and upon this point they use the following language: "In the case at bar the ordinance does not indicate, in any of its terms, that the forfeiture referred to in § 12 is to be treated as compensation to the city for any injury suffered, or for the breach of any contract or obligation on the part of the railway company. In no part of the ordinance is there any reference to any compensation to be paid the city for anything which the company may do thereunder." We agree with counsel upon this point, but this concession is one favorable to the appellant, not the respondents. Money compensation was not intended by the parties, and, as we have already stated, could not well be obtained for default of the defendant railway company. The absence of any agreement for compensation by reason of such default adds strength to the doctrine that the forfeiture clause should be declared absolute. The cases cited are in a great measure based upon the rule that where no compensation can be made for default of the party in the construction of public works or nonuser of a franchise, and where the public are interested, such as the operation of a railway, an absolute forfeiture will be declared.

Order reversed.

Canty, J., dissenting:

I cannot concur in all that is said in the foregoing opinion. The question before us is simply this: When a condition attached to a grant is broken, and a forfeiture declared, will an action lie to enforce the forfeiture? As a general rule there can be no doubt that it will lie. If the grantor has done anything to waive the forfeiture, or anything which makes it inequitable to enforce such forfeiture, that is a matter of defense which must be set up by answer. This is all there is now before the court. But the majority opinion seems to go on and decide, or at least intimate, that such a forfeiture cannot be waived, and compare the case to one where the legislature has granted the power or franchise on condition, and has specially provided for forfeiture in case of a breach of the condition. The legislature has a right to change a rule of law, and to provide for a nonwaivable forfeiture in a certain case or class of cases. But ordinarily a city council has no such power to change such a rule of law. In the absence of a law which should be interpreted as making the forfeiture nonwaivable, it may well be doubted whether a condition of forfeiture attached to a public grant may not be waived as well as a condition attached to a private grant. But, as before stated, the question of waiver is not now before the court, and should not be passed on at this time. The complaint contains nothing which can be construed into a waiver, and therefore states a cause of action.

RHODE ISLAND SUPREME COURT.

GARRATT FORD COMPANY

v.

VERMONT MANUFACTURING COMPANY *et al.*

(..... R. L.)

A contract of a foreign corporation, if not contrary to public policy, is not invalid because the corporation has not complied with Gen. Laws, chap. 253, §§ 36-41, requiring it to appoint a resident of the state as its attorney, but not declaring that such contract shall be void, while another statute expressly provides that in case of a foreign insurance company the contract shall be valid.

(July 12, 1897.)

PETITION for a new trial after judgment in favor of plaintiff in an action brought to recover the price of a certain tank which had been sold by plaintiff to defendant. *Judgment on the verdict directed.*

The facts are stated in the opinion.

Mr. F. W. Tillinghast, for defendant Garst:

There are no interstate questions arising.

Lasher v. Stimson, 145 Pa. 80.

Plaintiff cannot invoke the aid of the court in establishing its right to recover on a contract made in this state without complying with a prohibitive statute of the state.

Electric News & Transfer Co. v. Perry, 75 Fed. Rep. 898; *McCanna & F. Co. v. Citizens' Trust & S. Co.* 89 U. S. App. 332, 76 Fed. Rep. 420, 35 L. R. A. 236; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Thorne v. Travelers Ins. Co.* 80 Pa. 15, 31 Am. Rep. 89; *Bank of British Columbia v. Page*, 6 Or. 431; *Christian v. American Freehold Land Morig. Co.* 89 Ala. 198; *Hoffman v. Banks*, 41 Ind. 1; *Barbor v. Boehm*, 21 Neb. 450; *Stewart v. Northampton Mut. Live Stock Ins. Co.* 38 N. J. L. 436; *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.* 25 Wend. 648; 6 Thomp. Corp. § 7950.

If the plaintiff corporation has a right to sue in this case, it cannot do so until it has complied with our laws by appointing an attorney, etc., and this suit must abate.

Waller A. Wood Mowing & R. Mach. Co. v. Caldwell, 54 Ind. 270; 6 Thomp. Corp. § 7956.

Messrs. Bassett & Mitchell, for plaintiff:

The provisions of the statute requiring a foreign corporation doing business within the state to file the power of attorney with the secretary of state are directory merely, and a failure to comply with this does not invalidate contracts of the corporation nor deprive it of the right to sue for the same in the courts of the state, and does not render the contract void.

Rogers v. Simmons, 155 Mass. 259; *Chase's Patent Elevator Co. v. Boston Tow Boat Co.* 152 Mass. 428, 9 L. R. A. 339; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Kindel v. Beck*

& P. Lithographing Co. 19 Colo. 310, 24 L. R. A. 311; *Uiley v. Clark-Gardner Lode Min. Co.* 4 Colo. 869; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Fritts v. Palmer*, 182 U. S. 282, 33 L. ed. 817; 6 Thomp. Corp. §§ 7957, 7958.

Parties who have contracted with a foreign corporation and received the benefit of the contract cannot when paying contract set up that the company has not complied with the statutory requisites in regard to doing business in the state.

Washburn Mill Co. v. Bartlett, 8 N. D. 188.

It is not carrying on business within the state within the meaning of the statute, but is an act of interstate commerce.

Ware v. Hamilton Brown Shoes Co. 93 Ala. 145; *Kindel v. Beck & P. Lithographing Co.* 19 Colo. 310, 24 L. R. A. 311; *Bateman v. Western Star Mill Co.* 1 Tex. Civ. App. 90, 4 Intera. Com. Rep. 280; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Milan Milling & Mfg. Co. v. Gorton*, 93 Tenn. 590, 26 L. R. A. 135.

Stiness, J., delivered the opinion of the court:

The plaintiff, a corporation located in Boston, Massachusetts, sold to the defendant a tank, through a salesman who took the order in Providence, and it now seeks to recover the price in this suit. The defendant asked the judge presiding at the trial to charge that the plaintiff, being a foreign corporation, which had not complied with the law of this state in appointing a resident of this state as its attorney (Gen. Laws, chap. 253, §§ 36-41), was not entitled to maintain this action. To the refusal of the judge so to charge, the defendant asks for a new trial, on the ground of erroneous ruling.

The question whether a corporation of one state can do business in another state without complying with the laws of such state is one which has frequently arisen, and upon which decisions are conflicting, although many decisions turn upon the language of a statute. Thus, it is held that a statute prohibiting a foreign corporation from doing business in a state without complying with its terms makes such business illegal and void, and that no such corporation can maintain an action to enforce its illegal contracts; and where the statute does not provide for the consequences of noncompliance, the argument is that the acts of the corporation must be void, or else the statute would be nugatory. In Massachusetts a penalty is imposed upon the agent doing business; but the statute (Stat. 1884, chap. 330, § 3) says that a failure to comply with the conditions shall not affect the validity of an act of the corporation. *Rogers v. Simmons*, 155 Mass. 259. Some statutes declare the acts to be void. In such cases there can be no question of validity. Some cases hold that where the statute imposes a penalty upon the agent, but is silent as to the validity of the act, it is to be presumed that the legislature intended

NOTE.—As to the validity of contracts made by foreign corporations which have not been authorized to do business in the state, see note to *Edison* 38 L. R. A.

General Electric Co. v. Canadian P. Nav. Co. (Wash.) 24 L. R. A. 315.

the penalty as a sufficient safeguard for compliance, and that to declare the acts of the corporation void would go further than the statute, and impose an additional penalty, by construction, which should not be done. A notable case of this kind is *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 817, in which the court says: "The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. . . . If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested." To the same effect are *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Edison General Electric Co. v. Canadian P. Nar. Co.* 24 L. R. A. 815 [8 Wash. 370], with a note which holds the contrary view. See also an instructive article by Mr. Gunn in *Am. L. Reg.* Jan. 1897, p. 19.

Without multiplying authorities, we think that the reasoning which we have quoted is conclusive, although we concede that the greater number of authorities are probably the other way. We think, moreover, that we find support for this view in similar legislation in this state. In *R. I. Gen. Laws*, chap. 182, § 17, it is declared, in the case of a foreign insurance company, that the contract shall be valid, and the same declaration is made as to resident insurance companies which fail to comply with the law. The argument is pressed that, because the declaration of validity is made in these cases, its omission in the statute before us leads to the inference of the invalidity of other contracts. We do not think that the legislature intended to make one class of contracts valid, and other contracts, under similar conditions, invalid. If the legislature intends to make such contracts as the one in suit invalid, it is easy to say so; but, in the absence of such a provision, it is a wide stretch of judicial construction for the court to hold that such a result was intended. The purpose of the statute is not to invalidate contracts, but to require foreign corporations to appoint an attorney in the state upon whom service of process may be made. This purpose seems to be adequately served by imposing a penalty upon the agent who ventures to do business for the company without complying with the law. While we do not question the right of the state to impose such conditions and penalties upon foreign companies doing business here as it may deem proper, subject to the provisions of the Federal Constitution as to the

regulation of commerce among the states, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of noncompliance with our statutes, which may have been fully known to the debtors, when the general assembly has not clearly expressed that intention, and the inference of it is not necessary to the object of the statute. We are referred to *Electric News & M. Transfer Co. v. Perry*, 75 Fed. Rep. 898, in which it is claimed that our statute was construed to preclude a foreign corporation, which had not complied with it, from maintaining a suit. That case, however, was a bill in equity for an injunction to restrain police officers of Pawtucket, who had seized the property of the complainant for a violation of our statute against pool selling, from interfering with their business. Judge Colt, in the opinion, very properly said that a foreign corporation which has not complied with statutory provisions "cannot invoke the aid of this court to prohibit the defendants from interfering with a business which it has no legal right to carry on." That is a very different thing from holding that a contract is void which, in its nature, is not contrary to public policy. Our decision is that the court did not err in refusing the instruction asked for, and that the petition for a new trial must be dismissed.

Case remitted to the common pleas division, with direction to enter judgment on the verdict.

Michael LUBRANO

IMPERIAL COUNCIL OF THE ORDER OF UNITED FRIENDS.

(.....R. I.....)

1. A contract whereby a benefit is to accrue upon the death or physical disability of a person, which benefit is or may be conditioned upon the collection of an assessment upon persons holding similar contracts, is a contract of insurance within the meaning of *Gen. Laws*, chap. 184, § 2, respecting business by foreign insurance companies.
2. Jurisdiction of a foreign insurance company doing business in the state without complying with the statute, which requires it before doing business to appoint the insurance commissioner as attorney on whom process may be served, cannot be acquired by service on such commissioner, where the facts appear from the plaintiff's own showing, and the defendant has not appeared to plead to the jurisdiction, and is not shown to have received notice, either actual or constructive.

(April 17, 1897.)

PETITION by plaintiff for new trial after dismissal by the Common Pleas Division for want of service of an action brought to

NOTE.—On the question, Who may be served with process in suit against a foreign corporation? see note to *Foster v. Charles Betcher Lumber Co.* (S. D.) 23 L. R. A. 490.

recover the amount alleged to be due on a benefit insurance policy. *Petition denied.*

The facts are stated in the opinion.

Mr. Willard B. Tanner, for petitioner:

The defendant was doing an insurance business in this state.

Com. v. Wetherbee, 105 Mass. 149; *State, Graham, v. Nichols*, 78 Iowa, 747; *Knight's Templar & M. Life Indemnity Co. v. Berry*, 4 U. S. App. 358, 50 Fed. Rep. 511; *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775; *Niblack*, Ben. Soc. 2d ed. § 8.

The service of the writ was sufficient because the defendant is estopped to deny that they have not appointed the commissioner their attorney to accept service, after having done business in the state and received the benefits.

Sparks v. National Masonic Acci. Asso. 78 Fed. Rep. 277; *Ehrman v. Teutonic Ins. Co.* 1 McCrary, 123; *Moch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 696; *Knapp, S. & Co. v. National Mut. F. Ins. Co.* 30 Fed. Rep. 607; *Hagerman v. Empire State Co.* 97 Pa. 584; *Foster v. Charles Betcher Lumber Co.* 23 L. R. A. 490, note, 5 S. D. 57; 22 Am. & Eng. Enc. Law, p. 128, cases cited.

The elements of an estoppel are present because there is involved, first, the representation in insuring the plaintiff that they were authorized to do business in this state, a condition of which was appointing the commissioner attorney to accept service; second, knowledge of the facts on the part of the company that they had not appointed the commissioner their attorney; third, the intention that the plaintiff should act on the implied representation that the company was authorized to do business in the state; fourth, the representation was acted on by the plaintiff in accepting insurance, since it may be fairly said that the plaintiff would not have paid his money for insurance in an order which was not authorized to do business in the state.

► *Bigelow*, Estoppel, p. 487; *Pennypacker v. Capital Ins. Co.* 80 Iowa, 56, 8 L. R. A. 236; *Phenix Ins. Co. v. Pennsylvania Co.* 184 Ind. 215, 20 L. R. A. 403.

Tillinghast, J., delivered the opinion of the court:

This case is before us on the plaintiff's petition for a new trial. It was brought in the common pleas division, was not answered by the defendant, and was dismissed by the court for lack of service. The record shows that the defendant is a corporation of the so called "fraternal class," incorporated in the state of New York; that it is doing business in this state; that the plaintiff was a member of a subordinate lodge, organized under said corporation, in the city of Providence; and that this action is brought upon a liability incurred by said defendant. The writ in the case was served by leaving an attested copy thereof with the insurance commissioner of this state. The record shows, however, that he had not been appointed by the defendant as its attorney to accept service, under R. I. Gen. Laws, chap. 182, § 8, which is as follows: "No insurance company not incorporated under the authority of this state, shall directly or indirectly issue policies, take risks, or transact business in this

state, until it shall have first appointed in writing the insurance commissioner of this state to be the true and lawful attorney of such company in and for this state, upon whom all lawful process in any action or proceeding against the company may be served with the same effect as if the company existed in this state. Said power of attorney shall stipulate and agree on the part of the company that any lawful process against the company which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the insurance commissioner, and copies certified by him shall be received in evidence in all the courts in this state. Service upon such attorney shall be deemed sufficient service upon the principal."

The first question which we are called upon to decide is whether the contract on which the action is based is a contract of insurance, within the meaning of our statute. We think it is clear, upon the evidence submitted, that it is such a contract, and that the defendant is doing an insurance business in this state. The making of a contract like the one in suit, whereby a benefit is to accrue to the plaintiff upon his death or physical disability, which benefit is or may be conditioned upon the collection of an assessment upon persons holding similar contracts, is declared to be a contract of insurance by R. I. Gen. Laws, chap. 184, § 2. See also *Com. v. Wetherbee*, 105 Mass. 149; *State, Graham, v. Nichols*, 78 Iowa, 747; *Niblack*, Ben. Soc. & Acci. Ins. § 8, and cases cited.

The main question in the case, however, and the one which, in view of the authorities cited by plaintiff's counsel, has caused us to hesitate in deciding, is whether there has been any valid service of the writ. The plaintiff's counsel contends that the service was sufficient, because the defendant is estopped to deny that it has appointed the insurance commissioner its attorney to accept service, after having done business in the state, and received the benefits thereof. While it is probably true, and indeed such seems to be the well-settled law, that the defendant would be estopped to deny that it has complied with the statute as to the appointment of an attorney to accept service, yet a difficulty arises in the application of the principle to this case. The defendant makes no appearance; so that no question of estoppel, as it seems to us, can properly be raised or considered. See *Anthony v. Brayton*, 7 R. I. 53, 54. The writ was not served upon an agent of the defendant corporation, as was the case in *Moch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 696, and other cases cited by plaintiff; nor was it served upon any person authorized by the defendant to accept service thereof. Moreover, the fact appears of record, and from the plaintiff's own showing, that the defendant failed to comply with the statute first above quoted, and hence that there was no service of the writ whatsoever, unless we can hold that service upon the insurance commissioner, with the actual knowledge

the penalty as a sufficient safeguard for compliance, and that to declare the acts of the corporation void would go further than the statute, and impose an additional penalty, by construction, which should not be done. A notable case of this kind is *Fritts v. Palmer*, 132 U. S. 282, 33 L. ed. 817, in which the court says: "The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. . . . If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested." To the same effect are *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Edison General Electric Co. v. Canadian P. Nar. Co.* 24 L. R. A. 815 [8 Wash. 370], with a note which holds the contrary view. See also an instructive article by Mr. Gunn in *Am. L. Reg.* Jan. 1897, p. 19.

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38 L. R. A.

regulation of commerce among the states, yet, in view of the vast amount of business now done by such corporations, we think it is a conservative position to hold that the legislature did not intend to exempt our citizens from paying just debts, upon grounds of noncompliance with our statutes, which may have been fully known to the debtors, when the general assembly has not clearly expressed that intention, and the inference of it is not necessary to the object of the statute. We are referred to *Electric News & M. Transfer Co. v. Perry*, 75 Fed. Rep. 898, in which it is claimed that our statute was construed to preclude a foreign corporation, which had not complied with it, from maintaining a suit. That case, however, was a bill in equity for an injunction to restrain police officers of Pawtucket, who had seized the property of the complainant for a violation of our statute against pool selling, from interfering with their business. Judge Colt, in the opinion, very properly said that a foreign corporation which has not complied with statutory provisions "cannot invoke the aid of this court to prohibit the defendants from interfering with a business which it has no legal right to carry on." That is a very different thing from holding that a contract is void which, in its nature, is not contrary to public policy. Our decision is that the court did not err in refusing the instruction asked for, and that the petition for a new trial must be dismissed.

Case remitted to the common pleas division, with direction to enter judgment on the verdict.

Michael LUBRANO

IMPERIAL COUNCIL OF THE ORDER OF UNITED FRIENDS.

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(April 17, 1897.)

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recover the amount alleged to be due on a benefit insurance policy. *Petition denied.*

The facts are stated in the opinion.

Mr. Willard B. Tanner, for petitioner:

The defendant was doing an insurance business in this state.

Com. v. Wetherbee, 105 Mass. 149; *State, Graham, v. Nichols*, 78 Iowa, 747; *Knights' Templar & M. Life Indemnity Co. v. Berry*, 4 U. S. App. 858, 50 Fed. Rep. 511; *National Union v. Marlow*, 40 U. S. App. 95, 74 Fed. Rep. 775; *Niblack*, Ben. Sec. 2d ed. § 8.

The service of the writ was sufficient because the defendant is estopped to deny that they have not appointed the commissioner their attorney to accept service, after having done business in the state and received the benefits.

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The elements of an estoppel are present because there is involved, first, the representation in insuring the plaintiff that they were authorized to do business in this state, a condition of which was appointing the commissioner attorney to accept service; second, knowledge of the facts on the part of the company that they had not appointed the commissioner their attorney; third, the intention that the plaintiff should act on the implied representation that the company was authorized to do business in the state; fourth, the representation was acted on by the plaintiff in accepting insurance, since it may be fairly said that the plaintiff would not have paid his money for insurance in an order which was not authorized to do business in the state.

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Tillinghast, J., delivered the opinion of the court:

This case is before us on the plaintiff's petition for a new trial. It was brought in the common pleas division, was not answered by the defendant, and was dismissed by the court for lack of service. The record shows that the defendant is a corporation of the so called "fraternal class," incorporated in the state of New York; that it is doing business in this state; that the plaintiff was a member of a subordinate lodge, organized under said corporation, in the city of Providence; and that this action is brought upon a liability incurred by said defendant. The writ in the case was served by leaving an attested copy thereof with the insurance commissioner of this state. The record shows, however, that he had not been appointed by the defendant as its attorney to accept service, under R. I. Gen. Laws, chap. 183, § 8, which is as follows: "No insurance company not incorporated under the authority of this state, shall directly or indirectly issue policies, take risks, or transact business in this 38 L. R. A.

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on our part that he was never authorized to accept the same, gives jurisdiction. It seems to us that to so hold would violate the very foundation principle of all judicial proceedings which principle requires that, in order to give the court jurisdiction over a defendant where it is a proceeding *in personam*, he must have notice, either actual or constructive, of the proceeding instituted against him. In this case the defendant had neither. And that fact appears, not by reason of the defendant's setting up the same, as it does in the cases relied on by plaintiff, but from the record itself. And herein lies the difference between this case and those which have been cited by plaintiff's counsel. In those cases there was an appearance for the defendant, either general or special, at some stage of the proceeding, and the question of jurisdiction was litigated and decided adversely to the defendants respectively. Such was the case in *Hagerman v. Empire State Co.* 97 Pa. 534, where the writ was served on an agent of the defendant found in the state. The defendant had not complied with the statute in the appointment of an agent on whom process might be served. The court held that "when a foreign corporation, transacting business in this state, has failed to establish an office, and report the name of its agent to the secretary of the commonwealth, but has some person residing therein who acts as its agent, it must be presumed that the corporation has substituted such agent as one on whom service is authorized to be made." Moreover, under a statute of that state, service of process against a foreign corporation may be made upon any officer, agent, or engineer of the corporation, either personally or by copy. In *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 128, 1 Fed. Rep. 471, the defendant appeared and filed a plea to the jurisdiction, which plea was held to be defective. The court, however, considered the main point intended to be raised by the pleader, and held that the defendant could not be heard to say that service of the summons on the state auditor was not a good personal service on the company. It also held that, from the fact of the defendant's doing business in the state, the presumption of its assent to service in the mode prescribed by the statute arose, and that no averment or evidence to the contrary was admissible to defeat the jurisdiction, and that the defendant would not be permitted to relieve itself from a liability which the written stipulation required by the statute would have imposed, by pleading its own fraud on the law of the state and her citizens, under the maxim that no man shall take advantage of his own wrong. *Poster v. Charles Betcher Lumber Co.* 5 S. D. 57, 23 L. R. A. 490, was a defaulted case in the court below, where, after judgment, the defendant appeared, and moved to set aside the judgment, on the ground that the writ was not served on any authorized agent of the defendant, which motion was denied, and an appeal was taken. The record showed that the writ was served on two of the managing agents of the defendant. The defendant had failed to comply with the statute in the appointment of an agent authorized to accept service of process. The court held that, in the first place, the service on the managing agent of defendant was good, under the

statute of that state, which expressly declares that such service shall be good, and, in the second place, that the failure to comply with the laws of the state, in the appointment of an agent on whom process might be served, could not be taken advantage of by it. *Sparks v. National Masonic Acci. Assn.* 73 Fed. Rep. 277, was a defaulted case in the court below, the record of which court shows "that personal service was had upon defendant, in accordance with the laws of this state, as provided for by § 5912 of the [Revised] Statutes [of Missouri] of 1899, by serving the writ, with a copy of the petition, upon the superintendent of the insurance department of this state, the person authorized by law to receive such service, more than thirty days before the first day of this term." In an action on the judgment the defense set up was that the court rendering the same was without jurisdiction, and hence that the judgment was void. The defendant asserted that it never appeared in said action wherein the judgment was rendered. It denied that it was ever served with process, and also asserted that it never appointed the superintendent of the insurance department of the state of Missouri, or any other person on whom service might be made. The court held that, by the fact of doing business in the state, the defendant asserted a compliance with the laws thereof; and after enjoying the benefits of the business, and receiving the money of the assured, it could not be heard to say that it never submitted to the jurisdiction of the state. *Moch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 696, in which the general question of obtaining jurisdiction over a foreign corporation is very fully and ably discussed, was a case where the plaintiff served his writ upon an agent of the defendant in the state of Louisiana, and obtained judgment by default. Shortly afterwards the defendant appeared specially by its attorney, and moved that the suit be dismissed, on the ground that the defendant had not been legally cited, and hence that the court was without jurisdiction to render judgment in the case. This motion was denied, and no appeal was taken therefrom. Upon the judgment thus obtained, suit was subsequently brought in the United States circuit court of Virginia, the defendant having its principal office in Richmond, in said state. The defendant pleaded, among other things, that the person upon whom the writ was originally served in Louisiana was not its agent for the purpose of accepting service, and that the court below had no jurisdiction by reason thereof. It was held that where a court of general jurisdiction in another sovereignty has passed upon the question of its own jurisdiction, when expressly raised by plea, the parties to such a suit are bound in the home court, under the principle of *res judicata*. It was also held that an insurance company, chartered and resident in one state, which does business in another state, through an agent there, may be sued in that state, if its statute law does not forbid, by service of process on that agent, whether he has express power of attorney to receive or accept such service or not; and that this is especially so where the law of such state requires every foreign insurance company doing business therein to appoint an

agent in the state empowered to receive service of process. See also *Osborne v. Shawmut Ins. Co.* 51 Vt. 278. A collection of the cases on the general question before us may be found in *Foster v. Charles Betcher Lumber Co.* 28 L. R. A. 490, *et seq.*, 5 S. D. 57.

It will thus be seen that in those cases where the defendant appeared and pleaded to the jurisdiction, by setting up the fact that it had not appointed someone authorized by it to accept service of process, as required by statute, the courts uniformly held that this could not be allowed, the defendant being estopped from setting up its own misconduct. It will also be seen that in those cases where judgment was rendered by default the return on the writ showed a valid service *prima facie*, and nothing was brought upon the record by the plaintiff to contradict the same, so that the court was fully warranted in exercising its jurisdiction; that is to say, the court, having no knowledge to the contrary, was bound to presume that the defendant had discharged its statutory duty by appointing the person therein designated as its agent to accept service, and hence that service upon such person was good. Here, however, no such presumption can be said to arise, in the face of the record before us, which shows that, as a matter of fact, the defendant had not complied with the statute first above quoted; and hence the court cannot stultify itself by holding that any such presumption exists. Indeed, it would be absurd to say that a presumption arises as to the existence of a certain jurisdictional fact when the court is judicially informed that it does not exist. So that, even recognizing the full force

and authority of the decisions cited in support of the plaintiff's position, yet we do not think that, in the circumstances aforesaid, they are decisive of the question before us.

The case of *Knapp, S. & Co. Co. v. National Mut. F. Ins. Co.* 30 Fed. Rep. 607, is clearly in point. That was a case in the United States circuit court of Missouri, where the statutory requirement as to the appointment of the insurance commissioner by a foreign corporation doing business in the state is similar to the one here. Service of the writ was made upon said insurance commissioner, who declined to receive the summons and copy of the petition which was handed to him, but he gave no reason therefor. No appearance was entered by the defendant, and the plaintiff asked for a default. The court (Brewer, J.) held that the service was good if the insurance commissioner had power to receive the same, and that, as it was alleged in the petition that the company was doing business in the state, having agents and officers there, the court would presume that it had complied with the law, and therefore, *prima facie*, at least, the service was good, whereupon a judgment by default was entered. Had it come to the knowledge of the court, however, from the plaintiff's own showing, as it does in the case before us, that, as a matter of fact, said commissioner was not authorized to receive service of the writ, it is evident that the court would have held that there was no service, and hence no jurisdiction.

The petition for new trial must therefore be denied.

TENNESSEE SUPREME COURT.

JONATHAN TURNER'S SONS, *Appts.*,

LEE GIN & MACHINE COMPANY.

(.....Tenn.....)

Money tendered and paid into court as the full amount due the plaintiff constitutes a full discharge when plaintiff takes it from the court, although he protests that more is due and declines to accept it as full payment, if the terms on which it was tendered are not waived by the defendant or modified by rule of court.

(April Term, 1897.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Shelby County in favor of defendant in an action brought to recover the amount alleged to be due on an account. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to the effect of an unaccepted tender on the lien of a mortgage or pledge, see *note to Parker v. Reasley* (N. C.) 23 L. R. A. 231. 38 L. R. A.

Messrs. Thomas M. Scruggs and W. B. Henderson for appellants.

Mr. H. C. Warriner, for appellee:

The plea of tender and acceptance is not a plea in abatement, but is a plea in bar, and precludes any further recovery upon the matters sued on.

There is no law or statute authorizing magistrates to receive and hold money made the subject of tender by litigations before them. They are not by law authorized to receive such money officially. The proper practice is for defendant to make tender before trial, then repeat the tender before the magistrate, and then bring the money into the appellate court at the time the papers are filed therein.

Keys v. Roder, 1 Head, 20.

In Tennessee there is no such thing as a payment of money into court under a rule of court as known to the old practice. The defendant is allowed to pay money into court by a statute and without any of the restrictions and conditions imposed by the old rule.

Shannon's Code, § 4667.

This legislation was supplemental and amendatory to the "plea of tender;" but its adoption has operated to make the payment of money

into court under the old general rule obsolete. It has been the law since about 1852, and is apparently taken from the Alabama Code 1852, § 2245.

The authorities cited by plaintiff, to wit: Comyns' Dig. title *Pleader*, C 10; Tidd, Pr. 619, 620, 627, 630; *Boyden v. Moore*, 5 Mass. 365; *Williams v. Ingersoll*, 12 Pick. 345; *Murray v. Bethune*, 1 Wend. 191; *Sleight v. Rhineland*, 1 Johns. 192; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.* 7 Johns. 315; *Goslin v. Hodson*, 24 Vt. 140; *Keith v. Smith*, 1 Swan, 95.—do not apply to this case or to the facts; they are based upon the principles applicable strictly to a payment into court under the old general rule.

The defendant made tender, unexcepted to in form, of a sum less than that claimed by plaintiffs, as and for the full amount due them, and it was delivered to the magistrate at the request of the plaintiffs. The plaintiffs thereupon voluntarily applied for and received the amount so tendered under these circumstances, and they thereby accepted the tender as made, and they cannot now claim that they took it as payment *pro tanto* on their demand, and they cannot prosecute their suit for any alleged balance.

Haeussler v. Duross, 14 Mo. App. 103; *Gardner v. Black*, 98 Ala. 638; *Hanson v. Todd*, 95 Ala. 828; *Monroe v. Chaldeck*, 78 Ill. 429; *Adams v. Helm*, 55 Mo. 468.

Wilkes, J., delivered the opinion of the court:

This action was brought before a justice of the peace of Shelby county upon an open account for \$200 and interest. The warrant was taken out August 3, 1896. On the 12th of August, 1896, defendant appeared, and paid to the justice of the peace \$57, and the following minute entry was made by the justice: "Be it remembered that on this 12th day of August, 1896, came James Lee, Jr., and tendered plaintiff \$57, claiming that this is the whole sum due. Thereupon plaintiff declined to accept the same, and the said James Lee, Jr., paid said \$57 into court upon a verbal plea of tender." On the next day, August 13, 1896, defendant appeared by attorney, and filed the following plea: "The defendant James Lee, Jr., has tendered to the plaintiff the sum of \$57, and the same, together with the costs, has been accepted by plaintiff's attorney, and the defendant therefore prays that the suit herein be dismissed, and he go hence without future cost." On the 17th day of August, 1896, the justice of the peace rendered judgment for the plaintiffs against the defendant for \$224 and costs. The judgment further proceeded to recite that: "It appearing to the court that James Lee, Jr., paid into court August 12, 1896, upon an oral plea of tender, \$57, the judgment is credited with that sum paid over to the plaintiffs this day by the court, leaving \$167, for which sum, with interest until paid, execution will issue, and all costs." The defendant thereupon appealed to the second circuit court of Shelby county. On the 11th of January, 1897, this cause was heard in the appellate court before the trial judge without a jury, and a judgment was rendered reciting, among other things, "that at plaintiffs'

request the court first heard the cause on the plea of tender, and acceptance of same by the plaintiffs' attorney, and on hearing the testimony of plaintiffs' attorney the court finds for the defendant on said plea of tender and acceptance, and that same is in bar of plaintiffs' action herein." He then proceeds to give judgment for defendant that he be discharged of the debt, and adjudges the costs against the plaintiff, so far as they accrued after the payment of said money to the said justice of the peace. The plaintiffs, upon the hearing, and when the judgment was rendered, offered to prove their claim in full, but the court declined to hear it, holding that proof of the debt was inadmissible after acceptance by plaintiffs of the money paid into court. The plaintiffs have appealed to this court, and assign as error that the court erred in sustaining the plea, and in holding, as a matter of law, that the acceptance from the registry of the court by the plaintiffs of the moneys paid in by defendant under a plea of tender, barred the further prosecution of the suit for the balance of the debt sued on above the amount paid in by the defendant, and in declining to permit plaintiffs to prove their debt as sued for, after striking from the demand the money paid into court.

Upon the trial in the court below the attorney of plaintiff was asked: "Did not the defendant tender you \$57 and costs as the amount owing by him to plaintiffs, and in a form satisfactory to you; and with your assent did he not pay same over to F. M. Guthrie, the magistrate before whom the suit was pending?" To which he replied, "Yes, sir." He was then asked: "Did you not, on the same day, or day after, request the said Guthrie to pay said money over to you, and did you not receive the same?" To which he replied, "I did." The contention on behalf of plaintiffs is that, after receiving the \$57 from the justice of the peace, they had the right to pursue the collection of the balance of their account of \$200 and interest, merely crediting their claim with the \$57, as that much paid on account; and in support of this view counsel cites and relies upon Comyns' Dig. title *Pleader*, C 10; Tidd, Pr. §§ 619, 620, 627, 630; *Boyden v. Moore*, 5 Mass. 365; *Williams v. Ingersoll*, 12 Pick. 345; *Murray v. Bethune*, 1 Wend. 191; *Sleight v. Rhineland*, 1 Johns. 192; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.* 7 Johns. 315; *Goslin v. Hodson*, 24 Vt. 140. "The practice of bringing money into court is said to have been first introduced in the reign of Car. II. . . . to avoid the hazard and difficulty of pleading a tender. . . . In these [proper] cases, when the dispute is not whether anything, but how much, is due the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit; and the courts will make a rule that, unless the plaintiff accepts of it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of the court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in." Tidd, Pr. *619. "The motion for leave to bring money into court is a motion of course, and should regularly be made before plea pleaded." Id. *621. "Bringing money into court is, in gen-

eral, considered as an acknowledgment of the right of action, to the amount of the sum brought in; which the plaintiff, therefore, on producing an office copy of the rule, is entitled to receive at all events, whether he proceed in the action or not, and even though he be nonsuited, or have a verdict against him." Id. *624. In speaking of nonsuiting, Tidd says: "When money is brought into court, unless the plaintiff will accept it, with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds for the residue of the demand, in like manner as if it had been originally commenced for that only." Id. The practice of bringing money into court under the general rule is as follows, to wit: "When money is brought into court, the plaintiff either accepts it with costs, in discharge of the suit, or proceeds in the action. In the former case, he should take an office copy of the rule, and procure an appointment thereon from the master, or one of the prothonotaries, to tax the costs, and serve the same on the defendant's attorney; or, in default thereof, it will be considered that the plaintiff intends to proceed in the action, to recover a larger sum than that paid into court. . . . If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration, and to be paid out of court, to the plaintiff or his attorney; and upon the trial of the issue the plaintiff shall not be permitted to give evidence of the same. In such case, if the plaintiff proceed to trial, otherwise than for the nonpayment of costs, and do not prove more to be due to him than the sum brought in, the plaintiff, on the rule being produced, shall be nonsuited, or have a verdict against him, and pay costs to the defendant. . . . But if more appear to be due to him, he shall have a verdict for the overplus, and costs. . . . And the plaintiff is entitled to costs, up to the time of bringing money into court." Id. 626; *Keith v. Smith*, 1 Swan, 92. This case was tried in the circuit court in 1849, and decided by our supreme court in 1851. It was an action of assumpsit for work, labor, etc. The pleas were nonassumpsit and notice of set-off. There was no plea of tender at all. The parties had been in cross litigation, and in the last suit defendant offered as set-off a judgment previously rendered in his favor, and to avoid the effect of this set-off plaintiff had tendered the amount of this former judgment, which was refused. It will be noticed that this case was decided before the act authorizing payment of tender to the clerk, taken from the Alabama Code of 1852, and while money could only be paid into court by the debtor, under some rule made. The syllabus is as follows: "Tender in Court, How Made. To be available, a tender made in court must be under a rule of the court, and accompanied by a payment of proper costs up to that time." In such cases, of course, the payment into court must be made upon the terms imposed by the rule. If the general rule is adopted, then the form and practice laid down by Tidd must be observed. If a special rule is made, then the payment must be in accordance with the terms imposed by

the special rule. The court said: "It seems that the plaintiff tendered the amount of this judgment to avoid it as a set off, and the tender was refused; he then paid the money to the clerk of the court for the use of the defendant, but it was not received by defendant. The facts in this part of the case are so indistinctly stated that we cannot assume anything definite upon them. The object of the plaintiff doubtless was to avoid the effect of the set-off in reference to the matter of costs, now amounting to the sum of \$540. . . . But it does not appear that the money offered as a payment of the judgment was paid into court under an order and rule of the court, authorizing it to be done. If a party bring money into court, he must do so under a rule of the court, and upon payment of proper costs up to that time. The debt so paid will thereupon cease to form any part of the future litigation in that behalf, and the other party will be entitled to receive the money. 1 Tidd, Pr. 620. The proper practice in this respect seems not to have been adopted in the present case." Evidently the court was here considering the practice of the payment of money into court under the general rule as laid down by Tidd, and where the legal scope and effect of such payment was prescribed by the terms of the rule itself. See *Caruthers, Lawsuit*, p. 226, note 2; *Thomp. & S. Code*, § 2928, note. Such rule can have no application to the tender of money, and the payment thereof to the clerk, under a statute which imposes no terms whatever, but leaves the effect of tender and acceptance to the general principles applicable to such cases. Unquestionably, under the practice as thus laid down by Tidd, and followed in the case of *Keith v. Smith*, 1 Swan, 92, the rule of the court under which money was paid into court prescribed the terms upon which it was placed in court, and the terms upon which it might be withdrawn, and these terms would be such as the court should see proper to make. We have already shown what the general rule was when the court did not prescribe any special provisions or conditions. And in many cases the practice was as contended for by plaintiff, to wit, that he might withdraw the amount paid in, and continue his litigation for the balance claimed. In such case the amount thus withdrawn is stricken from the claim, and, in the event the plaintiff is successful to the full amount claimed, he only gets judgment for the balance. But since the Code of 1858 the tender of money and payment into court is made under that statute, and not under a general rule of court. This, of course, refers to payments generally, and not to payments made under special rules prescribing conditions and terms. The provision of the statute is found in § 4647, Shannon's Code, and is in these words: "A plea of tender of money or of a thing in action shall be accompanied by a delivery of the money or thing in action to the clerk of the court." The form of the plea is prescribed in § 4681, subs. 9, Shannon's Code. This statute is taken from the Code of Alabama of 1852 (§ 2245), and carried forward into its new Code as § 2685. This section has received construction in the courts of Alabama in several cases, and the exact prac-

tive involved in this case has been considered and passed upon in critical and exhaustive opinions.

In the case of *Gardner v. Black* (1893) 98 Ala. 638, the statute was construed. This was an action on two counts,—one for damages on breach of contract for failure to pay for building a house, the other on “*quantum meruit*” for material, work, and labor in the erecting of said house. There were three pleas, one of which was tender of a less amount, which was brought into court with costs. On plaintiff’s motion the money paid into court on the tender was paid over to him. Thereafter defendant moved to dismiss the case upon the ground that plaintiff having withdrawn the money paid into court on a plea of tender, thereby accepted that sum in full satisfaction of his complaint. Motion was overruled, and defendant excepted. The trial proceeded, and judgment was rendered for plaintiff for the balance claimed, and defendant appealed. The court, by McClellan, J., said: “Was there merit in the motion? The fact that the plea of tender did not go to the whole of plaintiff’s demand can be of no consequence whatever against the motion. These pleas never go to the whole claim asserted in the complaint. If they did, no necessity for interposing them could ever arise, as, of course, the plaintiff would always accept the sum tendered and the amount of costs accruing to time of tender. They, on the contrary, admit a part and only a part of the demand and are accompanied by the money necessary to discharge the part so admitted. The defendant says, in effect, ‘I owe you so much of what you claim, and here it is; the balance of your demand I do not owe, and I will defend against it.’ It is manifestly immaterial upon what line the defense as to the residue of the claim may proceed; it may rest in payment, recoupment, etc. In all cases the proposition of the plea is to pay the plaintiff the sum named in satisfaction of the whole claim advanced in the complaint, and if the proposition is accepted the result is complete liquidation of the demand, and this wholly irrespective of the grounds upon which the defendant declines to pay and proposes to deny his liability for the balance. If the defendants here prior to the suit had offered plaintiff \$184.44 in full payment of all their liabilities under the building contract and the plaintiff had accepted the money, there of course could be no doubt but that he would thereby have lost all right he might otherwise have had to insist on the payment of a larger sum, however clear such right might originally have been, however frivolous may have been the grounds of defendant’s objection to payment of the whole demand, and whatever line of defense he may have proposed taking against the demand as a whole,—whether by recoupment against it or otherwise. And as has been directly adjudged by this court the withdrawal by the plaintiff of money paid into court on a plea of tender stands upon the same footing and involves the same consequences as the acceptance of a tender before suit brought in full satisfaction of the demand.” The court then quotes from Judge Clopton’s opinion in *Hanson v. Todd*, 95 Ala. 828, and cites *Frank v. Pickens*, 69 Ala. 369, opinion by Judge Brickell. The judgment is affirmed. 38 L. R. A.

ment was reversed, and cause dismissed in supreme court. In *Hanson v. Todd* (1891) 95 Ala. 828, suit was for money due plaintiff for repair of dwelling house, etc. The only disputed question was the amount due. Defendant filed plea of tender of the amount alleged by him to be due, accompanied by delivery of money in court. Plaintiff, without demurrer or issue, received the money from the clerk under an order of the court, and struck from the complaint the amount so received. Thereupon defendant moved to dismiss the suit at plaintiff’s cost. This was refused. There was trial and appeal. The court, speaking by Clopton, J., says: “What is the legal consequence, when the plaintiff elects to take, and receives the money brought into court upon a plea of tender before suit commenced, is the controlling question presented by the record, and the only one necessary to be considered. As a general rule, a debtor has no right to insist that his creditor shall, by the reception of the amount tendered, be precluded from claiming that a greater sum is due, and suing to recover the same. A tender on such conditions that its acceptance would constitute, or clearly imply, an admission by the creditor that it was in full of his claim, is invalid, and may be refused. The only effect of a tender refused, if pleaded and the truth of the plea established, is to stop the interest, and exempt the defendant from the costs of a subsequent suit. While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet, when made in full of the amount due, and accepted, without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition that he receive it in full of his claim, but if he accepts it, he is bound by the condition, and will not be allowed to keep the money, and repudiate the condition. *Miller v. Holden*, 18 Vt. 387. A tender, if accepted, is accepted as made. The statute (Code, § 2685) requiring a plea of the tender of money to be accompanied by a delivery of the money to the clerk of the court, is declaratory of the general rule. A plea of tender, if in proper form, contains, substantially, the averment that the sum tendered and brought into court is the amount due plaintiff. The plea is in bar of, and, if proved, defeats any recovery. Bringing the money into court, on such plea, has all the effect of a tender on condition that the plaintiff receive the amount in full satisfaction of his claim. It is disembarassed of the principle that a tender cannot be made in such manner that the reception of the money satisfies the creditor’s demand. The object of the statute, in requiring a plea of tender to be accompanied by a delivery of the money to the clerk of the court, is that it shall be placed in the custody of the court, so that it may be paid to plaintiff whenever willing to accept it, and put an end to the litigation, or may be awarded to the party to whom it is ascertained to belong rightfully. *Frank v. Pickens*, 69 Ala. 369. . . . When the benefit of the tender is claimed in court, the plaintiff may elect to receive it, and put an end to the litigation, or he may take issue on the plea, and contest the fact, validity, and sufficiency of the tender. The voluntary reception of the

money by plaintiff is tantamount to a confession or admission of the truth of the plea—equivalent to an acceptance of the money in satisfaction of his entire demand; he cannot afterwards say that it was accepted only as a payment *pro tanto*. Under the common-law rule, if the plaintiff take the money which has been brought into court on a plea of tender before suit, the proper judgment is, *est inde sine die*. 9 Bacon, Abr. 839. The same result logically follows, when the plaintiff withdraws the money brought into court under the statute. In such case, if the plaintiff elects to take the money, the proper practice is for the court to order it paid to him, and render judgment against him for costs. . . . The motion of defendant should have been granted. . . . Reversed, and judgment rendered dismissing the suit at the costs of plaintiff." These Alabama cases are decided with reference to a statute of that state, precisely similar to our statute directing that upon a plea of tender the money be paid to the clerk of the court.

In the case of *Adams v. Helm* (1874) 55 Mo. 468, the plaintiffs were indebted to defendant in certain notes secured by trust deed on divers lots of land. The trust deed recited that defendant was to take notes secured by trust deed on lots sold in sums of \$100 or less, to be received as cash. When the original notes fell due, plaintiffs tendered in discharge of the balance due notes secured by trust deed to the amount of \$4,300. Defendant took the notes and deed, remarking that she would not receive them in satisfaction, but only as collaterals. Plaintiffs filed their bill to cancel their original notes, and to have satisfaction of original trust deed declared. The court says: "The only material question is, whether the tender and acceptance of the notes and deed of trust securing the same, as made by the plaintiffs, amounted to a payment or discharge of the balance of their indebtedness to [the defendant] Helm. The tender was made on that express condition, and under a protest to that effect. It was [defendant's] Helm's duty either to refuse it or accept it on the terms as made. She had no right to accept the tender, and prescribe the terms of her acceptance. She should have refused the tender or returned the notes and deed of trust at the time, or she must be held to the terms of the tender as prescribed by the debtor."

The case of *Hacussler v. Duross*, 14 Mo. App. 108, decided in 1888, is also in point. The suit related to the accounting of a trustee to whom real estate had been conveyed for the benefit of creditors. The assignee of four creditors sued because the trustee had not paid him what he claimed was due out of the proceeds of sale. The trustee tendered plaintiff, before suit, the amount he insisted was due, deposited the same in court with his answer, and plaintiff withdrew the money. It was held that "a plaintiff who so withdraws money cannot afterwards claim that it was accepted merely as a payment on account." A plaintiff, who in accordance with the proferat, accepts money paid into court in discharge of the demand sued on, thereby ends the suit, and is liable for all costs which accrue thereafter. The court says: "The object of this tender and payment into court was to enable plaintiff, if he

saw fit, to accept the amount conceded by defendant to be due, so as to put an end to the litigation. Appellant contends that his acceptance of the money paid into court is not to be taken as an admission that the rest of the demand was unfounded, and that he had a right to accept this money *pro tanto*, and continue the litigation. But a tender must be accepted as made. The payment of money into court had the effect of a tender; and if the money is taken out of court by plaintiff, when expressly offered as in full of plaintiff's claim, plaintiff cannot afterwards say that the tender was accepted, not as made, in satisfaction of the entire demand, but merely as payment on account." The court then examined the various authorities relied on by plaintiff to sustain his contention, several of which are relied on by plaintiffs in the present case, and showed that such authorities, properly construed, do not sustain plaintiff's contention, to wit: *Storey v. Krenson*, 55 Ind. 401; *Esler v. Mitchell*, 26 Mich. 500; *Spalding v. Vandercook*, 2 Wend. 431; *Sleight v. Rhineland*, 1 Johns. 192; *Hildyard v. Blowers*, 5 Esp. 69; *Johnston v. Columbian Ins. Co.* 7 Johns. 315; 1 Tidd, Pr. 619, 626.

We have examined carefully the cases to which we have been cited by counsel for plaintiffs in their able and exhaustive brief. While they are not exactly in point, the tendency of the cases cited, and especially those from New York, is in the direction of their contention. It would be useless to draw distinctions between those cases and the one now on trial, as, in any event, we think the rule and practice laid down and illustrated in the cases we have cited is the better rule under our statute, the fundamental idea and basis of which is that a defendant tendering money and paying the same into court does so in full satisfaction and liquidation of the plaintiff's demand, and, if accepted by plaintiff, must be so received.

Coming to the facts of the case now on trial, it is apparent that the amount paid in by defendant was tendered and paid in as the full amount due to the plaintiffs. It is true that plaintiffs at the time protested that more was due them, and declined to accept the amount paid in as a full discharge of the defendant's debt. Defendant, however, did not waive or relinquish their requirement. The fund was paid in as a full discharge, and it could be drawn out upon no other terms, in the absence of any rule of the court, or the consent of defendant. The plaintiffs applied for the money and received it, and now insist that it can be regarded as a payment only *pro tanto*, and that they have the right to proceed with their suit to recover the remainder of their claim. We are of opinion that when they applied for and received it they did so upon the condition on which it was deposited; that is, as a full discharge of defendant's debt. *Hanson v. Todd*, 95 Ala. 828; *Adams v. Helm*, 55 Mo. 468; *Hacussler v. Duross*, 14 Mo. App. 108; *Moynahan v. Moore* [9 Mich. 9], 77 Am. Dec. 486, note; 25 Am. & Eng. Enc. Law, p. 927. It is true, the creditor may limit the terms of his acceptance, and, if the debtor assent thereto, he will not be precluded from receiving any additional sum he may show to be due if he so provided. 25 Am. & Eng. Enc. Law, p. 927.

notes 2, 3. But he cannot prescribe the terms upon which it shall be received. Id. And in this case there was no order of the court defining the terms on which it was paid to plaintiffs, and received by them. The theory of the law is that a tender which is not accepted is not equivalent to performance, and does not satisfy or extinguish the obligation, nor bar an action upon it, but only stops interest and costs, if sufficient, and kept good. 25 Am. & Eng. Enc. Law, p. 924; *M'Nairy v. Bell*, 1 Yerg. 503, 24 Am. Dec. 454; *Keys v. Roder*, 1 Head, 20; *Miller v. McKinney*, 5 Lea, 98; *Lincoln Sav. Bank v. Ewing*, 12 Lea, 608; *Moynahan v. Moore* [9 Mich. 9], 77 Am. Dec. 488, note. The money paid in becomes the property of the plaintiff because it is an admission of indebtedness to the extent of the amount paid in, and the party paying it loses all right to it. 25 Am. & Eng. Enc. Law, p. 948. It remains, however, if not accepted, in custody of the court as a continuing tender until the rights of the parties are settled, unless withdrawn by consent or under order of court, or taken as tendered. If withdrawn by consent or under order of court, the order of consent fixes the terms of the withdrawal. If taken as tendered, then the terms of the tender control; and, unless drawn out by consent, or under order of court, it can only be taken as tendered; and, if taken, the plaintiff receiving it cannot claim to have taken it upon terms other than those imposed when tender is made. Upon final hearing, if the tender is found to be good and sufficient, it is a discharge of de-

fendant from all liability for the debt and such interest and costs as shall have accrued after tender made. If not sufficient, then it is applied as a payment or credit upon the execution; judgment being rendered for the full amount to which the plaintiff is entitled. 25 Am. & Eng. Enc. Law, p. 938, note; *Dakin v. Dunning*, 7 Hill, 30, 42 Am. Dec. 83. It is argued that this imposes a hardship upon the plaintiff by holding that, while the amount paid is his property, still he cannot draw it out except upon condition that he surrender the balance of his claim. Again, while thus retained in court, interest will cease, and even the principal may be lost, and it will work a hardship to subject the plaintiff to such danger and loss. But it must be remembered that the money must be paid into court in order to give the plaintiff the option to take it or refuse it. If not accepted, it must remain in court until it shall be decided which party is correct in its contention. The loss of interest must necessarily fall upon someone, and it is but just that it should fall upon that party who is cast in the suit, and who fails in his contention. As to what result will follow if the principal is lost, we need not now decide, as it is not involved in this case. All loss of interest or principal may be obviated by drawing out the fund on such terms as may be agreed on, or as the court may impose. In the absence of such terms or rule, the claim is discharged.

There is no error in the judgment of the court below, and it is affirmed, with costs.

WISCONSIN SUPREME COURT.

STATE of Wisconsin, *ex rel.* H. C. ASHBAUGH, *et al.*,
v.
CIRCUIT COURT OF EAU CLAIRE
COUNTY *et al.*

(.....Wis.....)

1. Newspaper articles charging a judge who is a candidate for re-election with corruption and partiality in actions already passed and ended, but not referring to any pending litigation, cannot be punished as a criminal contempt, although they are distributed to officers of the court and to persons summoned as jurors therein, as well as generally circulated.
2. An affidavit alleging the truth of newspaper statements, filed in response to an order to show cause why the affiant should not be punished for a contempt because of such publication, cannot be itself held to constitute a contempt when the original publication did not.
3. A writ of prohibition to restrain the judge from proceeding to punish a contempt in excess of his jurisdiction is an apt and proper remedy.

(September 21, 1897.)

NOTE.—For a case somewhat similar to the above, see *People, Connor, v. Stapleton* (Colo.) 23 L. R. A. 787.

38 L. R. A.

PETITION for a writ of prohibition to prevent defendants from proceeding to punish relators for alleged contempt of court. *Writ granted.*

Statement by Winslow, J.:

This was an action of prohibition commenced by the issuance of an alternative writ out of this court on the 3d day of April, 1897, upon motion of the attorney general, based upon the sworn petition or complaint of Messrs. Ashbaugh and Doolittle. The object of the action was to prohibit the further prosecution in the circuit court of Eau Claire county of certain proceedings then pending therein, wherein Ashbaugh and Doolittle were charged with having committed a criminal contempt of said court, and were threatened with immediate imprisonment therefor. Returns were in due time made to the alternative writ both by the circuit judge, Hon. W. F. Bailey, and by the sheriff of said county, C. H. Henry, and upon order of this court a supplemental return was made by the circuit judge. These returns were challenged as insufficient by demurrer, and upon argument the demurrer was sustained, and judgment rendered adjudging that the contempt proceedings were in excess of the jurisdiction of the court, and awarding an absolute writ of prohibition against the further prosecution of such pre-

ceedings. The facts which appeared by the complaint and the various returns were practically undisputed; and were, in brief, as follows: In March, 1897, the circuit court of Eau Claire county was in session, engaged in the trial of cases, the Honorable W. F. Bailey presiding. Judge Bailey's term was to expire in January, 1898, and the election of his successor was to take place on the 6th day of April, 1897. Judge Bailey was a candidate for re-election and two other candidates, Hon. James O'Neill and F. M. Miner, Esq., were also in the field. The petitioner Ashbaugh was the editor and publisher of a newspaper at Eau Claire, and the petitioner Doolittle was a lawyer in active practice at the same city. The campaign had become somewhat heated and acrimonious by the publication of newspaper articles pro and con. Both of the petitioners were strongly opposed to the re-election of Judge Bailey, and on the 11th day of March Mr. Doolittle published in Ashbaugh's newspaper an article several columns in length, charging the judge with being extravagant in the management of the court, and with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. These charges all referred to proceedings and cases already heard and decided, and not to matters then pending or on trial. On the 31st day of March an editorial article appeared in the said newspaper strongly opposing Judge Bailey's candidacy, and summarizing the charges against him which had been made at length in the Doolittle article. On the 1st day of April following, Judge Bailey made an order on his own motion requiring Messrs. H. H. Hayden and T. F. Frawley to institute contempt proceedings against Ashbaugh and Doolittle on account of the publications. Upon the same day Messrs. Hayden and Frawley presented a sworn petition to the court setting forth the facts as to the writing and publication of the articles, and alleging that Ashbaugh and Doolittle had circulated the articles among the officers of the court and persons summoned as jurors. Upon this petition, and on the 2d day of April, an order was made reciting that "it appears to the satisfaction of the court that H. C. Ashbaugh and L. A. Doolittle have committed a criminal contempt of said court," and requiring Ashbaugh and Doolittle to appear at 8 o'clock P. M. of the same day, and show cause why they should not be punished for said alleged contempt, and providing for the service of the order at least two hours before the hearing. This order was personally served shortly after 11 o'clock A. M. At 8 o'clock P. M. Ashbaugh and Doolittle appeared in court. Doolittle filed an affidavit of prejudice, but the court held that no change of venue could be granted. Further time was asked for, and time was given until 7:30 P. M., when Ashbaugh and Doolittle filed an affidavit alleging the truth of the articles, and asking further time until the 5th of April to prepare an answer. Thereupon an order was made that interrogatories be made and served, and that Ashbaugh and Doolittle appear at 10 o'clock A. M. on the 3d day of April, to which time the proceedings were adjourned. The interrogatories were made, asking whether the defendants wrote,

published, and circulated the articles, and such interrogatories were served at about 9 o'clock P. M. of the same day. At 10 o'clock A. M. upon the following day (April 3) the defendants appeared, and asked further time, which was granted, until 7:30 P. M. of the same day. Upon the assembling of the court at that time, the alternative writ of prohibition from this court was produced, and served upon Judge Bailey. Thereupon Judge Bailey announced that he would not proceed further with the pending proceedings, but at once made an order adjudging both Ashbaugh and Doolittle guilty of a new contempt in the immediate presence of the court, by reason of having filed their affidavit alleging the truth of the articles, and committing them to jail for thirty days, such imprisonment to commence at once. The commitment was placed in the hands of the sheriff at once, but was not executed by him. Upon these facts it was adjudged that both of the alleged proceedings for contempt were in excess of the jurisdiction of the circuit court, and the writ of prohibition was made absolute.

Mr. John M. Olin, for relators:

The only authority possessed by any court of record in this state to punish, as for criminal contempt, is given by § 2565, Rev. Stat.

This statute, authorizing courts to punish as for a criminal contempt, should be considered in connection with § 8 of art. 1 of our Constitution.

Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press.

This applies to words spoken or published concerning judicial conduct and character.

Storey v. People, 79 Ill. 45.

To constitute a contempt under subd. 6 of § 2565 the publication must be a report or copy of pending judicial proceedings.

Rapalje, Contempt, § 58; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199; *State v. Kaiser*, 20 Or. 60, 8 L. R. A. 584; *Rosewater v. State*, 47 Neb. 630; *Re Dalton*, 46 Kan. 253; *Re Thompson*, 46 Kan. 254; *Re Bahama Islands*, [1898] A. C. 138; *Storey v. People*, 79 Ill. 45; *Stuart v. People*, 4 Ill. 895.

This case does not fall within subd. 1 of § 2565, which provides for punishing as for criminal contempt any person guilty of disorderly, contemptuous, or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority.

Dunham v. State, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207.

This statute is a limitation upon the power of the court to punish for criminal contempts.

Stuart v. People, 4 Ill. 395; *Storey v. People*, 79 Ill. 45; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *People, Munell, v. New York County Oyer & Terminer Ct.* 101 N. Y. 245, 54 Am. Rep. 691; *Re Griffin*, 15 N. Y. S. R. 400.

The question involved in this case is *res judicata* in this state. Every issue involved in this case was determined by this court in 1855,

in the case of Beriah Brown and E. A. Calkins, plaintiffs in error, v. State of Wisconsin, defendant in error.

The statute in question is constitutional.

State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257.

The legislature has the right to limit and regulate the power of lower courts to punish for contempt, whether constructive or direct in character.

State v. McClaugherty, 83 W. Va. 250; *Rapalje*, Contempt, § 10; *State v. Kaiser*, 20 Or. 50, 8 L. R. A. 584; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 23 L. ed. 205; *Ex parte Poulson*, Fed. Cas. 11,350, 15 Haz. Reg. Pa. (1835) 880.

Proceedings to punish for criminal contempts for public criticism of the court or judge are not favored.

Rosewater v. State, 47 Neb. 630; *Batchelder v. Moore*, 42 Cal. 413.

The writ of prohibition was the only adequate remedy in this case.

An appeal would not lie.

Williamstown v. Darge, 71 Wis. 643.

As to whether a writ of error would lie, in such a case, the authorities are divided; but a great many hold it will not.

4 Enc. Pl. & Pr. 809.

This writ under our statute would only lie from a final judgment.

Rev. Stat. § 8043.

Whether a writ of error would lie or not is immaterial, since the writ of prohibition was the only writ which furnished an adequate remedy under the facts of this case.

People v. O'Neil, 47 Cal. 109; *Batchelder v. Moore*, 42 Cal. 413; *People, Wright, v. Placer County Judge*, 27 Cal. 152; *Hurestall v. Muir*, 62 Cal. 479; *Williams v. Dwinelle*, 51 Cal. 442; *People, Pierce, v. Carrington*, 5 Utah, 581; *State, Campbell, v. St. Louis Court of Appeals*, 97 Mo. 246; *People, Yearian, v. Spiers*, 4 Utah, 885.

The writ of prohibition is the usual remedy to stay contempt proceedings.

4 Enc. Pl. & Pr. 820; *State, Schoenhausen, v. King*, 47 La. Ann. 696; *Queen v. Lefroy*, L. R. 8 Q. B. 184, 4 Moak, Eng. Rep. 250.

The writ of prohibition has been held an appropriate writ where property rights only are involved in case it furnishes the only speedy and adequate remedy.

Havemeyer v. San Francisco City & County Super. Ct. 87 Cal. 267, 10 L. R. A. 650; *State, Ellis, v. Elkin*, 180 Mo. 90; *State, Long, v. Keyes*, 75 Wis. 288; *State, DePuy, v. Evans*, 88 Wis. 255.

Messrs. Fred A. Maynard, Attorney General, and *A. L. Sanborn* also for relators.

Messrs. T. F. Frawley and H. H. Hayden for respondents.

The following are excerpts from an article prepared by *Mr. W. F. Bailey*, respondent:

Due respect for the courts of justice is as necessary as a regard for the laws themselves.

4 Bl. Com. 238.

The power extends not only to acts which directly and openly insult or resist the powers of courts or the persons of the judges, but to consequential, indirect, and constructive contempts which obstruct the process, degrade

the authority, or contaminate the purity of the courts.

Watson v. Williams, 36 Miss. 331; *Re Pierce*, 44 Wis. 445; *State v. Doty*, 82 N. J. L. 403, 90 Am. Dec. 671.

Contempts which degrade the judicial authority include speaking or writing contemptuously of the courts or judges acting in their official capacity.

4 Bl. Com. 235; *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209; *Com. v. Dandridge*, 2 Va. Cas. 409; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 874; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242; *Re Tyler*, 64 Cal. 434; *Cooper v. People, Wyatt*, 13 Colo. 387, 373, 6 L. R. A. 430, 442; *Re Cheeseman*, 49 N. J. L. 187, 60 Am. Rep. 596; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *State v. Morrill*, 16 Ark. 883.

When a newspaper or other publication, being read by jurors and attendants upon the courts, has a tendency to interfere with the proper and unbiased administration of the law in pending cases, the resulting liability or responsibility is not limited to a civil action for damages by the parties prejudiced thereby, but it may be adjudged a contempt of court, and accordingly punished.

State, Phelps, v. Orleans Civil Dist. Ct. Judge, 45 La. Ann. 1250; *Re Sturoc*, 48 N. H. 482, 97 Am. Dec. 636; *Re Pryor*, 18 Kan. 73, 26 Am. Rep. 747; *Bloom v. People*, 28 Colo. 416.

The Constitution of the state in creating courts of record, vested in them *ex vi termini* this common-law power to punish for contempt, as an absolute and essential quality of superior courts, as much as the power to sit in judicial order, with open doors, in public session. No statute could be effectual to take it away; no statutory regulation can be effectual so to abridge, impair, or cripple it as to leave the courts without effectual power, effectually to punish as for contempt, disregard of the respect due to judicial administration, and disobedience of judicial determination.

Re Pierce, 44 Wis. 445; *State, Norris, v. First Judicial Dist. Ct.* 52 Minn. 238; *Watson v. Williams*, 36 Miss. 331; *Cartwright's Case*, 114 Mass. 230; *Re Cooper*, 32 Vt. 256; *Rottman v. Bartling* (Neb.) 87 N. W. 668; *Territory v. Murray*, 7 Mont. 251; *Golden Gate Consol. Hydraulic Min. Co. v. Yuba County Super. Ct.* 65 Cal. 187; *United States v. Hudson*, 11 U. S. 7 Cranch, 32, 3 L. ed. 259; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242; *Clark v. People*, 1 Ill. 266, 12 Am. Dec. 177; *State v. Woodfin*, 5 Ired. L. 199, 42 Am. Dec. 161; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Middlebrook v. State*, 48 Conn. 268, 21 Am. Rep. 650; *Cooper v. People, Wyatt*, 13 Colo. 387, 373, 6 L. R. A. 430, 442; *State v. Matthews*, 37 N. H. 450; *Ex parte Robinson*, 86 U. S. 19 Wall. 510, 23 L. ed. 208; *Holman v. State*, 105 Ind. 513; *State v. Morrill*, 16 Ark. 883; *State, Phelps, v. Orleans Civil Dist. Ct. Judge*, 45 La. Ann. 1250; *Kilbourn v. Thompson*, 108 U. S. 168, 28 L. ed. 877; *Bloom v. People*, 28 Colo. 416; *Re Chadwick* (Mich.) 3 Det. L. N. 231; *Re Woolley*, 11 Bush, 111; *Re Rosenberg*, 90 Wis. 588; *People, Munell, v. New York County Oyer & Terminer Ct.* 101 N. Y. 245, 54 Am. Rep. 691; *People, Barnes, v. Albany County Sess. Ct.* 147 N. Y. 390.

In Iowa it is held that the statute is restrictive of the common law.

Dunham v. State, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207.

In Indiana the rule is stated that "comments, however stringent, which have relation to proceedings which are past and ended, are not in contempt of the authority of the court."

Cheadle v. State, 110 Ind. 301, 59 Am. Rep. 199.

This is merely a judicial modification of the law as to contempt, not a legislative one.

The same modification was made or recognized in Illinois.

Storey v. People, 79 Ill. 43.

Also in South Dakota.

State v. Sweetland, 3 S. D. 508.

In North Carolina it is held that the inherent power of courts to punish summarily for contempts any act committed in their presence, or so near their sittings as to disturb their proceedings, or that is calculated to disturb their business or impair their usefulness or bring them into disrespect or contempt, cannot be taken away by legislation; but that the common-law power of courts to punish for contempt acts not committed in their presence but calculated and intended to impair their usefulness and bring them into disrespect, may be regulated by the legislature.

Re Robinson, 117 N. C. 538.

In Nebraska it is held that a newspaper publication is a contempt of court only when it has reference to a matter then pending in court, and is of a character tending to the prejudice of pending and subsequent proceedings upon such matter.

Percival v. State, 45 Neb. 741.

In West Virginia (*State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257), it was held that the statute restricting the power to punish for contempt was, as to the supreme court, of no force. In a subsequent case (*State v. McLaugherty*, 38 W. Va. 250), it was held that the statute was effectual to control the power of the district courts upon the ground that they could punish the offending parties as for a crime, while in the supreme court there was no such power.

In Ohio it was held that it was not necessary to determine as to the effect of the statute, as the offense in the case came within its provisions, but it expressed grave doubts whether power to restrict the courts in respect to punishment for contempt rested in the legislature.

Myers v. State, 46 Ohio St. 478.

A court may be insulted by the most innocent words uttered in a peculiar manner and tone.

If the words might be contemptuously spoken, that was ample occasion for the decision of the royal court, with which no other court can meddle. Every court in such a case has to form its own judgment.

Wilson's Case, 7 Q. B. 984; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 22 L. ed. 205.

Disorderly conduct, insulting demeanor to the court, etc., constitute a direct contempt.

Holman v. State, 105 Ind. 518; *Russell v. French*, 67 Iowa, 102; *Ex parte Smith*, 28 Ind. 47; *Bloom v. People*, 28 Colo. 416; *United States v. Church of Jesus Christ of L. D. S.* 6 Utah, 9.

The act and conduct were not only a direct contempt, but such a direct contempt as came 38 L. R. A.

within the very letter of the first subdivision of the statute.

Re Chadwick (Mich.) 3 Det. L. N. 221; *Myers v. State*, 46 Ohio St. 478.

To what extent, if at all, can an appellate court review or revise the judgment of the circuit court, punishing a contempt committed by words and manner in open court.

That it did not extend to the conduct for which the relators here were ordered to be punished prior to the decision by the supreme court herein seems to be clear by the decisions of courts.

Wilson's Case, 7 Q. B. 984; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 22 L. ed. 205; *Holman v. State*, 105 Ind. 518; *Russell v. French*, 67 Iowa, 102.

The power does not exist in the supreme court to determine in advance (that is, before the circuit court has determined that the alleged matter or conduct is a contempt) by writ of prohibition, whether the matter so charged as a contempt is so in fact.

Ex parte Kearney, 20 U. S. 7 Wheat. 88, 5 L. ed. 391; *Re Falvey*, 7 Wis. 639; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242; High, Extr. Legal Rem. § 767; *State, Kellogg v. Gary*, 38 Wis. 97; 19 Am. & Eng. Enc. Law, p. 267; *State, De Puy v. Evans*, 88 Wis. 255; *Hauser v. State*, 88 Wis. 678.

When a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court.

Arnold v. Booth, 14 Wis. 187.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari to correct mistakes of that court in deciding any question of law or fact within its jurisdiction.

Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Re Pennsylvania*, 109 U. S. 174, 27 L. ed. 894; *Re Hagar*, 104 U. S. 520, 26 L. ed. 816.

Courts have been restrained from punishing for alleged contempt, but in every well-considered case it will be observed the restraining mandate was based upon want of authority in the court.

People, Wright v. Placer County Judge, 27 Cal. 151; *Brown v. Moore*, 61 Cal. 432; *Huerfano v. Muir*, 62 Cal. 480; *State, Phelps v. Orleans Civil Dist. Ct. Judge*, 45 La. Ann. 1250; *State, Liveray v. Civil Dist. Ct. Judge*, 84 La. Ann. 741; *State, Follet v. Rightor*, 82 La. Ann. 1182.

Prohibition will not lie when there exists any other adequate legal remedy.

High, Extr. Legal Rem. § 770; *State, Rogers v. Burton*, 11 Wis. 57; *State, Dilworth v. Braun*, 31 Wis. 606; *Re Radt*, 86 Wis. 645; *State, De Puy v. Evans*, 88 Wis. 255.

Winslow, J., delivered the opinion of the court:

The importance of the questions arising in this case, and the imperative necessity of a wise and just decision, can hardly be overestimated. These questions involve not only the

right of a court to enforce due respect for its authority, and punish acts which tend to diminish such proper respect and interfere with the performance of its important public duties, but they involve as well the preservation of personal liberty as against summary imprisonment, the right of free speech, the freedom of the press, and the proper limit which may be placed upon the discussion of the fitness of candidates for public office. Fully realizing, as we believe, the gravity of these questions, we have given the case the fullest and most careful consideration within our power, in order that no false step, involving at once consequences disastrous and far-reaching, might be taken. The questions involved upon which all minor questions depend are but two in number: First, Did the publications in question constitute a criminal contempt of court? and, second, Is the writ of prohibition the proper remedy?

1. Did the publications constitute a criminal contempt of court? In considering this question it has not been deemed necessary to reproduce the articles in this opinion. It is sufficient to say of them that, among other things, they charged Judge Bailey with having been intentionally partial and corrupt in the trial of certain causes in his court. If the charges were true, the unfitness of Judge Bailey for his office was certain. That they were intemperate in tone, and well calculated to exasperate their subject, may be at once admitted. It seems probable also that from their very intemperance they were rather calculated to injure the cause which they were designed to help than otherwise. These questions are, however, foreign to the present inquiry; the question being, not whether Judge Bailey as an individual was grossly slandered, but whether a criminal contempt of court was committed. A criminal contempt at common law may be generally defined as any act which tends either to obstruct the course of justice or to prejudice the trial in any action or proceeding then pending in court. The power of courts of superior jurisdiction created by the Constitution to punish such acts is necessarily inherent in such a court, and arises by implication from the very act creating the court. A court without this power would be at best a mere debating society, and not a court. These principles have been recognized in all courts from time immemorial. *Re Rosenberg*, 90 Wis. 581-588, and 589; *Ex parte Robinson*, 83 U. S. 19 Wall. 505, 23 L. ed. 205; *Rapalje*, Contempt, § 1. Doubtless, this power may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which are essential to preserve its character as a judicial tribunal. The decisions on this point are well-nigh unanimous. See authorities collated in note to *Percival v. State*, 50 Am. St. Rep. 568-573, 45 Neb. 741. It is, and must be a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded so that they be not overstepped.

It is important that it exist in full vigor, it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence. The ultimate question then is, Is it necessary to the due administration of justice by a court that the publication of such an article as the one before us be punished as a criminal contempt. Before discussing the authorities upon this question, it will be well to state the exact facts which were charged in the petition of Messrs. Hayden and Frawley in the circuit court. It was alleged that the articles were written by Doolittle, and by his request published by Ashbaugh; that court was in session, with a full panel of jurors, trying jury cases, and that the articles were by the defendants generally circulated in the city of Eau Claire, and were distributed to various persons residing in this state, and were by them distributed and delivered to the officers "of said court, and to persons summoned as jurors in said court," and "were read by the officers and jurors so in attendance in said court." The articles themselves referred to no cases pending or on trial, but contained only strictures upon the general character of the judge, and his acts in former cases which had been concluded. The fact should also be remembered that a judicial election was impending, and that the judge was a candidate for re-election. It is evident that, if any contempt was committed, it was what is known as constructive contempt, as distinguished from direct contempt. *Rapalje*, Contempt, § 22. Numerous cases are cited which are claimed to support the contention that such publications constitute constructive contempt of court. Examination of these cases, however, reveals the fact that the great majority of them simply hold that publications of this nature, which refer to an action or proceeding then pending and undecided, constitute contempt. Such cases are *Skurrod's Case*, 48 N. H. 423, 97 Am. Dec. 626; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Territory v. Murray*, 7 Mont. 251; *Re Chessman*, 49 N. J. L. 187, 60 Am. Rep. 596; *Cooper v. People*, *Wyatt*, 18 Colo. 887, 878, 6 L. R. A. 480, 443; *State, Phelps v. Orleans Civil Dist. Ct. Judge*, 45 La. Ann. 1250. The principle on which these cases are placed is that such publications have a natural tendency to prejudice the course of justice in the particular cause then pending, and hence constitute constructive contempt. It is unnecessary in the present case, nor would it be proper, to affirm or deny the correctness of these decisions. Such a case is not now before us. The publications complained of here referred to no pending litigation, nor is it charged that they were circulated or brought into the immediate presence of the court.

Passing from this class of cases, we come to the cases which involve the consideration of adverse or libelous newspaper comments upon the acts of a court in actions already past and ended, and here we find much contrariety of opinion, not to say confusion, in the utterances of courts and text-writers. Cases may be

found holding directly that such publications constitute constructive contempts, and may be punished as such. *State v. Morrill*, 16 Ark. 384; *Dandridge's Case*, 2 Va. Cas. 409; *Re Chadwick* (Mich.) 8 Det. L. N. 221. The reasoning upon which such decisions rest is that such publications tend to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness. This doctrine is certainly extreme. Carried to its ultimate conclusion, it would call for the punishment of any adverse criticism on the official conduct of a sitting judge, and absolutely prevent all public or private discussion of court proceedings. All such discussions, if unfavorable to the ability or honesty of a judge, must tend in some small degree, at least, to undermine public confidence in the court in the future. On the other hand, many well-considered cases may be found in which it is distinctly held that such publications do not constitute contempt, and cannot be punished as such. Some of these cases go upon the ground that, even if such publications were punishable as constructive contempts at common law, still that it was competent for the legislature to limit such power by statute, and that such power has been limited by statutes substantially similar to our own. *Rev. Stat. § 2565*. Some of the cases, however, distinctly hold that under our form of government such publications do not constitute contempt, and that to punish them as such would be a serious invasion of the great constitutional guaranties of freedom of speech and of the press. The following decisions are cited as enunciating one or both of these principles. *Stuart v. People*, 4 Ill. 395; *Storey v. People*, 79 Ill. 45; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199; *Re Robinson*, 117 N. C. 533; *State v. Sweetland*, 3 S. D. 503; *Percival v. State*, 45 Neb. 741.

In our own state the question has never been discussed in any opinion. It is a fact, however, that a case arose and was decided upon the merits early in the history of this court, while Chief Justice Whiton was on the bench, involving this very question, although for some reason no opinion was ever filed. The original records are still preserved in the clerk's office, and they disclose the following facts: In October, 1854, Messrs. Brown and Calkins published a newspaper in Madison, and during the October term of the circuit court of Dane county published an article charging corruption and malice upon the grand jury and the presiding judge of the court in the finding of an indictment against the school land commissioners. Proceedings were instituted in the circuit court as for criminal contempt, and, after hearing, the court adjudged that a contempt had been committed, and adjudged that a fine be imposed upon both defendants. The cause was removed to this court upon writ of error, was afterwards argued, and the judgment was wholly reversed on the 21st day of May, 1858. Upon the outside of the record appears the notation "*Stuart v. People* [4 Ill.] 6 Scam. 402," and in the volume of court minutes appears the notation, "Opinion by the chief justice." Although no opinion was ever in fact filed, there seems to be no escape from

the conclusion that this court at that time held that the publication before it did not constitute a contempt. No other ground appears upon which the judgment could have been reversed upon the merits. But, whatever may be thought of the case just mentioned, or its weight as authority, we are well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and our reasons for that conclusion will be briefly stated. Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments "on all subjects" (Const. U. S. Amend. 1; Const. Wis. art. 1, § 8); the right of trial by jury (Const. Wis. art. 1, §§ 5, 7); also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action at law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by anyone that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there can be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this "doth hedge about" a judge; certainly not when he is a candidate for public office.

Recurring to the question with which the discussion opened, namely, Is it necessary that a court should possess this power? we feel bound to hold that, considering the guaranteed rights of the citizen just referred to, no such power as this is necessary for the due administration of justice. It may be freely admitted that under the common law as administered in England the mere writing contemptuously of a superior court or judge has been declared a constructive contempt. 4 Bl. Com. 285. We however, adopted no part of the common law which was inconsistent with our Constitution (Const. Wis. Schedule, § 13), and it seems clear to us that so extreme a power is incon-

sistent with, and would materially impair, the constitutional rights of free speech and free press. But it is claimed that the publication constituted a criminal contempt, within the provisions of our statute. Section 2555, Rev. Stat., defines criminal contempts, and divides them into seven classes. Of these classes only the first and the sixth have any possible bearing upon the case. These classes are: "(1) Disorderly, contemptuous, or insolent behavior committed during its sittings, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority." "(6) The publication of a false or grossly inaccurate report or copy of its proceedings; but no court can punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings or decisions had in such court." Certainly the publication in question does not fall within the first subdivision. Acts punishable under this provision must have been in the immediate view and presence of the court, and it was not charged in the complaint of Messrs. Hayden and Frawley that any such act had been committed. It was not even alleged that the publication had been circulated in the court-room. Nor does the sixth subdivision apply, because it was not charged that the references to the proceedings in court were in any respect false or inaccurate. It may well be doubted whether the publication itself could be well called in any proper sense a "report or copy" of the proceedings of the court, but, conceding that it could be so called, the charge of contempt must certainly allege that the report is "false or grossly inaccurate," in order to make a case of contempt. This is jurisdictional. If it be not alleged, no contempt is stated. Our conclusion is that the attempt to punish the publication in question as for contempt was in excess of the jurisdiction of the circuit court.

But another claim was made by the counsel who so ably represented Judge Bailey, in this court which requires some attention. It appears by the return that immediately upon the service of the alternative writ upon him, Judge Bailey announced that he would proceed no further with the pending proceedings, and that they were stayed. After making this announcement, however, the judge at once stated that a new contempt had been committed by Ashbaugh and Doolittle in the immediate presence of the court by the filing of their sworn return or affidavit in response to the original order to show cause stating that the charges in the newspaper articles were true; that this contempt was independent of the alleged contempt by publication, and was not included within the inhibition of the writ, and that he would at once punish them for this contempt. Thereupon the judge proceeded at once to ad-

judge them guilty of this new contempt, and sentenced them to imprisonment therefor. We are unable to agree with this contention. If, as we have held, the original publication was not contempt, and the attempt to punish it as such was in excess of the jurisdiction of the court, then certainly the defendants had a right, when summoned into court, to allege its truth. They were forced, if they were in any degree honorable men, and not mere slanderers, to allege the truth of the publication. Any other course would demonstrate their pusillanimity. It cannot be endured that a court, by unauthorized summary proceedings, should wring from a man such a declaration, and then abandon the original proceedings, and punish this forced declaration as contempt.

2. The question remains whether the writ of prohibition is the proper remedy. This writ issues only to restrain a court in the exercise of judicial functions outside or beyond its jurisdiction, and when there is no other adequate remedy. *State, DePuy, v. Evans*, 88 Wis. 265. Having held that the attempt to punish the publication in question as contempt was in excess of the jurisdiction of the circuit court, no reason is seen why the writ is not an apt and proper remedy, unless, indeed, there be other adequate remedies. We do not think that in a case like the present, where immediate imprisonment was threatened, and about to be inflicted, either writ of error or habeas corpus can be said to be an adequate remedy. In either case the trial must have been concluded, and sentence imposed, before the writ could issue, and in the case of habeas corpus the imprisonment must have actually begun. There certainly is grave doubt whether certiorari would lie in any event. *Chittenden v. State*, 41 Wis. 265. In view of these considerations, it seems certain that neither of the last-named writs would afford an adequate remedy, even conceding that they would be applicable. Prohibition has been used in other jurisdictions in similar cases. *Queen v. Lefroy*, L. R. 8 Q. B. 184, 4 Moak, Eng. Rep. 250; *People, Wright, v. Placer County Judge*, 27 Cal. 151; *Williams v. Dwinelle*, 51 Cal. 442; *People, Pierce, v. Carrington*, 5 Utah, 531.

During the preparation of this opinion, the writer has been furnished with a pamphlet discussion of the law of contempts, prepared by Judge Bailey. Although arriving at different conclusions from those reached by us, Judge Bailey's discussion of the question bears the marks of his well-known legal ability and industry, and it is but fair to say that it has been of much assistance in finding and considering authorities upon the interesting questions involved in this case. The judgment in this case having already been entered and executed, no mandate is necessary.

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina

v.

Peter HIGGINS.

(.....S. C.....)

1. A statute forbidding the citizens of any other county from fishing in the waters of two specified counties without a license, without anything to forbid the citizens of those counties from fishing in other counties without a license, violates the constitutional guaranty of the equal protection of the laws.
2. Fish are to be classed as game within the meaning of a constitutional provision against special laws to provide for the protection of game.
3. A special law to prevent fishing for profit by citizens of one county in the waters of another county, which is limited to certain counties, is in violation of the provision of Const. art. 3, § 84, against special laws "where a general law can be made applicable."
4. An arrest under a warrant which was not supported either by oath or affirmation is in violation of Const. art. 1, § 16.

(October 23, 1897.)

APPPLICATION by defendant for a writ of habeas corpus to obtain his release from the custody of the sheriff to which he had been committed for alleged violation of a statute regulating the right to fish. *Petitioner discharged.*

The facts are stated in the opinion.

Mr. Huger Sinkler for petitioner.

Mr. C. P. Townsend, Assistant Attorney General, for the State.

McIver, Ch. J., delivered the opinion of the court:

This was an application, addressed to this court in the exercise of its original jurisdiction, by the defendant for a discharge under a writ of habeas corpus. It appears from the sheriff's return to the writ that the defendant was committed to his custody "by virtue of an order of arrest for the violation of act No. 98, Laws of 1896, in that, being a citizen of the county of Charleston, he did catch fish for profit in the waters of Berkeley county, to me directed, a copy of which annexed I transmit to you." The only question made at the argument of the case was whether the act mentioned was in violation of the Constitution. It was contended on the part of the defendant that the act in question violated two of the provisions of the Constitution which went into effect "from and after the 31st day of December in the year of 1895." These two provisions are: First, § 5 of article 1, which reads as follows: "The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any

person be denied the equal protection of the laws;" second, § 84 of article 3, which contains, among others, the following provisions: "The general assembly of this state shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit: . . . To provide for the protection of game. (2) In all other cases, where a general law can be made applicable, no special law shall be enacted."

The act of 1896, which is claimed to be in violation of these two sections of the Constitution, is entitled "An Act to Further Regulate Fishing for Profit in the Waters of This State," and contains the following provisions: Section 1: "That after the passage and approval of this act, it shall not be lawful for a citizen of one county to fish for profit in the waters of another county without first obtaining therefor from the treasurer of the county in which he intends to so fish, a license to do so." The second section simply prescribes the price of such license, and the fund to which it shall be appropriated, and therefore is not pertinent to the present inquiry. The 8d section of the act reads as follows: "That this act shall not apply to any counties in this state other than the counties of Colleton and Berkeley." The 4th section of the act provides the punishment for violating the provisions of the act, and its terms throw no light upon the question which we are to determine. The terms of this act are peculiar; for while its title and the provisions of the 1st section clearly make it a general law, applicable to fishing in any waters of this state, within any of the counties of the state, the provision in the 8d section expressly confines its operation to the two counties therein specified, thereby clearly making the act a local or special law. There is another peculiarity about this act; for the phraseology employed in the 8d section leaves it at least doubtful whether the intention was to prohibit the citizens of Colleton and Berkeley counties alone for fishing for profit in the waters of any other county without a license, as would seem to be the logical inference, inasmuch as the terms of the 1st section expressly apply to the citizens of every county in the state, while the terms of the 8d section are limited to the counties of Colleton and Berkeley,—that is, to the citizens of those two counties, leaving the citizens of all the other counties at liberty to fish anywhere without a license.—or whether the intention was to prohibit the citizens of every other county from fishing for profit in the waters of Colleton and Berkeley without a license. Assuming the latter to be the real intention of the act, as we think it likely was the case, we will consider the question in that aspect. Taking that view of the act, it will be observed that while it forbids the citizens of every county in the state, except those of Colleton and Berkeley, from fishing in the waters of those two counties without a license, there is nothing in the act to forbid the citizens of Colleton and Berkeley from fishing in the waters of every other county in the state without a license. This is a discrimination in favor of the citizens of Colleton and Berkeley coun

NOTE.—For discrimination between localities in respect to fisheries, *Bittenhaus v. Johnston* (Wis.) 32 L. R. A. 380.

33 L. R. A.

ties, and is in conflict with that clause of the Constitution quoted above, declaring that no person shall be denied the equal protection of the laws.

But, again, if, as we have seen above, this act is a local or special law, it violates the provisions of § 84 of article 3, cited above, provided it concerns any of the subjects or is for any of the purposes mentioned in that section. The manifest object of the act was to protect fish in the waters of Colleton and Berkeley counties, and, if fish can be regarded as game, then, being a local or special law providing for the protection of game, it is in conflict with the section of the Constitution last referred to, for that section expressly forbids the enactment of any local or special law "to provide for the protection of game." The authorities clearly show that fish can and should be classed as game. In 8 Am. & Eng. Enc. Law, at page 1023, it is said: "Animals pursued and taken by sportsmen are designated as game." And in a note on the next page of that valuable work it is said: "Game includes wild bees and fish;" citing Cooley, Torts (1880), 435. So, in 2 Bl. Com. chap. 80, that standard author, in speaking of animals *fera natura*, classes fish with deer, pheasants, partridges, etc. So, in Kent, Com. pt. 5, lect. 35, the same classification is made. It is obvious, therefore, that the act in question is in conflict with § 84 of article 3 of the Constitution.

It seems to us also that the act in question, viewed in the light contended for by the state, must be regarded as in violation of another subdivision of § 84 of article 3. Subdivision 11 of that section declares that, "in all other cases where a general law can be made applicable, no special law shall be enacted." It is very clear that this is a case where a general

law could have been made applicable. This is conclusively shown by the terms of the 1st section of this very act, which, if it stood alone, would have been a good general law; but when the legislature saw fit, by the provision in the 3d section, to limit its operation to certain specified localities, the act was deprived of its character as a general law, and became a special or local law concerning a subject, and for a purpose expressly forbidden by the Constitution.

There is another view of this case, which, though not mentioned in the argument, may be considered by us, as this is not a case of appeal, but a case in the original jurisdiction of this court; and this view is absolutely conclusive of the defendant's right to a discharge from custody. The Constitution, in § 16 of article 1, forbids the issuing of any warrant for the arrest of any person except upon probable cause, supported by oath or affirmation. In the case of *State v. Wimbush*, 9 S. C. N. S. 300, it was held that a warrant issued on a statement of facts not sworn to is unconstitutional, null, and void, and that it was not unlawful to resist an officer attempting to arrest one under an illegal warrant. Now, from the papers accompanying the sheriff's return to the writ of habeas corpus, and referred to in the return, it is manifest that the warrant under which the defendant was arrested was not supported either by oath or affirmation, and the arrest was therefore illegal, and the sheriff had no lawful authority to retain him in custody. For this, if for no other reason, the defendant was clearly entitled to his discharge.

In accordance with these views, an order has heretofore been granted discharging the defendant from custody.

OHIO SUPREME COURT.

SUN FIRE OFFICE OF LONDON, *Plff. in Err.*,

v.
Ida A. CLARK *et al.*

(53 Ohio St. 414.)

*1. A deed absolute on its face, but shown by a separate written agreement to be a security

*Headnotes by the COURT.

NOTE.—Mortgage as effecting change of title or interest in insured property.

The general rule is that the mere giving of a mortgage does not effect a change of title or interest in the insured property within the meaning of conditions in insurance policies avoiding the policy in case of change of interest or title. The wording of the condition is different in different policies and a slight variation of phraseology has sometimes been sufficient to change the rule.

Insurable interest.

The giving of the mortgage does not terminate the insurable interest of the mortgagor. *Buffalo* 88 L. R. A.

for the performance of a personal obligation of the grantor to the grantee, is a mortgage.

2. A policy of insurance containing a provision that if any change take place in the title, interest, or possession of the property insured, by sale, transfer, or conveyance, without the consent of the insurer, the policy shall become void, is not invalidated by the making of a mortgage. The words "title" or "possession," as

Steam Engine Works v. Sun Mut. Ins. Co. 17 N. Y. 401.

If an insured mortgages after the insurance is made he nevertheless continues to be interested so as to have a right to recover in case of loss. *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 259.

A mortgage of chattels without change of possession will not avoid a policy of insurance. *Union Ins. Co. v. Barwick*, 36 Neb. 224.

Alienation.

A mortgage is not an alienation.

In *Savage v. Howard Ins. Co.* 52 N. Y. 503, the court by way of argument states that a mortgage is not an alienation of the property mortgaged.

here used, mean an actual change in law and equity, and the word "interest" means a change in the insurable interest of the owner of the property, neither of which is affected by the execution of a mortgage.

3. Where a policy of insurance stipulates that it shall become void by the taking of additional insurance without the consent of the insurer, such stipulation is not within the provisions of § 3643, Rev. Stat., for the reason that additional insurance does, as a matter of law, increase the risk, and, if taken without the consent of the insurer, invalidates the policy.

(October 29, 1895.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

A transfer of the estate short of a conveyance of the title is not an alienation of the estate. *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624.

A chattel mortgage is not an alienation which will avoid insurance on the property. *Rice v. Tower.* 1 Gray. 425.

If the policy is to become void in case the property is aliened a chattel mortgage will not avoid it. *Sovereign Ins. Co. v. Peters.* 12 Can. S. C. 33.

In *Abbott v. Hampden Mut. F. Ins. Co.* 30 Me. 414, in which the property has been conveyed with a mortgage back, the court says to constitute an alienation it is not necessary that there should be an absolute transfer. If there has been such a disposition of it that any portion has been passed to another the alienation has occurred.

In *Farmers' Ins. Co. v. Ashton.* 31 Ohio St. 477, the court says it is not necessary for us to consider whether or not a mortgage will avoid the policy under a condition against alienation.

Assignment.

Nor is a mortgage an assignment.

A condition against alienation or assignment does not include a mortgage. *Sands v. Standard Ins. Co.* 27 Grant, Ch. (U. C.) 167, 26 Grant, Ch. (U. C.) 113; *Smith v. Niagara Dist. Mut. Ins. Co.* 38 U. C. Q. B. 575; *Wilby v. Standard Ins. Co.* 3 Ont. Rep. 115; *Bull v. North British Canadian Invest. Co.* 14 Ont. Rep. 322.

Title or ownership.

A condition making the policy void if the property is sold or transferred or any change takes place in title or possession is not violated by the giving of a mortgage on the property. *Loy v. Home Ins. Co.* 24 Minn. 315, 31 Am. Rep. 316.

A stipulation against any change in title or ownership is not violated by a chattel mortgage to one who had an insurable interest in the property when the mortgage was given. *Taylor v. Merchants & B. Ins. Co.* 33 Iowa. 412.

A policy providing that it should be void in case of any sale, transfer, or change of title, or in case of a voluntary conveyance, is not avoided by giving a mortgage upon the property. *Friezen v. Allemania F. Ins. Co.* 30 Fed. Rep. 352.

In *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.* 66 Vt. 459, which involved the question of liability for premiums, the court held that mortgaging the property does not change or transfer the title so as to make the policy void.

A mortgage is not within a condition against change taking place in the title whether by sale, legal process, judicial decree, or voluntary transfer or conveyance. *Hartford F. Ins. Co. v. Walsh.* 54 38 L. R. A.

Statement by Minshall, Ch. J.:

The action below was upon a policy of insurance in the sum of \$3,000, made and delivered by the Sun Fire Office of London to Ida A. Clark to indemnify her against loss by fire on her dwelling house, and payable to George W. Pringle as his interest might appear, his interest being that of a mortgagee. The first defense of the answer admitted certain allegations, and then denied all the other averments of the petition. The questions, however, arise upon the second and third defenses in the answer and the issues made thereon. These defenses are as follows:

Second Defense.

"Further answering said petition, defendant for a second defense says that it is one of the express conditions and provisions of the policy of insurance so made by it, and a part thereof, that the same should become void, unless con-

Ill. 164, 5 Am. Rep. 115; *Aurora F. Ins. Co. v. Eddy.* 55 Ill. 213.

A chattel mortgage is not within a provision against sale or transfer or change of title. *Hennessey v. Manhattan F. Ins. Co.* 28 Hun, 98.

The headnote in *Tallman v. Atlantic F. & M. Ins. Co.* 29 How. Pr. 71, states that a chattel mortgage is within a provision against any sale, transfer, or change of title, but it appears from the case that there had been a sale under the mortgage and an absolute change of title before the loss, so that the point as above stated, although raised in the case, was not necessary to its decision, and in fact was not directly decided by the court.

In Canada some of the cases have held that a mortgage was within a condition against change of title.

In *Samo v. Gore Dist. Mut. F. Ins. Co.* 26 U. C. C. P. 405 (Galt's opinion) the statute made the policy void if there was any change in the title or ownership in the insured property, and it was held that a mortgage not reported to the company would make the policy void under the statute.

A chattel mortgage is a change of title within the meaning of a condition making the policy void in case of change of title in the property. The court says the words "changes of title" must be construed to comprehend any change from the entire unconditional ownership of the assured in the property insured. *Citizens' Ins. Co. v. Salterio.* 23 Can. S. C. 155, 14 Can. L. T. 360.

But under the statute 36 Vict. chap. 44, § 390, an alienation by way of mortgage will avoid the policy. *Mechanics' Bldg. & Sav. Soc. v. Gore Dist. Mut. F. Ins. Co.* 3 Ont. App. Rep. 151; *Kanady v. Gore Dist. Mut. F. Ins. Co.* 44 U. C. Q. B. 261.

Change of interest.

A mortgage is not a change of interest. *Lampasas Hotel & P. Co. v. Phoenix Ins. Co.* (Tex. Civ. App.) 38 S. W. 361. In that case *East Texas F. Ins. Co. v. Clarke.* 79 Tex. 23, 11 L. R. A. 293, is distinguished, and to some extent criticised.

But the majority of the cases hold otherwise.

A mortgage is within a condition against conveyance of any interest in the property. *East Texas F. Ins. Co. v. Clarke.* 79 Tex. 23, 11 L. R. A. 293.

In *Olney v. German Ins. Co.* 38 Mich. 94, 13 L. R. 684, there was a condition against encumbrance by mortgage, "or any change in the interest, title, or possession of the property." A chattel mortgage by one of the partners was given on his interest, and the court held that the policy was avoided; but in discussing the question it says the placing of the chattel mortgage by one partner for his in-

sent in writing was indorsed thereon by or on behalf of the defendant, if any change took place in the title, interest, location or possession of the property insured (except in case of succession by reason of the death of the insured) whether by sale, transfer, or conveyance, in whole or in part, or by legal process or judicial decree; and defendant alleges that after the making of said policy, and by deed dated November 7, 1889, the plaintiff, Ida A. Clark, conveyed the premises, upon which stood the house by said policy insured, to one Clark A. Rhodes. Her husband, F. W. Clark, joined in said conveyance (which is recorded in vol. 460, page 326, of Cuyahoga County Records) without notice to or consent of this defendant, which was ignorant of the same until after the destruction of said house by fire. By which conveyance said policy became void and of no force and effect."

Third Defense.

"Further answering said petition, defendant, for a third defense says, that it is one of the conditions of the policy of insurance so made by it, and a part thereof, that the same should become void, unless consent in writing was indorsed thereon, by or on behalf of the defendant, if the insured had, or should, after the making of the same, obtain any other policy or agreement for insurance, whether valid or not, on the property in said policy mentioned or any part thereof, and it alleges that on or about the 1st day of December, 1888, the plaintiff, Ida A. Clark, obtained a policy of insurance of the Springfield Fire & Marine Insurance Company on the same house insured by the said policy of defendant, to the amount of \$2,000, and on the piano, household furniture, and family wearing apparel while therein contained to the amount of \$500, without any

dividual benefit upon the partnership chattels works a change of interest therein.

A provision against change of interest is violated by the inclusion of the property in a mortgage thereof through negligence or inattention of the assured. *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535.

A chattel mortgage is a change affecting the interest of the insured within the meaning of the policy. *Salterio v. London F. Ins. Co.* 26 N. S. 20.

A chattel mortgage will avoid a policy under a condition making it void if the said property is sold, or interest of the parties therein changed. *Torrop v. Imperial F. Ins. Co.* 26 Can. S. C. 585.

A condition making the policy void if the interest of the insured in the property should be changed in any manner, whether by act of the parties or by operation of the law, will include the giving of a mortgage upon the property. *O'Neill v. Ottawa Agri. Ins. Co.* 30 U. C. C. P. 151, 15 Can. L. J. 207.

Sale, alienation, conveyance, transfer, or change of title.

A mortgage is not a sale, alienation, conveyance, transfer, or change of title. *Commercial Ins. Co. Spanknebe*, 52 Ill. 53, 4 Am. Rep. 582.

Prior to maturity a chattel mortgage will not avoid the policy under a condition against sale, transfer, conveyance, or change in title. *Hanover F. Ins. Co. v. Connor*, 20 Ill. App. 297.

In *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 584, the court in argument states that a mortgage is not a violation of a condition against a sale, conveyance, alienation, or change of title.

A mortgage is not a sale, transfer, or change of title. *Byers v. Farmers' Ins. Co.* 35 Ohio St. 606, 35 Am. Rep. 623.

Sale or otherwise.

In *Cowan v. Iowa State Ins. Co.* 40 Iowa, 551, 20 Am. Rep. 583, the court, in discussing the effect of a condition against alienation by sale or otherwise, says that nothing less than the transfer of the property insured, whereby the plaintiff would part with all his interest therein, would operate to defeat the policy.

A mortgage is not an alienation by sale or otherwise. But the court intimated that from the decision in *Abbott v. Hampden Mut. F. Ins. Co.* 30 Me. 414, it would seem that if the provision was that if the property should be alienated in whole or in part a mortgage would violate it. *Pollard v. Somerset Mut. F. Ins. Co.* 42 Me. 221.

A provision against alienation by sale or otherwise does not include a mortgage. *Jackson v. 38 L. R. A.*

Massachusetts Mut. F. Ins. Co. 23 Pick. 418; *Conover v. Mutual Ins. Co.* 8 Denio. 254, 1 N. Y. 290.

In *French v. Rogers*, 16 N. H. 177, it was questioned whether or not a policy was avoided by execution of a mortgage which provided that if the property is alienated by sale or otherwise the policy should be void.

Alienation in whole or in part.

A mortgage will violate a provision that the policy shall be void if the property or any part thereof shall be alienated, or in case of any change or transfer of title. The mortgage must be regarded as a material change in the interest of the insured. *Sossaman v. Pamlico Bkg. & Ins. Co.* 78 N. C. 145.

Alteration in ownership or termination of interest.

A mortgage will avoid a policy under a condition that all alienations and alterations in the ownership of the property insured in any material particular shall make void the policy. *Edmunds v. Mutual Safety F. Ins. Co.* 1 Allen, 811, 79 Am. Dec. 748.

A chattel mortgage is not within conditions against transfer or termination of the interest of the assured by sale or otherwise, or any sale, alienation, transfer, or change of title. *Van Deusen v. Charter Oak F. & M. Ins. Co.* 1 Robt. 55, 1 Abb. Pr. N. S. 349.

Must be specific provision against encumbrance.

In the absence of a stipulation making it so a mortgage will not defeat the right of the mortgagor to recover on the policy. *Dutton v. New England Mut. F. Ins. Co.* 29 N. H. 153.

Placing an encumbrance on insured property will not avoid the policy in the absence of a provision avoiding it in case of the placing of a mortgage or other lien upon it. The court said had the insurer intended to provide against encumbrances nothing would have been easier than the insertion of such a clause in the contract by clear and unmistakable language. That this was not done is the best of evidence that it was not the intention of the parties that the policy would be violated by an encumbrance without permission. *Germania F. Ins. Co. v. Stewart*, 18 Ind. App. 627.

In the absence of any stipulation in the policy in order to avoid it the transfer must be absolute so that no property or interest remains in the insured. If it is in the nature of a mortgage or in trust with a resulting trust in the insured he may recover to the extent of his loss. *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76; *Rollins v. Columbian Mut. F. Ins. Co.* 26 N. H. 300; *Folsom v. Belknap County Mut. F. Ins. Co.* 30 N. H. 231.

notice to this defendant or its consent thereto, and the loss on said buildings was paid by said insurance company in pursuance of said policy; whereby said policy sued upon herein became and has been ever since, utterly void and of no effect whatever."

To these defenses the plaintiff replied as follows:

First denying the averments of the second defense, she averred: "That at the time mentioned she and her husband mortgaged said property to said Clark A. Rhodes, the instrument being in form only, a deed, and that at the time of said fire said mortgage had not become absolute, nor was the debt secured thereby due and payable. She further avers that she immediately gave notice of such mortgage to said company, both to the agent through whom said policy was issued to the general agent of said defendant in Cleveland,

Ohio, and to the company itself, and received from none of these persons or from said defendant any intimation that said policy would be forfeited on account of said mortgage, and on account thereof she did not as she might and would otherwise have done, procure other insurance in place of the policy referred to in said petition.

"Replying to the third defense contained in said answer, this plaintiff says that immediately upon obtaining the policy of insurance mentioned in said third defense, she notified said defendant of said insurance, who consented thereto."

The case was tried to a jury, evidence was offered by both parties upon the issues joined, as appears from a bill of exceptions taken and made a part of the record. At the close of the evidence the court instructed the jury as follows:

And facts cannot be alleged which would prove the conveyance fraudulent for the purpose of restricting the interest of the insured. *Carroll v. Boston Marine Ins. Co.* 8 Mass. 517.

A mortgage is not a sale or transfer, nor is it a change in title. *Judge v. Connecticut F. Ins. Co.* 132 Mass. 521. The court says had it been intended to include a mortgage among those changes in title which would avoid the policy, it would seem that they would have been specified in express terms. The mortgagor is still interested to the full value of the property. He makes no such change in title or interest as will be affected by the other transactions mentioned in the policy.

Other conditions.

A chattel mortgage is not an assignment of the policy. *Prows v. Ohio Valley Ins. Co.* 2 Cin. Sup. Ct. Rep. 14.

The execution of a mortgage is not an increase of risk. *Howard F. Ins. Co. v. Bruner*, 23 Pa. 50.

But it has been held that whether or not the execution of a mortgage on the property increases the risk is a question for the jury. *Collins v. Merchants' & B. Ins. Co.* 95 Iowa, 540; *Henderson v. Ohio Farmers' Ins. Co.* 2 Ohio Dec. 189.

If the policy contains a provision against sale, transfer, or change in title, and mortgaged property is subsequently put into the building, where the risk will attach except for such provision, the mortgage should be deemed a breach of condition, so that the policy will not cover the property so put into the building. *Schumitsch v. American Ins. Co.* 48 Wis. 25.

Mutual companies.

There seems to be an exception to the general rule in case of mutual companies.

In case of a mutual company alienation by mortgage will render the policy void. *Burton v. Gore Dist. Mut. Ins. Co.* 14 U. C. Q. B. 342.

Where the insurer is a mutual company and is given a lien on the property insured for assessments on the premium notes, a provision that alienation by sale or otherwise shall render the policy void will include alienation by mortgage, since otherwise the insurer must lose its lien, or the lien must be enforced against an innocent mortgagee. *McCulloch v. Indiana Mut. F. Ins. Co.* 8 Blackf. 50; *Indiana Mut. F. Ins. Co. v. Coquillard*, 2 Ind. 645.

Absolute conveyance.

As a general rule an absolute deed which is intended as a mortgage will have no more effect upon the insurance than a simple mortgage would.

A policy is not made void by an absolute conveyance. 88 L. R. A.

ance as security for a debt by reason of the clause making it void in case of the termination of the interest of the assured. *Holbrook v. American Ins. Co.* 1 Curt. C. C. 198.

A condition making the policy void in case of the transfer of the insured property will not apply in case of an absolute transfer which was intended as a mortgage. *Ward v. Beck*, 18 C. B. N. S. 668, 32 L. J. C. P. N. S. 112, 9 Jur. N. S. 912.

A deed absolute to secure a debt will not avoid a policy under a condition that it should be void if the property is sold or transferred or any change takes place in title or possession. *Nussebaum v. Northern Ins. Co.* 37 Fed. Rep. 524, 1 L. R. A. 704.

A condition making the policy void in case of any sale, transfer, or change of title in the property is not violated by the giving of an absolute deed for the security of money which contains a defeasance clause upon its face. *Virginia F. & M. Mut. Ins. Co. v. Fearin Bros.* 62 Ga. 515.

In *National Ins. Co. v. Webster*, 83 Ill. 470, parol evidence was held admissible to show that an absolute bill of sale was intended as a mortgage, but it would seem that this was for the purpose of showing who was the proper plaintiff in the action, rather than whether or not the policy had been avoided by the transfer.

In *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 176, 85 Am. Dec. 553, two of the three judges sitting held that a transfer to secure debts did not avoid the policy under a condition making it void in case of any sale, transfer, or change of title. But the court was agreed that if the effect of the transfer was to decrease the interest of the insured in the property, as by being for the security of the debts of a third person, the transfer would avoid the policy.

A condition that the policy shall be void if the property is sold is not violated by the giving of a deed absolute in form which is duly recorded if at the same time a defeasance bond is executed, although the bond is never recorded. *Bryan v. Traders' Ins. Co.* 145 Mass. 389. The court holds that the statute making such a transaction a conveyance as to third parties does not apply, so that the expressions in *Foot v. Hartford F. Ins. Co.* 119 Mass. 259, which tend to hold them to be so, were not necessary to the decision.

A provision in the policy against the termination of the interest of the assured in the property is not violated by a conveyance absolute on its face which is in reality a mortgage. And the fact that the instrument is intended for a mortgage may be shown by parol. *Jecko v. St. Louis F. & M. Ins. Co.* 7 Mo. App. 808.

An absolute deed intended as a mortgage does not terminate the insurable interest of the mort-

"Under the construction which I have placed upon § 3643, of the Revised Statutes of Ohio, and the pleadings and proof in the case, I deem it my duty to direct the jury to return a verdict for plaintiff for the amount of the policy and interest from March 12, 1890."

Exception was taken to the ruling of the court: a motion was made for a new trial and overruled, and judgment entered on the verdict, which was affirmed by the circuit court. The ruling of the court is assigned for error here.

Messrs. H. C. Ranney and C. W. Fuller, for plaintiff in error:

Even if in the view of the court the conveyance should be merely a mortgage, the authorities support the position that under the peculiar wording of the provision in this policy there would still be a forfeiture of the policy.

Edmonds v. Mutual Safety F. Ins. Co. 1 Allen, 311, 79 Am. Dec. 746; *Abbott v. Hampden Mut. F. Ins. Co.* 30 Me. 414; May, Ins. § 271; *Hitchcock v. North Western Ins. Co.* 26 N. Y. 68; *Savage v. Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741.

The breach of the condition with reference to additional insurance would, beyond question, under the authorities constitute a good defense to this action.

Queen Ins. Co. v. Leslie, 47 Ohio St. 418, 9 L. R. A. 45; *Jeffries v. Economical Mut. L. Ins. Co.* 89 U. S. 23 Wall. 47, 22 L. ed. 833; *Phœnix Ins. Co. v. Michigan S. & N. I. R. Co.* 28 Ohio St. 69.

gagor. Hodges v. Tennessee M. & F. Ins. Co. 8 N. Y. 416.

A deed absolute in form, given to secure a debt, is not a sale or transfer of the property or change of title within the meaning of those words in a condition in an insurance policy. *Barry v. Hamburg-Bremen F. Ins. Co.* 110 N. Y. 1.

A condition that the interest of the assured must be the entire, unconditional, and sole ownership is not violated by the execution of a bill of sale to secure a debt. *Kronk v. Birmingham F. Ins. Co.* 91 Pa. 300.

A deed of trust to secure payment of debts is not a sale or change of title. *Quarrier v. Ætna F. & M. Ins. Co.* 10 W. Va. 507; *Nease v. Ætna Ins. Co.* 22 W. Va. 283.

An absolute deed with a defeasance which is seasonably recorded is a mortgage and will not defeat a policy under a clause making it void in case of alienation in whole or in part. *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

A deed made as collateral security for a debt which is never created does not avoid a policy under a condition that the policy is to become void if the property is sold or transferred, or if the interest of the assured is other than the entire, unconditional, and sole ownership of the property. *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144. The court says there is a vast difference between giving a deed and having title to the land. The former is evidence of the latter, but may exist without it.

But where the state statute provides that an absolute conveyance to secure a debt shall be regarded as an absolute conveyance and not as a mortgage it will be within the terms of a condition making the policy void in case the property is sold or the title transferred or changed. *Phoenix Ins. Co. v. Asberry*, 95 Ga. 792.

So, where the defeasance of a deed given to secure a debt is not recorded, and the statutes pro-

The evils which § 3643 was intended to remedy were over insurance, and the dishonesty and fraud attendant upon the gambling nature of such contracts, and nothing was farther from the intention of the legislature than the extension of the language so as to deprive companies of all defenses save two.

Farmers' Ins. Co. v. Wells, 42 Ohio St. 519.

The manifest policy of the statute is to prevent over insurance, and to guard, as far as possible, against carelessness and every inducement to destroy property in order to procure insurance upon it.

Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; *Sleeper v. New Hampshire F. Ins. Co.* 56 N. H. 401; *Queen Ins. Co. v. Jefferson Ice Co.* 64 Tex. 583.

The words, "any change increasing the risk," must be restricted to any change in the physical condition and surroundings of the property, and should not be extended so as to include any other possible change in the title, amount of insurance, encumbrance, vacancy, or occupancy, which have hitherto, without question, been valid conditions in the policy.

Brigel v. Starbuck, 34 Ohio St. 280; *Woodard v. Michigan, S. & N. I. R. Co.* 10 Ohio St. 121; *Shultz v. Cambridge*, 38 Ohio St. 659; *Lane v. State*, 39 Ohio St. 312; *Myers v. Seaberger*, 45 Ohio St. 234; *Dwelling House Ins. Co. v. Webster*, 7 Ohio C. C. 511; *Phœnix Ins. Co. v. Michigan S. & N. I. R. Co.* 28 Ohio St. 69; *Savage v. Howard Ins. Co.* 52 N. Y. 505, 11 Am. Rep. 741.

vided that an absolute conveyance shall not be affected or defeated by an unrecorded defeasance, there will be an alienation within the meaning of a condition in an insurance policy against alienations. *Foot v. Hartford F. Ins. Co.* 119 Mass. 259.

If the policy provides that it shall become void if the property is alienated in whole or in part, and the insured mortgages the property and then transfers his equity of redemption, taking back a defeasance which he neglects to record, although the transfer is recorded, it appearing of record that there has been an alienation, the policy will be void. *Tomlinson v. Monmouth Mut. F. Ins. Co.* 47 Me. 232.

And a condition making the policy void in case the property shall be sold, will be broken by a conveyance by those holding the equity of redemption to the mortgagee under a parol agreement by him to sell the property and account to them for the proceeds. *Dalley v. Westchester F. Ins. Co.* 131 Mass. 173.

An alienation is effected by an absolute deed to secure a debt, although it is accompanied by an unsealed agreement to reconvey upon repayment of the amount due. *Adams v. Rockingham Mut. F. Ins. Co.* 29 Me. 294. The court says the transaction between the parties to the conveyance was not a mortgage of the property, and had not the equitable incidents of a mortgage.

And in Michigan it has been held that a condition against sale, transfer, or change of title is broken by a deed absolute on its face to secure payment of a debt. *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279. The court says if the trust instead of being secret appeared on the face of the conveyance there would still be a change of the title. We think the conveyance would clearly come within the condition of the policy and put an end to the insurance.

H. P. F.

Messrs. White, Johnson, & McCaslin, for defendants in error:

The "insurable interest" of the owner of the property mortgaged to secure a debt on which the owner is personally liable extends to the full value of the mortgaged property, and this even though the property is mortgaged to its full value.

Royal Ins. Co. v. Stinson, 108 U. S. 25, 26 L. ed. 473; *Gusst. v. New Hampshire F. Ins. Co.* 66 Mich. 98; 11 Am. & Eng. Enc. Law, p. 314, note 11, p. 315, note 2; *Higginson v. Dall*, 13 Mass. 96; *French v. Rogers*, 16 N. H. 177; *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249; *Strong v. Manufacturers' Ins. Co.* 10 Pick. 40, 20 Am. Dec. 507; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 404.

The subsequent giving of a mortgage, unaccompanied by possession, does not operate as a change, alteration, or transfer of interest in insured property, within the meaning of a condition in the policy prohibiting change, alteration, or transfer of interest or title.

Nor does it operate as a change, alteration, or transfer of title in the meaning of such a condition in the policy.

In the application of the last two propositions it is immaterial what is the form of the instrument, whether a deed absolute on its face, but shown by parol or written defeasance to be only a mortgage, or a trust deed to secure a debt, or an instrument in form of a mortgage.

Jecko v. St. Louis F. & M. Ins. Co. 7 Mo. App. 308; *Judge v. New York Bovey F. Ins. Co.* 132 Mass. 521; *Dolliver v. St. Joseph F. & M. Ins. Co.* 128 Mass. 315, 35 Am. Rep. 378; *Kronk v. Birmingham F. Ins. Co.* 91 Pa. 300; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Clay F. & M. Stock Ins. Co. v. Beck*, 43 Md. 358; *Ellis v. Insurance Co. of N. A.* 32 Fed. Rep. 646; *Van Deusen v. Charter Oak F. & M. Ins. Co.* 1 Robt. 55; *Fernandez v. Great Western Ins. Co.* 3 Robt. 457; *Hitchcock v. North Western Ins. Co.* 26 N. Y. 68; *Bates v. Buckeye Ins. Co.* 1 Cin. Sup. Ct. Rep. 523; *Virginia F. & M. Ins. Co. v. Feagin Bros.* 62 Ga. 515; *Wood v. American F. Ins. Co.* 78 Hun, 109; *Hammel v. Queen's Ins. Co.* 54 Wis. 72, 41 Am. Rep. 1; *Grable v. German Ins. Co.* 32 Neb. 645; *Taylor v. Merchants & B. Ins. Co.* 83 Iowa, 402; *Quarrier v. Aetna F. & M. Ins. Co.* 10 W. Va. 507; 1 Biddle, Ins. § 213; *Bryan v. Traders' Ins. Co.* 145 Mass. 389; *Barry v. Hamburg-Bremen F. Ins. Co.* 110 N. Y. 1; *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96; *Friezen v. Germania F. Ins. Co.* 30 Fed. Rep. 352; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 800, 89 Am. Rep. 584; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford F. Ins. Co. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *Loy v. Home Ins. Co.* 24 Minn. 815, 31 Am. Rep. 346; *Hanover F. Ins. Co. v. Connor*, 20 Ill. App. 297; *Hartford Steam Boiler Inspection & Ins. Co. v. Lasher Stocking Co.* 66 Vt. 439; *Union Ins. Co. v. Barwick*, 36 Neb. 224; *Shepherd v. Union Mut. F. Ins. Co.* 38 N. H. 232; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 606, 35 Am. Rep. 625; *Lycoming F. Ins. Co. v. Haven*, 95 U. S. 242, 24 L. ed. 473; *Hill v.* 38 L. R. A.

Cumberland Valley Mut. Protection Co. 59 Pa. 474; *Masters v. Madison County Mut. Ins. Co.* 11 Barb. 624.

In giving construction to any statute, the court must consider its policy, and give it such an interpretation as may appear best calculated to advance its object by effecting the design of the legislature. The great object of the statute in question is clearly expressed in the title prefixed to it.

Wilber v. Paine, 1 Ohio, 251; *Burgett v. Burgett*, 1 Ohio, 469, 18 Am. Dec. 634; *Tracy v. Card*, 2 Ohio St. 431; *Slater v. Cave*, 3 Ohio St. 85; *Follock v. Speidel*, 27 Ohio St. 86; *Hayes v. Lewis*, 28 Ohio St. 326; *State v. Harmon*, 31 Ohio St. 264; *Cincinnati Gaslight & C. Co. v. Arondale*, 43 Ohio St. 264; *Cross v. Armstrong*, 44 Ohio St. 613; *Sawyer v. State, Horr*, 45 Ohio St. 344; *Hauck v. State*, 45 Ohio St. 439; *Henry v. Perry Twp.* 48 Ohio St. 674.

It is not true that the crying evil had been questions as to the value of the property.

The courts condemn the many conditions and warranties contained in the fine print of the applications and policies, prepared by learned and astute counsel for insurance companies, in such a way as, while seeming to promise indemnity, to in fact deprive the insured of all benefit from the policy.

Queen Ins. Co. v. Leslie, 47 Ohio St. 418, 9 L. R. A. 45.

The object of the act obviously was to remedy an evil with which the people of this state had long believed themselves to be grievously afflicted.

The state of things believed to exist was this: The principal act of precaution was, to guard the company against liability for losses.

Delancey v. Rockingham Farmers' Mut. F. Ins. Co. 52 N. H. 581.

The legislature of Missouri conceived that the promises held forth to the assured in the policies in general use were but too often a delusion and a snare, and as the courts were powerless to correct the fraud it had to be corrected by statute.

White v. Connecticut Mut. L. Ins. Co. 4 Dill. 177. See also *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 322; *Me. Rev. Stat.* 1883, pp. 445, 446, § 20; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *Wall v. Equitable L. Assur. Soc.* 32 Fed. Rep. 273.

Minshall, Ch. J., delivered the opinion of the court:

1. The first question presented arises on the second defense. The evidence sustained the reply of the plaintiff to the effect that the instrument was simply a mortgage. A separate written instrument was given by Rhodes stating that the conveyance was given to secure the payment of a promissory note to him, by Clark and wife, for \$2,000, and his liability for them on an injunction bond; and expressly stipulated that the conveyance "was in the nature of a security" to him for the above purposes. Hence it was simply a mortgage. It seems well settled in this state and elsewhere that the making of a mortgage does not violate a provision in a policy of insurance, that any change in the title, interest, or possession of the assured in the property, without the assent of the insurer, shall avoid the policy. The mort-

gage, being simply a security for the debt, is extinguished by its payment without any reconveyance. The mortgage of itself does not make the mortgagee a freeholder, and a judgment recovered against him does not become a lien on the land, nor is he liable to the dower rights of his wife. It has none of the incidents of a legal or equitable title. True, upon foreclosure and sale, the mortgagee may by purchase at the sale become the owner of the land; but this is a right he enjoys in common with all others. It is also true that as between the mortgagor and mortgagee the latter, on condition broken, is regarded as the legal, but not as the equitable, owner. The mortgagor remains the equitable owner until the property is sold under the order of the court. Until then he may, by paying the debt, redeem the land. So that his insurable interest in the property remains the same,—which is the interest meant by the use of the word in the language of the policy, where it occurs. If lost by fire he remains liable on the debt, and has, by reason of the loss, so much the less property with which to pay it. Hence he has the same interest in its preservation after as before making the mortgage; and the moral hazard of the insurer is not increased. *Byers v. Farmers' Ins. Co.*, 85 Ohio St. 606, 85 Am. Rep. 628; *Kronk v. Birmingham F. Ins. Co.*, 91 Pa. 800; *Royal Ins. Co. v. Stinson*, 108 U. S. 25, 29, 26 L. ed. 473, 477; *Barry v. Hamburg-Bremen F. Ins. Co.*, 110 N. Y. 1; *Judge v. New York Bovey F. Ins. Co.*, 182 Mass. 521; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 58, 4 Am. Rep. 582; *Columbian Ins. Co. v. Lawrence*, 27 U. S. 2 Pet. 25, 7 L. ed. 835; *Jecko v. St. Louis F. & M. Ins. Co.*, 7 Mo. App. 303; *Guest v. New Hampshire F. Ins. Co.*, 66 Mich. 98; *May, Ins.* § 272.

The general current of authority is in accordance with these cases; and while a different view has been taken by the courts of some of the states, it will be found that, as a rule, this has proceeded from the old conception that a mortgage is to be regarded as a conveyance; or from a more rigid adherence to the terms of the policy, in disregard of the rule that provisions imposing forfeitures should be strictly construed.

In giving effect to the language of any instrument, regard must be had to its purpose. A mere change in title, where the owner retains the same actual interest in the property—the same insurable interest—is not within the reason of the language employed. The object of the provision containing the language was to protect the insurer against a possible change in the owner's insurable interest in the property by a sale, transfer, or conveyance, whereby the hazards of the contract into which he had entered might be increased without his consent. Hence the generality of the language employed must be restrained to the reason and object of its use by the parties. To do otherwise would be to stick in the letter of the language employed by the parties to express their meaning, without regard to its spirit. *May, Ins.* § 273; *Ayres v. Hartford F. Ins. Co.*, 17 Iowa, 176, 185, 35 Am. Dec. 558.

Hence, so far as the second defense is concerned, the undisputed evidence shows that 88 L. R. A.

there was no error in the court directing a verdict for the plaintiff. The execution of the conveyance, being simply a mortgage, did not affect the title or interest of the mortgagor in the property (*Barry v. Hamburg-Bremen F. Ins. Co.*, 110 N. Y. 1), and whether made with or without the consent of the company, is immaterial.

2. The principal question in the case arises upon the third defense—the taking of additional insurance without the consent of the company. There was evidence tending to show that there was no consent; so that the correctness of the ruling cannot be affirmed, unless, as a matter of law, it was immaterial. And this upon a construction given to § 3643, Rev. Stat., is what is claimed. It is not claimed but that before the statute the facts stated would have constituted a defense to any recovery on the policy, but it is claimed that under this statute, the taking of additional insurance without the consent of the company does not avoid the policy, unless it is averred and shown that it increased the risk. The court is of a different opinion, and thinks that the statute has no application to the case. It reads as follows: "Sec. 3643. Any person, company, or association, hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurers receive a premium shall be paid, and in case of a partial loss the full amount of the partial loss shall be paid; and in case there are two or more policies upon the property, each policy shall contribute to the payment of the whole or the partial loss in proportion to the amount of insurance mentioned in each policy; but in no case shall the insurer be required to pay more than the amount mentioned in its policy."

This section has been considered by this court in a number of cases. *Queen Ins. Co. v. Leslie*, 47 Ohio St. 413, 9 L. R. A. 45; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 26 L. R. A. 313. It is not our purpose to question the soundness of either of these cases, when limited and applied to its facts. A careful reading of the statute will disclose, as we think, a simple purpose on the part of the legislature to limit it to such matters connected with the physical condition of the property—its value, structure, and surroundings—as might have been discovered in the examination required to be made by the agent of the company, on an application by the owner for insurance, and not to include or extend to things that would require an examination of records, or anything else outside of the physical condition and situation of the property; certainly not, to a knowledge of things that then had no existence, and could not be divined from anything the examination required to be made by the agent, might disclose. As stated in the syllabus of *Queen Ins. Co. v.*

Leatie, it is "a condition or situation of the property at the time of the insurance, which the examination the agent is required by the statute to make should have reasonably discovered," that will not defeat a recovery on the policy. In other words, no exception can be taken by the company to anything within the purview of the examination, after issuing the policy; and if any change takes place in the condition of the property, increasing the risk, it must be set up as a defense by the company.

The construction claimed for the statute by the defendant in error is placed upon the generality of the words in the clause of the statute following that which directs the making of an examination by the agent of the company. This examination relates only to the physical condition of the property, and, therefore, by the ordinary rules of construction, the general language immediately following should be limited to a change in such things as come within the purpose of the examination. So interpreted, they can mean no more than that, in the absence of any change in the physical condition of the property increasing the risk, the full amount of the insurance shall be paid in case of a total loss. If it had been intended to enlarge the meaning so as to embrace other matters made material by the terms of the policy, more apt words could, and, as we think, would, have been used. The language would have been so introduced as not to be naturally restrained by the context to a more limited meaning. Confining the meaning of the language "in the absence of any change increasing the risk" to what precedes, gives effect to all that is claimed as the purpose of the legislature in enacting the statute,—the prevention of the evils connected with over insurance, by making companies liable for the full amount insured, after issuing a policy therefor and receiving premiums proportioned to the valuation of the property, made by their agents on an examination of the premises.

As confirming this view as to the construction of the statute, it is difficult to see how an issue of fact could be taken and tried on the question whether the taking of additional insurance in a given case did or did not increase the risk. The fact must generally be the same in all cases, and therefore becomes a question of law, and cannot be changed by averment. Its importance to the insurer, and the reason for the insertion of a stipulation against additional insurance without his consent, is, doubtless, based upon the generally observed fact, that the care of an owner for the preservation

of his property is in direct proportion to his interest in it. Therefore, an insurer having stipulated for protection against a lessening of the owner's interest in the property insured, without his consent, may be, in a particular case, be deprived of the benefit of the stipulation by an averment that the plaintiff differs from men in general, and would take the same care of his property whether his interest in it is much or little? Without stopping to inquire whether the legislature might establish such a ground of defense, the absurdity of such an issue is good reason for saying that such an intention cannot be inferred from the mere generality of the words used in this section of the statutes. It would involve an inquiry somewhat novel in courts. The reception of evidence to prove that a man is as good as his fellows in general is not unusual, but to prove that he is better and more to be trusted is seldom, if ever, gone into. It would be difficult, if not impossible, for a jury to return a verdict after the most exhaustive inquiry. As a rule, selfishness is at the bottom of all human conduct. If you would know what a man would be likely to do in a given case, learn what it is to his interest to do. In the absence of any interest, he is likely to do nothing.

The conclusions reached do not trench upon what was decided in either of the preceding cases. In *Queen Ins. Co. v. Leatie* the answer averred that the property was unoccupied at the issuing of the policy, which was contrary to the representation of the insured. The fact that it was vacant could readily have been discovered by an examination; and the court held that there was no fraud in the representation if made; for if the examination required by the statute had been made, the fact that it was not occupied would have appeared. In *Moody v. Amazon Ins. Co.* it was averred that the property became vacant after the issuance of the policy without the consent of the company, but the answer did not aver that it increased the risk. Occupancy in any case may be determined by an examination of the property. It is a physical fact open to view; and so within the general language of the statute when restrained to the meaning disclosed by its context. A change in this regard does not, by the statute, invalidate the policy unless it increase the risk, which must be averred, and proved if denied. This is what, as we understand it, was decided on the subject before us, in the case just referred to.

Judgment reversed, and cause remanded for a new trial.

VIRGINIA SUPREME COURT OF APPEALS.

F. J. KIMBALL *et al.*, Receivers of the Norfolk & Western Railroad Company, *Pliffs.*
in *Err.*,

v.
George L. CARTER.

(.....Va.....)

1. An exception to a question which subjects the court to the unnecessary labor and danger of mistake by being required to search through a record to ascertain the facts that ought to be embodied in the exception itself will not be considered.
2. An exception to a question will not be considered when the answer is not given.
3. Inclosed lands within the meaning of a statute requiring a railroad to fence its right of way through inclosed lands are those surrounded by a fence, hedge, ditch, wall, or any line of obstacle interposed so as to part off and shut in the land and set it off as private property.
4. The inclosure of lands leased by a lessee from different parties is sufficient to make them inclosed lands while in his possession within the meaning of a statute requiring a railroad through them to be fenced, if the entire tract in his possession is inclosed, although separate parcels are not divided by fences.
5. The inclosure of lands need not be by continuous and lawful fence at all times sufficient to prevent stock passing through it in order to constitute them inclosed lands within the meaning of a statute requiring a railroad right of way to be fenced through such lands.

(July 22, 1897.)

ERROR to the Circuit Court for Wythe County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's cattle. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bolling & Stanley for plaintiffs in error.

Mr. Waller S. Poage, for defendant in error:

The place of entry, and not the place of killing, is the test by which plaintiff's right to recover is tried.

Thornton, Railroad Fences, pp. 215, 382, and cases cited; 3 Wood, Railway Laws, p. 1559, and note.

On the questions of fact involved in the case, the jury decided against the defendants, and as the evidence is certified, the case comes here as on a demurrer to the evidence.

See Code, § 8484.

The jury found that the lands were inclosed lands. They found that the defendants had failed to construct a fence as required by law, and they found the cattle came on the track at a place where the defendants were required by law to fence.

NOTE.—On the question what constitutes inclosed lands within the meaning of a statute requiring a railroad through them to be fenced, there does not seem to be much authority prior to this case.

88 L. R. A.

Keith, P., delivered the opinion of the court:

George L. Carter brought an action of trespass on the case in the circuit court of Wythe county against Kimball and Fink, receivers of the Norfolk & Western Railway Company, to recover damages for the negligent killing by the railroad company of fourteen cattle in October, 1895.

The case was tried before a jury, which rendered a verdict for the plaintiff, assessing his damages at \$572.55, upon which the court rendered judgment. To certain rulings of the court during the progress of the trial the defendants tendered bills of exceptions, and obtained a writ of error from one of the judges of this court.

The negligence alleged by the plaintiff for which he seeks to hold defendants responsible is the failure of the railroad company to fence its track as required by law to do where it runs through inclosed lands.

The plaintiff is the lessee of several tracts of land lying contiguous to each other, owned by the Max Meadows Land & Improvement Company, J. G. Kent, John P. Sheffey, and the Misses Sayers. Through a portion of the land rented from John P. Sheffey the line of the Norfolk & Western Railway passes at the point where the accident occurred. To the south of the line of railway, and between it and Reed creek, there is a field of about 20 acres, which had been planted in corn, and was prepared to be seeded in wheat. Reed creek, at this point, constitutes the boundary between the lands leased by the plaintiff from Sheffey and those belonging to Joe Kent, of which he was also the lessee. Upon the western boundary of the Sheffey line the farm of Christopher Holston was separated from it by a fence, shown by the evidence to be in a dilapidated condition. In the angle formed by this line of fence and the line of railway the plaintiff had constructed, partly upon the land leased by him of Sheffey and in part upon the land of the railway company, stock pens, in which he had placed 300 head of cattle. During the night they broke down the pen, wandered upon the railway, and fourteen of them were killed by one of the trains of the defendant company.

During the progress of the trial counsel for the plaintiff asked the following question of the plaintiff, who was testifying in his own behalf: "Please explain to the jury the condition of that embankment where the fence runs down to the creek, as to the height of it at the Holston line." This question, as stated in the exception, will be found at page 34 of the evidence. It is in fact at page 37, and marginal page 39.

Of the witness J. G. Kent the following question is asked: "You have been grazing this land for a long time, and attending these lands for a long, long time. Haven't the fences on the farm ordinarily been sufficient to restrain

As to the obligation toward employees to fence a railroad, see note to *Dickson v. Omaha & St. L. R. Co.* (Mo.) 25 L. R. A. 330; also *Carper v. Kimball* (C. C. App. 4th C.) 85 L. R. A. 138.

stock?" This question is stated to be at page 70. It is in fact at page 60, and marginal page 75.

Of the witness Dobbins the following question was asked: "State to the jury, please, whether or not you, as the manager for Mr. Carter, and his overseer, have kept the wire and cattle guards in there as far as you could." Stated to be at page 174 of the record, but in fact at top page 125, and marginal page 179.

The court certifies that all of the foregoing questions were asked, and that the answers to the same will be found in the record, and that exception to each of said questions was noted at the time.

After much difficulty, these questions were found in the record, not one of them at the place indicated in the exceptions, and the answer to no one of them in point of fact given. The exceptions, therefore, to these questions, will not be considered. First, because the exceptions are not taken in the proper form. This court has heretofore said, and repeats, that it will not be subjected to the unnecessary labor and the danger of mistake by being required to search through a record in order to ascertain facts that ought to be embodied in the exception itself. See *Norfolk & W. R. Co. v. Shott*, 92 Va. 34; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108.

In the second place, the exception here stated would, in no event, be considered, because, while the question is objected to, the answer is not given, so as to enable the court to pass upon its relevancy and value. *Gray's Case*, 92 Va. 772; *Union Cent. L. Ins. Co. v. Pollard* (Va.) 36 L. R. A. 271; and *Childress v. Chesapeake & O. R. Co.* (Va.) 26 S. E. 424.

The plaintiff asked for the following instructions:

"No. 1. The court instructs the jury that if they shall believe from the evidence that the cattle of the plaintiff were killed or injured on the railroad of the defendants, operated by them as receivers, by the engine and cars of the said defendants, in charge of their servants, agents, and employees, as charged in the declaration, and shall further believe from the evidence that the said cattle were killed or injured by the defendants, their servants, agents, and employees, at a point on the said railroad on which said railroad passes through the lands leased by the plaintiff from John P. Sheffey, and shall further believe from the evidence that the said lands were inclosed lands, and shall further believe from the evidence that the defendants, their servants, agents, and employees, had failed to fence its right of way or roadbed through the said inclosed lands so leased by the plaintiff at the place of said injury,—then the court instructs the jury that they shall find for the plaintiff, and assess his damages at such sum as to the jury shall seem right and proper, based on the evidence as to the value of said stock at the time the same were killed or injured.

"No. 2. The court instructs the jury that if they believe from the evidence that the lands of the plaintiff, at the point where the cattle mentioned in the declaration were killed or injured, were cleared agricultural or farming or grazing lands, and were used as such at the time, and were so inclosed as to be reasonably

safe for the purposes of such use, then the said lands were inclosed lands, within the meaning of the law requiring the defendant company to fence its roadbed which ran through such lands."

And the defendants asked for the following instructions:

"No. 1. The court instructs the jury that, although they may believe from the evidence that the plaintiff's lands were inclosed, and that it was the duty of the defendants to fence their track through said land, under the statute, yet, if the jury further believe that the cattle which were killed or injured came upon the track of the defendants' railroad, at a point where the plaintiff has a private crossing over and across said railroad, and were struck and killed or injured by the defendants' engine on said crossing, the defendant company, under the statute, could not obstruct the said private crossing by fencing across the same, and are not liable for stock killed or injured in consequence of coming on the track at such private crossing.

"No. 2. The court further instructs the jury that under the statute the defendant company is not bound to fence its track unless the lands through which it runs are inclosed by a continuous and lawful fence running up to the line of the right of way of the defendant company, and if they believe from the evidence that there was not such a continuous and unbroken line of fence sufficient to prevent stock passing through it, then the company was not bound to fence at this point, and they will find for the defendant.

"No. 3. The court instructs the jury that if they believe from the evidence that there was on the south side of the defendants' railway, and on each side of the private crossing near Cove creek bridge, a ditch sufficient to prevent the passage of live stock, that then the said defendant was not required to fence its roadbed at said point, and they will find for the defendant.

"No. 4. The court further instructs the jury that the plaintiff cannot claim the line of Reed creek as a lawful fence, so as to relieve him of the duty to inclose his land, since the said creek has never been declared by the legislature of Virginia a lawful fence.

"No. 5. The court instructs the jury that the statute requiring railroads to fence their roadbed applies only to the individual land-owners along its road, where their lands have been properly inclosed; and if the jury shall believe from the evidence that the lands of the plaintiff were not inclosed, but that the inclosure sought to be set up in this case was made by means of the fences surrounding the lands of the Misses A. and E. Savers, the Max Meadows Land & Imp. Co., J. G. Kent, J. P. Sheffey, and Mrs. Holton, and others, then, that this inclosure, if there was one, is not sufficient, and they will find for the defendant."

Whereupon the court gave instructions Nos. 1 and 2 asked for by the plaintiff, and instruction No. 1 asked for by the defendants, but refused to give defendants' instructions Nos. 2, 3, 4, and 5, and to this action of the court the defendants excepted.

While the exception is in terms directed to both of the instructions asked for the plaintiff,

the argument of counsel for the plaintiff in error was addressed chiefly, if not altogether, to point out objections to instruction No. 2. Indeed, instruction No. 1 seems to be wholly free from objection as a proposition of law, and there is evidence in the record tending to prove each of the facts hypothetically stated in it, and upon which it is predicated.

The plaintiff's instruction No. 2 merits more careful consideration. It says to the jury "that if they believe from the evidence that the lands of the plaintiff, at the point where the cattle were killed, were cleared agricultural or farming or grazing lands, were used as such at the time, and were so inclosed as to be reasonably safe for the purposes of such use, then the said lands were inclosed lands, within the meaning of the law requiring the defendant company to fence its roadbed which ran through such lands." As has already been said, the defendant in error was the lessee of several tracts of land. The accident occurred upon the tract leased by him of J. P. Sheffey; and the defendant in error, in his testimony, states unequivocally that it was inclosed land, and it is conceded that the right of way of the railroad company was not fenced. He states that "the lands are inclosed in two or three ways from different points. It so happens that I have about 500 acres of land which lies in a body, and makes one inclosure from a point more than a mile east from where the wreck occurred. You strike a cattle guard and a line fence between myself and J. C. and J. R. McGavock and the Max Meadows Land Company and others.

Q. That is east, isn't it?

A. Yes, sir. From that point you go around the entire boundary back to the Holston line; and cross this point, the Holston line, west of the cattle pen.

Q. Do you go around the Sheffey farm?

A. Yes, sir.

Q. Is the Sheffey farm divided into fields for agricultural and grazing purposes?

A. At this point there is one fence a short distance west of the point where the cattle were first struck, running north, dividing what we call the 'large meadow' from the upper meadow, or small meadow.

Q. These lands are all fenced in, aren't they?

A. Yes, sir.

The plaintiffs in error sought, by cross-examination and otherwise, to show that the lands were not inclosed, because the division line between the Sheffey land and the adjoining tract, belonging to Christopher Holston, was in a dilapidated condition, a few panels of the fence having been washed away some months before the accident occurred. The field upon the Sheffey farm at the point of the accident had been cultivated in corn, and had been sown, or was about to be seeded, in wheat. The adjoining field upon the Holston farm was in a similar condition, and therefore the fence which had been carried away by high water had not as yet been restored, there being no present occasion for it. It also appears in evidence that there is no fence along a part of Reed creek where it separates the Sheffey and Kent lands, but, as the creek runs through a chan-

nel 6 or 8 feet deep, its banks are relied upon as a sufficient protection to crops and to stock; and it is to be borne in mind that the Kent land is contiguous to the Sheffey tract, and forms, together with it, an unbroken boundary of land, all of which is in the possession of the defendant in error as the lessee of its owners.

Were these lands inclosed, within the meaning of the statute? The term "inclosed lands" is to be interpreted in accordance with the common and ordinary definition of the words used, there being nothing whatever to indicate that they were otherwise employed.

Webster defines "enclosed" or "inclosed," applied to lands, as "separate from common grounds by a fence," citing Blackstone.

Worcester defines it: "To part off or shut in by a fence; to set off as private property,"—citing London Enc.

A fence is defined to be "an inclosure about a field or other space, or about any object; especially an inclosing structure of wood, iron, or other material, intended to prevent intrusion from without or straying from within." Webster, Dict.

"A line of obstacle, as a frame of wood, a wall, hedge, or ditch interposed between two portions of land for the purpose of preventing cattle from going astray, or for protecting a field or property from unlawful encroachment." Worcester, Dict.

The supreme court of Vermont, in *Porter v. Aldrich*, 89 Vt. 326 (cited in 6 Am. & Eng. Enc. Law, at page 639), says: "The word 'inclosure' imports land inclosed with something more than the imaginary boundary-line; that there should be some visible or tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle."

And in *Biggerstaff v. St. Louis, K. C. & N. R. Co.* 60 Mo. 567, it is said: "Where a statute requires railroad companies to fence their tracks along 'inclosed or cultivated fields,' it is not necessary that, in order to be entitled to this protection, the inclosure of the fields should be by lawful fences."

This meaning was adopted in *Taylor v. Welbey*, 36 Wis. 42, cited in 6 Am. & Eng. Enc. Law, p. 638.

Inclosed lands, therefore, are lands surrounded by a fence; and a fence is a visible or tangible obstruction which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property.

If the definition here given of "inclosed lands" is sound,—and it seems to be amply supported by lexicographers and law writers, as well as by adjudged cases,—then instruction No. 2 was as favorable to the plaintiffs in error as they had a right to expect.

The foregoing observations sufficiently dispose of instruction No. 2 asked for by plaintiffs in error.

Instruction No. 1 asked for by plaintiffs in error was granted.

Instruction No. 3 is in the teeth of the statute. The court was asked to say to the jury that the presence of a ditch on each side of the private crossing near Cove creek bridge suffi-

cient to prevent the passage of live stock excused the plaintiffs in error from the duty of erecting a fence as required by §§ 1258 and 1259 of the Code. It may, perhaps, be that the ditch, so far as it extends, if sufficient to prevent the passage of stock, would excuse the plaintiffs in error from the duty of erecting a fence along the space protected by it, but there is no pretense that the right of way was ditched along its entire length through the field in question. The purpose of the statute, among others, is to preclude just such controversies as this instruction invites as to the particular point of entry upon the track by requiring the entire right of way to be fenced throughout the inclosure through which it passes. It might be conceded that the defendants were at the precise point designated in the instruction, within one of the exceptions enumerated in § 1259, and yet the conclusion would not follow that the jury should find for the defendants.

Instruction No. 4 was properly refused, because there was no claim advanced that Reed creek was a lawful fence, nor any duty imposed upon the defendant in error to inclose any part of his lands by a lawful fence.

The fifth instruction asked for by the plaintiffs in error is that, if the jury shall believe that the inclosure relied upon by the defendant in error was by means of fencing surrounding the lands leased by him of several owners, such inclosure would be insufficient. The defendant in error was, as we have said, the lessee of several tracts of land constituting one compact boundary, the whole of which was in his occupancy and enjoyment for grazing and agricultural purposes. When his leases

terminate, the condition of the fences dividing the several tracts, or separating the tracts into fields, may become a question between the defendant in error and his lessors; but if, in the enjoyment and cultivation of these lands during the term for which he has rented them, the defendant in error should find it to his advantage to increase or diminish, to change or alter, the fields and inclosures, we do not perceive that it is a matter which at all concerns the plaintiffs in error. So long as the lands in the possession of Carter come substantially within the description of "inclosed lands," as those words are used in the statute, so long it remains the duty of the railroad company to fence its right of way where it passes through these lands.

We are therefore of opinion that there is no error in the action of the court in granting the instructions that it gave and in refusing those which it rejected.

There was a motion to set aside the verdict as contrary to the evidence. In discussing the assignments of error with respect to the instructions, we have seen that there is evidence proving the killing of the stock of the defendant in error; that the right of way of the railroad company passes through the inclosed lands of the defendant in error, but that this right of way was not fenced as the law requires; and the presence of these facts is sufficient to support the verdict of the jury, no question being raised as to the amount of damages.

Upon the whole case, we are of opinion that there is no error to the prejudice of the plaintiffs in error, and *the judgment of the Circuit Court of Wythe County is affirmed.*

TEXAS SUPREME COURT.

M. DOBBINS, *Plff. in Err.*,
v.

MISSOURI, KANSAS, & TEXAS RAIL-
WAY COMPANY of Texas.

(.....Tex.....)

1. The common law imposes no duty upon the owner to use care to keep his property in such condition that persons, even if children of tender years, going thereon without his invitation may not be injured.

2. Railroad companies are not charged with the duty of preventing the accumulation of water on their rights of way by Rev. Stat. 1895, art. 4436, providing that in no case shall any railroad company construct a roadbed without first constructing the necessary culverts or sluices, as the natural lay of the land requires, for necessary drainage thereof.

3. The rule imposing upon the owners the duty not to permit any dangerous excavation to remain on his land so near a street or highway as to endanger persons who

may accidentally stray from the same does not apply where one approaches the excavation from another route.

4. The maintenance of an excavation so near a path designed for the use of persons going to and from a railroad-station platform on business as to be dangerous to one straying from the same does not render the company liable for the death of a child who falls into it while playing along the path.

(May 24, 1897.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment reversing a judgment of the District Court for Dallas County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's minor child. *Affirmed.*

The facts are stated in the opinion.

Messrs. Parks & Carden for plaintiff in error.

Messrs. Alexander, Clark, & Hall, for defendant in error:

Under the evidence deceased was a technical

NOTE.—As to the liability for dangerous grounds lying open beside a highway or frequented path, see *note to Lepnick v. Gaddis (Miss.)* 26 L. R. A. 686; 38 L. R. A.

also *Pekin v. McMahon (Ill.)* 27 L. R. A. 206; and *Moran v. Pullman Palace Car Co. (Mo.)* 33 L. R. A. 755.

trespasser, and as such, being a mere infant, defendant was under no obligation to anticipate that the child would stray from home unattended and meet with injury. Defendant was under no obligation to maintain its right of way with reference to the unattended presence of infants and to what was possible to befall them unattended.

Williams v. Texas & P. R. Co. 60 Tex. 205; *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 703; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, and cases cited; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 498, 13 L. R. A. 765; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461; *Haskell v. Winona & St. P. R. Co.* 46 Minn. 233; *McCarty v. Fitchburg R. Co.* 154 Mass. 17; *Cooley, Torta*, p. 660; *Missouri, K. & T. R. Co. v. Edwards* (Tex.) 82 L. R. A. 825.

The principle applied in what are known as the *Turntable* or *Dangerous Machine Cases* is a most exceptional rule of law, most hesitatingly announced in the early case of *Stout v. Sioux City & P. R. Co.* 2 Dill. 294, and altogether repudiated in many states of the Union. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 Tex. 360.

Can the pool of water in question, as an attractive and alluring object for children, be held dangerous within the rule announced in the *Turntable Cases*?

As a matter of law the exceptional rule, as affecting the dominion of one over property and usage thereof, in such cases as this, is confined to dangerous machinery, and should not be extended so as to embrace objects not from their nature reasonably likely to produce serious results.

It was error for the court to charge the jury what omission would constitute negligence, whether "to drain the water hole" or "to keep children out" of it.

Civil Stat. art. 1317; *Dillingham v. Parker*, 80 Tex. 573; *Gulf, C. & S. F. R. Co. v. Greenlee*, 62 Tex. 349; *Mexican Nat. R. Co. v. Crum*, 6 Tex. Civ. App. 707; *Galveston, H. & S. A. R. Co. v. Kutac*, 76 Tex. 478; *Texas & P. R. Co. v. Chapman*, 57 Tex. 82; *Heldt v. Webster*, 60 Tex. 209; *Missouri P. R. Co. v. Lee*, 70 Tex. 496; *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 351; *Texas & P. R. Co. v. Wright*, 62 Tex. 517; *Chatham v. Jones*, 69 Tex. 746.

No law requires railway companies to drain pools of water along their right of way, or to keep children out of such pools as may exist anywhere on the right of way.

Texas Trunk R. Co. v. Ayres, 83 Tex. 269; *Western U. Teleg. Co. v. Andrews*, 78 Tex. 307; *Fox v. Brady*, 1 Tex. Civ. App. 594; *Smith v. Wilson & B. Sav. Bank*, 1 Tex. Civ. App. 124.

The court erred in that portion of its charge in which it held that defendant was liable if the pool of water was dangerous, and was reasonably calculated to and did attract children thereto, and if defendant knew of such hole and its danger, and that it was reasonably calculated to and did attract children thereto; or by the use of such diligence in the care of its premises as a person of ordinary prudence, engaged in the same business under similar circumstances, could have known these facts, and that defendant failed to use such care 88 L. R. A.

to drain said pool or to keep children out of the same.

Cannon v. Cannon, 66 Tex. 686; *Denham v. Trinity County Lumber Co.* 73 Tex. 78; *Harrison Mach. Works v. Templeton*, 82 Tex. 446; *Equitable L. Ins. Co. v. Huzlewood*, 75 Tex. 343, 7 L. R. A. 217.

Denman, J., delivered the opinion of the court:

Prior to the construction of the roadbed of defendant in error there was, several hundred yards north of the point where Letot station is now situated, a depression from the east to the west which carried off storm water from the surrounding lands. Said roadbed having been constructed north and south across this depression without the necessary culverts and sluices to carry off such water, it was, in its course westward, diverted by the roadbed, and compelled to run south in the excavation made on the right of way on the east side of the track in building the road. In its course it passed along by the section house, thence on by the plank platform provided by the company for the reception and discharge of passengers and freight at said station, cutting a ditch several feet deep, and forming within 2 or 3 feet of the platform a pool of water several feet deep. From this platform a path led to a store and postoffice across the ditch, which was crossed, within 10 feet of said pool of water, on some plank placed there by the company, such pathway being generally used by persons going to and from the platform. There were several houses near the pool, one of which was the company's section house, about 200 feet therefrom, to which plaintiff, Dobbins, lived. The ditch above described ran between this section house and the track, and there was another running on the other side of the house, the two ditches uniting before reaching the pool. Plaintiff's child, less than three years old, escaped alone from the section house under circumstances warranting a finding by the jury that neither he nor his wife was guilty of negligence, and a short time thereafter was found drowned in the pool. From a judgment in favor of plaintiff for damages resulting from the death of the child the company appealed to the court of civil appeals, where the judgment of the trial court was reversed, and the cause remanded, on the ground that there was "no phase of the evidence which justified a verdict for the plaintiff, and the court should have so instructed the jury." Plaintiff has brought the cause to this court upon writ of error complaining of said holding of the court of civil appeals, and alleging, in order to give jurisdiction to this court, "that the judgment of the court of civil appeals reversing the judgment of the district court herein practically settles the case, and petitioner's attorneys here and now state that the decision of the court of civil appeals practically settles the case, and petitioner further says that no proof other than that made on the trial of this cause in the district court can be produced upon another trial, and that no different evidence nor better evidence can be produced on another trial of this case than was produced on the trial in the district court." In addition to the facts above stated there was evidence

from which the jury could have found that the pool at its nearest point was not over 2 feet from the path; that there was thickly settled neighborhood around the station; that the pool was attractive and dangerous to little children of the age of deceased; that such children, including deceased, had before often played around same; that no precautions were taken by the company to prevent such children from getting into it; that the company was sometime before the accident informed of such facts, and requested by plaintiff to remove the pool, which was not done. There is no evidence in the record from which the jury could have concluded that the child was or had been traveling or attempting to travel said path at or just before it got into the pool. There is no evidence of any passway from the section house, nor is there any evidence tending to show by what route the child reached the pool. There is no evidence that said path was used or intended to be used by anyone other than those going to and from the platform upon business in some way connected with the company.

The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists, there is no distinction between a case where an infant is injured and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former. If there be no duty, the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby. Since the common law imposes no duty on the railroad to use care to keep its right of way in such condition that persons going thereon without its invitation may not be injured, and since there is no evidence in the record from which the jury could have found such an invitation to the child, it was no more liable in law for its death than would have been a neighbor had it wandered into his uninclosed lands and been drowned in his tank or creek, or been killed by falling down his precipice. Since the principles above stated have been so fully and ably discussed heretofore by many learned jurists, we deem it unnecessary to undertake to elaborate them, but will content ourselves by referring to the opinion of the court of civil appeals and the following cases decided upon similar facts: *Hargreaves v. Deacon*, 25 Mich. 1; *Missouri, K. & T. R. Co. v. Edwards* (Tex. Sup.) 32 L. R. A. 825; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755; *Charlebois v. Gogebic & M. R. R. Co.* 91 Mich. 59; *Clark v. Manchester*, 62 N. H. 577; *Greene v. Linton*, 7 Misc. 272; *Murphy v. Brooklyn*, 118 N. Y. 575; *Witte v. Stifel*, 126 Mo. 295; *Gulligan v. Melanconet Mfg. Co.* 143 Mass. 527; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 389; *Richards v. Connell*, 45 Neb. 467; *Benson v. Baltimore Truclion Co.* 77 Md. 535, 20 L. R. A. 714; *Sterger v. Van Sicklen*, 132 N. Y. 499, 16 L. R. A. 640; *Frost v. Eastern R. Co.* 64 N. H. 220; *Kilr v. Nieman*, 63 Wis. 271, 60 Am. Rep. 854; *Galveston Oil Co. v. Morton*, 70 Tex. 400; *Clark v. Rich-* 38 L. R. A.

mond, 83 Va. 355; *Ratte v. Dawson*, 50 Minn. 450; *Indianapolis v. Enmelman*, 108 Ind. 630, 58 Am. Rep. 65.

We are aware that there are cases asserting a contrary doctrine, but do not think they are based upon sound principle. They rest mainly upon *Stour City & P. R. Co. v. Stout* (1873) 84 U. S. 17 Wall. 657, 21 L. ed. 745, and cases following same, known as the "Turntable Cases." In the *Stout Case* there were three questions to be determined: (1) Did the law impose upon the company a duty to use care to keep its property in such condition that persons going thereon without its invitation would not be injured? (2) Was the child, six years old, guilty of contributory negligence? And (3) Was the company guilty of negligence in leaving the turntable unlocked? The first and most important question, without an affirmative answer to which the third could not arise, was not even referred to, and, if we may judge from the opinion, that learned court's attention was not called to its presence in the case; the second was admitted by the railroad in favor of plaintiff; and the third, if the first were determined in the affirmative, was clearly a disputed question of fact, which the court correctly held was settled by the verdict. The main force of the opinion is spent upon this third question in attempting to show that the evidence was of such a character that the jury were justified in finding that the company had not used such care in guarding the turntable as a reasonably prudent person would have done under similar circumstances. There could have been no doubt upon this question. The opinion of the court would have been much more satisfactory if it had undertaken to establish instead of assuming the affirmative of the first question. If a child go uninvited upon a neighbor's property, and be drowned in his tank, creek, or river, or fall off his fence, woodpile, haystack, or precipice, or is injured while playing with his cane mill or corn sheller, and the courts assume the affirmative of the first question above stated, as was done in the *Stout Case*, the jury would in most cases be warranted in finding that the neighbor had not used reasonable care to so guard his tank, etc., or lock his cane mill or corn sheller, as to avoid such injury. Under this new doctrine the question as to whether the tank, etc., or the cane mill, etc., was attractive and dangerous to the child would be for the jury, and they could as truthfully say it was as they could of the turntable; for our common experience, as well as the reported cases, demonstrate that a great many more children lose their lives by such means than upon turntables. This logical extension, or rather application, of the doctrine of the *Stout Case* has recently found expression in the case of *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, where a verdict and judgment holding the owner of a lot in the city, upon which there was a pool of water, liable for the death of a boy who went there uninvited, and was drowned, was upheld, the court, after assuming the existence of the duty, as was done in the *Stout Case*, saying: "The question whether a defendant has or has not been guilty of negligence in case of such an accident upon his land to a child of tender years is for the jury. Involved in this question is the further

question whether or not the premises were sufficiently attractive to entice children into danger, and to suggest to the defendant the probability of the occurrence of such accident; and therefore such further question is also a matter to be determined by the jury. *Mackey v. Picksburg*, 64 Miss. 777; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745. The subject of the attractiveness of the premises was submitted to the jury by the instructions given for the plaintiff in the case at bar." See also *Standal v. Boyd* (Minn. 1897) 69 N. W. 899, affirming such a judgment without discussion on authority of the *Turntable Cases*; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Brinkley Car-Works & Mfg. Co. v. Cooper*, 60 Ark. 545. The difficulty about these cases is that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In these cases the courts, yielding to the hardships of individual instances where owners have been guilty of moral, though not legal, wrongs, in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law and assumed legislative functions imposing a duty where none existed. As a police measure, the lawmaking power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal and civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed, the courts may properly enforce it, or allow damages for its breach, but not before.

We do not wish to be understood as holding that one is not liable for injuries to persons going onto his land uninvited, when such injuries are intentionally inflicted; *e. g.*, where a pit is sunk, or a gun is set on one's land to injure trespassers. In such cases the liability is based upon the breach of the duty imposed by law not to intentionally injure even a trespasser; and such intent may be evidenced by circumstances, as where one secretly digs a pit across a pathway over his land where he has reason to believe another will pass at night. In such cases the liability is not based upon the assumption that the owner owes a duty to the uninvited persons to keep his premises reasonably safe, but upon the fact that he owes a duty to such person not to intentionally injure him. The failure to observe this distinction has led to much confusion. But plaintiff in error contends that article 4486, Rev. Stat. 1895, which reads as follows: "In no case shall any railroad company construct a roadbed with-

out first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof,"—imposed upon the company the duty of preventing the accumulation of water on its right of way. The object of this statute was to prevent the railroad from unnecessarily interfering with the natural drainage of the land on either side of its right of way. The words "for the necessary drainage thereof" express the purpose of the statute, and "thereof" refers to "land." It was not intended to compel the railroad to so leave and maintain the excavations made from time to time on its right of way in such condition as to prevent the accumulation of water therein. While such a requirement might be just in some places, it would be so very burdensome when applied to all portions of the road, that this statute was evidently intended that courts should not construe it as imposing the duty contended for by plaintiff in error in the absence of language plainly expressing such intention on the part of the lawmaking power. We do not regard *Rosenthal v. Taylor, B. & H. R. Co.* 79 Tex. 325, as in conflict with the construction here given to the statute. There the water was backed up onto the adjoining land, and was allowed to remain until it became stagnant and offensive. The condition of the water was a nuisance interfering with Rosenthal in the enjoyment of his property, and the company would have been liable at common law for that reason if the water had been confined to its right of way. The fact that the company so constructed its roadbed as to violate the statute by backing the water over the adjoining land aggravated and increased the nuisance, for even pure water thus backed upon his lots became a nuisance.

The case before us is not within the rule of law imposing upon the owner the duty not to permit any dangerous excavation to remain on his own land so near a street or highway as to injure persons who, while attempting to follow same, may by mishap fall therein, because (1) there is no evidence tending to show that the child was at the time of the accident traveling or attempting to travel the path, and such duty is not imposed as to persons who approach the excavation by any other route; and (2) the path not being a public road, but merely for the use of persons going to and from the platform on business connected in some way with the company, the invitation to use it would probably not apply to the child in this case, and therefore the law did not impose the duty above mentioned on the railroad as to it; such duty being imposed only as to persons thus invited to use the path.

Being of opinion that the court of civil appeals did not err in reversing and remanding the cause on the ground above stated, it becomes our duty under the statute to here enter judgment that plaintiff in error take nothing by his suit, which is accordingly done.

GEORGIA SUPREME COURT.

W. W. BAUGHN, Next Friend of Elizabeth Nobles, *Pff. in Err.*,

v.

STATE of Georgia.

(.....Ga.....)

"1. There is no law in force in this state which makes it incumbent upon a judge of the superior court, at the time when judgment is to be entered, or after it has been entered, to allow or order a judicial investigation concerning the mental condition of one against whom a lawful verdict of guilty has been rendered in a capital case, and who has thereby become subject to the penalty of death; nor in

*Headnotes by COBB, J.

NOTE.—Insanity after the commission of a criminal act.

I. Effect; generally.

II. Question when and how raised.

III. Test of insanity which will prevent trial.

IV. Determination as to submission of issue.

a. Doubt as to sanity.

b. Evidence to establish doubt.

c. Discretion of the court as to.

V. Disposition of the issue.

a. How tried; generally.

b. Procedure on trial.

VI. Effect of the determination.

VII. Insanity after verdict.

VIII. Insanity after judgment.

IX. Appeals.

X. Effect of recovery.

I. Effect; generally.

The inquiry into the guilt of a person accused of crime must be postponed where he is insane, until such time as he shall be able to properly model his defense. *Frith's Case*, 22 How. St. Tr. 807.

If insanity is deemed to exist at the time of the arraignment of a person accused of crime counsel should then make the objection, and if sustained the person should be excused from pleading and the proceeding should await his recovery. *State v. Reed*, 41 La. Ann. 581.

And when a person accused of crime is called upon to plead, if there are circumstances that suggest that he is not in the possession of his reason there should be an inquiry made touching his sanity at that time, as to whether he is in a situation of mind to state what the grounds of defense are. *Frith's Case*, 22 How. St. Tr. 811.

And if it is found that he fails to plead by the act of God the court will not proceed to try him. *Com. v. Braley*, 1 Mass. 108.

The rule generally stated is that no person in a state of insanity should be tried, sentenced, or executed for an alleged criminal act. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 218; *State v. Reed*, 41 La. Ann. 581. And see *Taffe v. State*, 23 Ark. 34; *State v. Peacock*, 50 N. J. L. 84; *United States v. Lancaster*, 7 Biss. 440; and *Kinloch's Case*, 18 How. St. Tr. 385, *infra*.

And when a defendant in a criminal case is called for trial or brought up for judgment, if there is any reason to suspect that he is insane the question must be submitted to the jury either of the regular panel or of another to be summoned for that purpose. *People v. Farrell*, 81 Cal. 578; *Ley's Case*, 1 Lewin, C. C. 220.

The reason why an insane person should not be tried is that he is disabled by the act of God to make a just defense if he has one. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 218.

And the judge is authorized to ingraft upon a

either instance is a refusal by such judge to enter upon an investigation of this kind, with or without the aid of a jury, a denial to the prisoner of "due process of law."

2. The provisions of the Code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty.

(March 12, 1897.)

ERROR to the Superior Court for Twiggs County to review a judgment refusing to examine into the insanity of Elizabeth Nobles who had been convicted of murder. *Affirmed*. The facts are stated in the opinion.

criminal proceeding in his court, not yet closed, a proceeding for the determination as to the present sanity or insanity of the person on trial. *State, ex rel. Chandler*, 45 La. Ann. 698.

Insanity when discovered was held at common law to bar any further steps against a person accused of crime at whatever stage of the proceeding, and it was always competent to institute an inquiry into his condition. *Underwood v. People*, 82 Mich. 1.

The rule was that one who after his plea and before his trial becomes of nonsane memory shall not be tried, and if after his trial he becomes of nonsane memory he shall not receive judgment, or if after judgment he becomes of nonsane memory his execution shall be spared, as, were he of sane memory, he might allege something in stay of judgment of execution. *Rex v. Dyson*, 7 Car. & P. 306; *Reg. v. Berry*, 34 L. T. N. S. 590, L. R. 1 Q. B. Div. 447, 45 L. J. M. C. N. S. 123, 18 Cox, C. C. 189.

And 2 N. Y. Rev. Stat. 697, § 2, providing that no insane person can be tried, sentenced to any punishment, or punished for any crime or offense while he continues in that state, is in strict conformity with the common-law rule on the subject. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 218.

And W. Va. Code, chap. 159, §§ 9, 10, providing that no one while insane shall be tried for crime, and if the court sees reasonable ground to doubt his sanity the trial shall be suspended until a jury shall inquire of such sanity, is only declaratory of the common law. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

So, Wis. Rev. Stat. § 4700, providing for an inquiry where there is probability that a person accused of crime is insane at the time of his trial, and thereby incapacitated to act for himself, to determine whether he is insane, is substantially in affirmance of the common-law power of the court, and is not in derogation of the constitutional provisions securing to the accused a fair and impartial trial, as the result of such inquiry can have no legal effect upon the main issue. *French v. State*, 93 Wis. 325.

And a construction of the statutes of a state on this subject by its courts of last resort will be followed by the Federal courts. *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144). Affirming principal case.

An inquiry as to the present sanity of a person accused of crime, however, is based rather upon public propriety and decency than upon any right of the person. *Carr v. State*, 98 Ga. 89; *Spann v. State*, 47 Ga. 549.

And a deaf and dumb person from nativity may be arraigned for a capital offense if intelligent questions can be conveyed to him by signs and symbols. *King v. Jones*, 1 Leach, C. L. 130.

Mr. Marion W. Harris, for plaintiff in error:

Though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.

4 Bl. Com. 395.

Become insane after conviction. If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with concurrence and assistance of the ordinary thereof, shall sum-

mon a jury of twelve men to inquire into such insanity; and if it be found, by the inquisition of such jury, that such convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution to the presiding judge of the district, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had.

Georgia Code 1882, 4666.

Lunatics, how disposed of. When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of § 4666 of the Code, it shall be the duty of the judge to certify the fact, and the said convict shall be received into the lunatic asylum, there to be

And the fact that a defendant in a criminal action was insane when required by the condition of his bail bond to plead to an indictment, and had been taken out of the state and confined in an insane asylum of another state to be treated for his insanity, is no defense to his sureties in a transaction on the bond. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 43.

II. Question when and how raised.

Where at any stage of the trial in a criminal prosecution it is found that the accused has not sufficient intellect to understand the nature of the proceeding against him, the jury should be discharged and the person detained under the provisions of 39 & 40 Geo. III. chap. 94, § 2. *Reg. v. Berry*, 34 L. T. N. S. 580, L. 1 Q. B. Div. 447, 45 L. J. M. C. N. S. 123, 18 Cox, C. C. 189.

If the court, either before or during the progress of the trial of a prosecution for crime, either from observation or upon suggestion of counsel, has facts brought to its attention which raise a doubt of the condition of the defendant's mind as to sanity, the question should be settled before the prosecution is continued. *State v. Peacock*, 50 N. J. L. 34.

And if at any time a doubt arises as to the sanity of a person accused of crime, it is the duty of the court of its own motion to suspend the trial or further proceedings in the case at whatever stage the doubt arises until the question of sanity is determined. *People v. Ah Ying*, 42 Cal. 18.

And an inquiry as to the mental condition of a person accused of a crime may be directed upon suggestion of the state's attorney. *State, ex rel. Chandler*, 45 La. Ann. 606.

So, if a person indicted for felony stands mute upon his arraignment the court may instruct the sheriff to return a jury instantler and try whether he stands mute obstinately or by the visitation of God, and if they find that he stands obstinately mute sentence may be passed without further inquiry. *King v. Mercer*, 1 Leach, C. L. 183.

And where a suggestion of the insanity of a person accused of crime and deemed to be insane is not made at the arraignment, the objection to his trial may be made at any time before the commencement thereof, and if sustained the trial cannot proceed, and even though not made until the trial has begun, it is not then too late and must be considered and determined in some way, and even after conviction it may be interposed as a reason why sentence should not be passed. *State v. Reed*, 41 La. Ann. 581.

And a jury may be impaneled by the direction of the court to try and determine whether a person who discovers strong marks of mental derangement on his arraignment was sane or not though he pleaded not guilty to the indictment, and where 38 L. R. A.

a verdict is returned that he was not of sound memory he may be remanded to prison. *Com. v. Hathaway*, 18 Mass. 290.

And one convicted of murder on arraignment and plea of guilty, and whose sanity at the time of the plea was subsequently made one of the grounds for a motion for a new trial, may properly be rearraigned where upon the case being again called for trial he requested permission to enter a plea of not guilty. *Shaw v. State*, 32 Tex. Crim. Rep. 155.

So, counsel for the defendant in a criminal case cannot waive an inquiry as to his client's sanity where a doubt exists. *People v. Ah Ying*, 42 Cal. 18.

And a person accused of crime who is insane at the time of his trial and incompetent to conduct his own defense is incompetent to waive his rights. *State v. Patten*, 10 La. Ann. 299, 68 Am. Dec. 594.

And where a bill has been found against an insane person for murder, and he has been removed by order of the secretary of state to the county lunatic asylum, the court will nevertheless require that he be brought up and his alleged insanity inquired into by a jury, though the governor of the asylum had made an affidavit that he was in a helpless state of insanity, unless it be shown that it would be dangerous to bring him into court, in which case the court will allow the witnesses their costs and bind them over to appear when called upon. *Queen v. Derryhouse*, 2 Cox, C. C. 446.

The New York statutes contemplate two cases in which a commission may be appointed, first, after a plea on the merits and before trial to determine his mental condition at the time of the commission of the crime, and second, when a person in confinement under an indictment, whether before or after conviction, appears to be insane, to determine his mental condition at the time of the examination. *People v. McElvaine*, 125 N. Y. 596.

But the plea or suggestion in a criminal prosecution that the person is now insane cannot be made under the Pennsylvania statute providing that if upon the trial the accused shall appear to the jury to be a lunatic the court shall order him into strict custody, where it was presented after a plea of not guilty had been entered of record and the jury had been sworn upon the merits of the case, and the prisoner was placed in jeopardy. *Com. v. Taylor*, 16 Phila. 439.

And evidence that a person accused of crime is insane should be introduced at the time of the plea bearing upon that issue where it was known to counsel at the time of the trial, and in such case a new trial will not be granted on the ground of insanity under a statute providing that sanity must be shown before conviction. *Burton v. State*, 33 Tex. Crim. Rep. 138.

A person accused of crime who has pleaded guilty to the charge on arraignment, however, should be

safely and securely kept and treated as other adjudged insane persons.

Code 1892, 4666 (a).

The tribunal established by said § 4666 was not a judicial tribunal, and did not afford "due process of law" for the determination of the issue presented.

By the settled principles of the common law the ascertainment of the fact of insanity or sanity at any stage of the proceedings, in the course of a legal investigation, was a function of the trial court.

By the common law, at any stage of a criminal case, and especially in capital cases, whether before indictment, upon arraignment, during trial, at verdict, prior to judgment, or even in the shadow of the gallows, the proper suggestion of the present, existing insanity of

the defendant as an immunity from further proceedings against him as long as his malady continued, and also a trial in some way of the issue tendered at these respective stages, was his legal right and was not extended as a mere matter of judicial grace. In doubtful cases the issue was always submitted to a jury.

4 Bl. Com. 24, 25, 396; 1 Hale, P. C. 34, 35; *Frith's Case*, 22 How. St. Tr. pp. 810, 817, 818; *Queen v. Goode*, 7 Ad. & El. 538 and notes; *Queen v. Duerryhouse*, 2 Cox, C. C. 448; Carr, Trial of Lunatics, p. 85; Buswell, Insanity, pp. 455, 457, 461 *et seq.*; Clark, Crim. L. 149; Bishop, New Crim. Proc. 666, 667; Russell, Crimes; Chitty, Crim. L. 761; *Freeman v. People*, 4 Denio, 20, 47 Am. Dec. 216; Hargraves, State Tr. 205.

The common-law rule and its methods of

permitted to withdraw that plea where there is evidence sufficient to raise a doubt respecting the condition of his mind at the time he interposed it. *People v. Scott*, 59 Cal. 341.

The grand jury has no authority to ignore a bill for murder on the ground of insanity, though it appear clearly from the testimony that the accused was in fact insane; it is their duty to find a bill if they believe the acts done were such as would have amounted to murder if done by a person of sound mind so as to enable the court to order the detention of the party during the pleasure of the Queen on arraignment or trial under 39 & 40 Geo. III. chap. 94, §§ 1, 2. *Reg. v. Hodges*, 8 Car. & P. 196.

And a person indicted for felony who is enlarged on bail to answer is not in confinement within the meaning of that term as used in Ala. Rev. Code, § 1060, authorizing the circuit judge in certain cases to order an inquiry as to the sanity of persons in confinement under indictment and direct their removal to an insane asylum. *Ex parte Trice*, 53 Ala. 548.

Present insanity at the time of the trial of an indictment for homicide must be specially pleaded in Tennessee, however, and cannot be established like insanity at the time of the commission of the act under a plea of not guilty. *Green v. State*, 88 Tenn. 614.

And the defense of insanity cannot be put in under Ga. Code, §§ 4673, 4299, providing therefor in case of mental derangement existing at the time of the trial without an averment of the existence of a diseased condition of the mind at that time. *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480.

And a plea of insanity provided for in Irwin's Ga. Code, § 4234, is in its nature a plea for the purpose of preventing a trial on the merits, and though it may cover insanity at the time of the act its essence is that the person is insane at the time of the trial, and it must contain that allegation. *Long v. State*, 38 Ga. 491.

It has always been the practice in Georgia where insanity at the time of the trial is insisted upon in a criminal prosecution to file a special plea to that effect and try such plea by a special jury. *Fogarty v. State*, 80 Ga. 450.

And a judgment of a circuit judge on an inquiry as to the sanity of a prisoner in confinement under indictment, under the provisions of Ala. Rev. Code, § 1060, providing therefor, is invalid and a nullity unless notice was given to the person affected by the proceeding and the record recites the existence of every fact upon which jurisdiction is based. *Ex parte Trice*, 53 Ala. 548.

The better opinion has been stated to be, however, that the objection of present insanity in a criminal prosecution requires no formal pleading, but may be presented orally, and the court may 38 L. R. A.

raise it on its own suggestion. *State v. Reed*, 41 La. Ann. 581.

Michigan Laws 1873, act 168, providing for the confinement in the insane asylum of the state's prison of persons acquitted of murder or other high crimes on the ground of insanity until discharged by the governor on receipt of the certificate of the circuit judge of the circuit where the trial was had, and the medical superintendent of the state insane asylum, upon an examination made by him after being summoned for that purpose by the prison inspectors, that the person is no longer insane, leaving the inspectors free to act or not as they see fit, and making no provision by which any of the parties could be compelled to act, leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors, and is unconstitutional in failing to furnish means for the enforcement of the remedy provided, and is in violation of safeguards against restraints of personal liberty without due process of law. *Underwood v. People*, 33 Mich. 1, 20 Am. Rep. 683.

III. Test of insanity which will prevent trial.

The test of insanity which will prevent a trial in a criminal action is whether the person is mentally competent to make a rational defense. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216; *Guagando v. State*, 41 Tex. 626.

And the question upon an inquiry as to the present sanity or insanity of the person accused of crime is, Is he sane enough to present to counsel the facts which ought to be stated and presented to the jury upon his trial? *State v. O'Grady*, 8 Ohio Legal News, 137; *Frith's Case*, 22 How. St. Tr. 311.

Upon the trial of such an issue the jury is to consider whether he had sufficient intellect to comprehend the course of the proceeding so as to make a proper defense, to challenge any juror that he might wish to object to, and to comprehend the details of the evidence. *Rex v. Pritchard*, 7 Car. & P. 303.

The knowledge of right and wrong as a test of insanity does not apply to a collateral proceeding to ascertain the mental capacity of a person about to be put on trial for a criminal act. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And a person who by reason of insanity is unable to comprehend his position and to make his defense cannot be placed upon trial for a criminal act. *State v. Peacock*, 50 N. J. L. 34; *United States v. Lancaster*, 7 Biss. 440.

And one who has not intelligence enough to understand the nature of the proceedings against her in a criminal prosecution ought to be found not sane on a preliminary proceeding as to present sanity. *Rex v. Dyson*, 7 Car. & P. 305; *Reg. v.*

application have been incorporated into the state systems.

Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216; Carr, Trial of Lunatics, pp. 85, 89, 45, 93, note 2; *Crocker v. State*, 60 Wis. 556; *State v. Vann*, 84 N. C. 723; *State v. Peacock*, 50 N. J. L. 84; *People v. Farrell*, 31 Cal. 576; *Guagando v. State*, 41 Tex. 626; *Com. v. Buccieri*, 153 Pa. 535; *State, ex rel. Chandler*, 45 La. Ann. 696; *Gruber v. State*, 3 W. Va. 699.

In Georgia the common-law method was intended to apply till after sentence.

When at the stage beyond judgment, the codifiers lopped off this function from the trial court, it was their duty to intrust it to a substitute competent to exercise the function.

Berry, 34 L. T. N. S. 590, L. R. 1 Q. B. Div. 447, 45 L. J. M. C. N. S. 123, 13 Cox, C. C. 189.

No person should be tried for a felony when he has not reason enough to appreciate his peril or to act advisedly with his counsel in suggesting to them such facts as would break the force of the prosecuting evidence, and introduce such exculpatory proof as his case would warrant. *Taffe v. State*, 23 Ark. 34.

And a conviction against a person accused of crime who is found guilty on the evidence, but that he was not capable of understanding, and had not as a fact understood, the nature of the proceedings against him, cannot be sustained. *Reg. v. Berry*, 34 L. T. N. S. 590, L. R. 1 Q. B. Div. 447, 45 L. J. M. C. N. S. 123, 13 Cox, C. C. 189.

A person arraigned for crime who is capable of understanding the nature and object of the proceedings going on against him, and who rightly comprehends his own condition in reference to such proceeding, and can conduct his defense in a rational manner, however, is to be deemed sane for the purposes of being tried, although on some other subjects his mind may be deranged or unsound. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

So, a person should not be tried or convicted for felony when he was so intoxicated that he had not reason enough to appreciate his peril or act advisedly, and was not able to understand the facts of his case, and could not communicate with his counsel with intelligence in suggesting to them such facts as would break the force of the prosecuting evidence and in adducing such exculpatory proof as his case would warrant. *Taffe v. State*, 23 Ark. 34.

The jury in a preliminary proceeding to determine as to present sanity or insanity, under 2 N. Y. Rev. Stat. 697, § 2, providing that no act by a person in a state of insanity can be punished as an offense, and no insane person can be tried or sentenced to any punishment or be punished for any crime or offense while he continues in that state, must be satisfied that the person's mind is in such a state of unsoundness or disease as to exempt him from responsibility, and not merely that he was so infirm as to render him incapable of managing his own affairs. *People v. Kleim*, 1 Edm. Sel. Cas. 13.

IV. Determination as to submission of issue.

a. Doubt as to sanity.

The court cannot find a person accused of crime to be insane as that is a matter of fact to be found by the jury, but if upon arraignment it has reason to think him insane, or even has doubt upon that subject, it may order an inquest for the purpose of trying that question; and if it finds him insane it may order him into custody to be kept in conformity to the statute, so long as he shall continue of unsound mind. *Webber v. Com.* 119 Pa. 223.

Where there is a doubt of the sanity of a person

Hence the common-law method was properly invoked even after sentence, and its denial was a denial of due process of the law.

Spann v. State, 47 Ga. 549; *Carr v. State*, 96 Ga. 89; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232.

The test is, not that the citizen's right may be obtained by the method established, but that the method shall insure those rights.

State v. Billings, 55 Minn. 487; *Brown v. Leves Comrs.* 50 Miss. 483; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 237, 41 L. ed. 985.

Since the right to set up insanity both before and after judgment, and the immunity from judgment in the one case and execution in the other which its successful establishment would

accused of crime he must not be put upon his trial, but a jury must be impaneled to try the fact. *Ley's Case*, 1 Lewin, C. C. 239.

And it is the duty of the court to suspend the trial of a criminal prosecution and impanel a jury to inquire into the question when there is reasonable ground for doubt of the sanity of the accused. *Gruber v. State*, 3 W. Va. 699.

The court, upon an application for a preliminary inquiry as to the sanity of a person accused of crime, may hear the testimony offered, and if, after hearing it, it entertains a doubt as to the present sanity of the prisoner, it is its duty to award an inquest for the trial of that fact before any other proceedings are had. *Webber v. Com.* 119 Pa. 223.

The court must see reasonable ground to doubt the sanity of a person about to be tried for felony, however, before impaneling a jury to inquire as to his sanity. *State v. Harrison*, 36 W. Va. 723, 18 L. R. A. 124.

It is only in case of doubt as to the present sanity of a person accused of crime upon arraignment, that a preliminary inquiry as to such sanity is to be ordered. *Webber v. Com.* 119 Pa. 223.

And where the judge in a criminal prosecution has no doubt of the prisoner's present sanity he is not bound to order an inquest, and would not be justified in doing so. *Webber v. Com.* 119 Pa. 223.

And it is only when the necessity of an examination is specially made to appear to the court in which the indictment is pending that it is bound to order an examination under the provisions of N. Y. Code Crim. Proc. § 653, that if a defendant in confinement under indictment appears at any time before or after conviction to be insane, the court in which the indictment is pending, unless the defendant is under sentence of death, may appoint a commission to examine him and report to the court as to his sanity at the time of the examination. *People v. McElvaine*, 125 N. Y. 596.

The court in a criminal prosecution is not bound to stop or justified in arresting the progress of the trial upon the mere suggestion of insanity, in the absence of any substantial evidence of the existence of a degree of mental disorder which would unfit the accused from conducting his cause or instructing his counsel. *State v. Peacock*, 50 N. J. L. 84.

And neither the assertion of the prisoner nor his counsel that he is insane, nor the production of affidavits, nor the entry of a plea of present insanity upon the record in a criminal prosecution, can, of itself alone, suffice to produce the state of doubt which is a necessary prerequisite to the order of an inquiry. *Webber v. Com.* 119 Pa. 223.

And evidence of mere incapacity to understand and comprehend all his legal rights, and to make known in the most distinct and intelligent manner to his counsel all the facts material to his defense is not sufficient to warrant a reasonable doubt as

afford, was a fundamental and inalienable right of the prisoner at common law, then the holding that there was no such right in Elizabeth Nobles and no duty upon the judge of Twiggs superior court to allow it, was not only a denial of due process of law, but a denial and an abridgment of her rights, privileges, and immunities as a citizen of the United States, which the states are inhibited to do.

14 Am. U. S. Const. § 1; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

The right to set up insanity is inalienable, and is, by implication, part of the bill of rights

Carr, Trial of Lunatics, p. 44, note 1, and citations, 70; *Re Spies*, 128 U. S. 131, 151-

to his sanity upon which an inquiry into the mental condition of a person accused of crime must be instituted, under Iowa Rev. 1880, § 5015, 5019. A doubt must be raised whether at the time there is such mental impairment, either from idiocy, insanity, or the like, as to render it probable that the prisoner cannot, as far as devolves upon him, have a full, fair, and impartial trial. *State v. Arnold*, 12 Iowa, 479.

So, where a defendant in a criminal action, once found insane at the time of his proposed trial, is called for trial a second time, if there is any doubt as to his sanity the court must proceed as at first, and try the question of insanity anew, and so on until the end, as often as occasion may require. *People v. Farrell*, 31 Cal. 576.

The existence of a doubt as to the present sanity of a person accused of crime is a matter which from the necessity of the case can only be determined by the court itself. *Webber v. Com.* 119 Pa. 223.

And it is the duty of the court in a criminal prosecution when the subject is brought to its attention by responsible parties to itself make a sufficient inspection and examination to determine whether an application for a commission to ascertain whether the accused is insane is made in good faith and upon plausible grounds, and the apparent facts thus discovered are made the condition of the right of the court to institute the statutory inquisition. *People v. McElvaine*, 125 N. Y. 506.

The jurisdiction given by Ala. Rev. Code, § 1060, to the circuit judge in certain cases to order an inquiry as to the sanity of prisoners in confinement under indictment vests in the judge, and not in the court. *Ex parte Trice*, 53 Ala. 546.

b. Evidence to establish doubt.

In determining whether a reasonable doubt exists as to the sanity of a person accused of crime before impaneling a jury to make the inquiry the court is not limited to the case made for the prisoner, but may in its discretion investigate the matter thoroughly and take into consideration all the circumstances. *State v. Arnold*, 12 Iowa, 479.

And it may inspect and examine him and consider his actions and demeanor and read affidavits and inquire of physicians and others touching his then mental condition, for the purpose of determining what action to take. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

And a personal inspection of the prisoner, or an examination of him, whether public or private, or inquiry from an attending physician or those around the accused who have means of knowledge, or any other testimony which may contribute to the creation of a doubt in the mind of the judge, may be resorted to in a criminal prosecution to determine as to the existence of such a doubt as to the sanity of the accused. *Webber v. Com.* 119 Pa. 223.

88 L. R. A.

153, 166, 180, 181, 81 L. ed. 80, 86, 90, 91; Landon's Const. History, pp. 102, 294-296; *Ball v. United States*, 140 U. S. 119, 129-131, 35 L. ed. 377, 382; *Schwab v. Berggren*, 143 U. S. 442, 448, 36 L. ed. 218, 223.

Messrs. Glenn & Rountree also for plain tiff in error.

Messrs. J. M. Terrell, Attorney General, and *Tom Eason*, for the State:

Neither the Constitution of the United States nor of the state of Georgia guarantees to a person convicted of crime who may thereafter become insane the right to have judicially determined the question of sanity.

At common law the stay of the execution depends on the discretion of the judge.

And if from the appearance and conduct of a person accused of crime when called upon to plead there is reason to believe that he is insane the court should institute a preliminary proceeding to ascertain his insanity. *Jones v. State*, 13 Ala. 153.

But where a prisoner on being called upon to plead stands mute and exhibits symptoms of insanity which the prosecution claims to be feigned, and a jury is impaneled under 39 & 40 Geo. III. chap. 94, § 2, to try his sanity, it is the duty of the prosecution to lay evidence before the jury from which the court may ascertain the truth of the matter, and then counsel for the prisoner may call witnesses to rebut any inference of artifice or design. *Reg. v. Davies*, 6 Cox, C. C. 323, 3 Car. & K. 323.

And where the prosecution in a criminal action does not adduce evidence in a proceeding to ascertain the sanity of the accused under that statute the judge will interfere to ascertain the truth by examining the officers of the prison, and may postpone the trial independently of the statute until the next assizes. *Reg. v. Davies*, 6 Cox, C. C. 323, 3 Car. & K. 323.

c. Discretion of the court as to.

The general rule is that the judge in a criminal prosecution in which the present insanity of the accused is suggested may call an inquisition or not at his pleasure. *Spann v. State*, 47 Ga. 549.

Whether a preliminary proceeding shall be instituted to ascertain as to the sanity of a person accused of crime must be left to the sound discretion of the court, and if the prisoner pleads to the indictment, the omission of the court to institute such an inquiry cannot be assigned as error, though there may be considerable ground for the belief that the prisoner was insane at the time of the trial. *Jones v. State*, 13 Ala. 153.

And the decision of a trial court on the question of the propriety of impaneling a jury to inquire as to the sanity of a person accused of crime, preliminary to his trial for the criminal act, will not be reversed on appeal unless it manifestly appears that the decision was wrong or that the discretion of the court was abused. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

So, refusal of the judge in a criminal prosecution to order a jury to inquire as to the sanity of the accused upon a mere suggestion of present insanity, or even when supported by affidavit, is not an abuse of discretion where he is satisfied that the accused is feigning insanity to avoid a trial, and is competent to make a proper defense. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

And a judgment of conviction in a criminal prosecution will not be reversed on appeal because of a refusal to grant a preliminary inquest as to the present sanity of the accused for the mere purpose that the prisoner may be then arraigned to plead his insanity, where the question as to his

1 Hale, P. C. 370; 4 Bl. Com. 395; 1 Hawk. P. C. 3; *Bonds v. State*, Mart. & Y. 143, 17 Am. Dec. 795; *Jones v. State*, 13 Ala. 153; *Laros v. Com.* 84 Pa. 200; Carr, Trial of Lunatics, 87; *Spann v. State*, 47 Ga. 551.

The right of review or the right of appeal to a higher court is not a matter of absolute right.

McKane v. Durston, 153 U. S. 684, 38 L. ed. 887; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599.

Due process of law does not require an indictment by a grand jury if the Constitution of the state authorizes prosecution by information.

McNulty v. California, 149 U. S. 645, 37 L.

sanity at the time of the commission of the act and at the time of the trial was determined against him on such trial. *Webber v. Com.* 119 Pa. 223.

And refusal to permit a plea of not guilty to be withdrawn in order to determine the question of the person's present insanity, where eight days after the plea a jury was called and the prisoner exercised his right of challenge and permitted them to be sworn, is not error where the judge told the jury that if they should find the prisoner to be insane during the trial but not at the commission of the crime they might say so in their verdict, and then the court would either delay judgment or stay execution. *Taylor v. Com.* 109 Pa. 262.

So, the provision of N. Y. Code Civ. Proc. § 658, that when a defendant pleads insanity the court in which the indictment is pending, instead of proceeding with the trial of the indictment, may appoint a commission of not more than three disinterested persons to examine him and report to the court as to his sanity at the time of the commission of the crime, is not mandatory, but invests the trial judge with a discretion to appoint a commissioner or not, as in the exercise of his judgment he may deem it proper or necessary to do. *People v. McElvaine*, 125 N. Y. 593.

While the decision of the judge as to whether there is reasonable ground to doubt the sanity of the person accused of crime must have a weighty if not decisive influence, however, it has been held that an abuse of discretion would be remediable. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

And that refusal by the court in a criminal prosecution to entertain the objection that the accused is now insane, or to hear evidence thereon, or to determine it in any way, is error which will sustain a reversal and remanding of the case. *State v. Reed*, 41 La. Ann. 581.

And refusal to submit the question as to whether the accused was mentally competent to make a rational defense on a plea of insanity supported by affidavits filed before trial in a criminal case is not cured by trying the issue on insanity after the trial and conviction. *Guagando v. State*, 41 Tex. 626.

But it will not be found on appeal that a judge abused his discretion in a criminal prosecution in refusing a preliminary inquest as to the present sanity of the accused where his act has been justified both by the verdict and his own freedom from doubt after hearing all the testimony. *Webber v. Com.* 119 Pa. 223.

A refusal of the court in a criminal prosecution to instruct the jury that the defendant must be acquitted if insane at the time of the trial indicates that it had no doubt of his sanity though testimony tending to show that he was insane had been admitted. *People v. Lee Fook*, 85 Cal. 300.

And the admission of evidence in a criminal action as to the defendant's insanity does not indicate that the court had a doubt as to his sanity which would require the submission of the question. 88 L. R. A.

ed. 892; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Duncan v. McCall*, 139 U. S. 449, 35 L. ed. 219; *Duncan v. Missouri*, 153 U. S. 377, 38 L. ed. 485.

As to the manner of dealing with insane convicts under sentence of death, see Carr, Trial of Lunatics, pp. 74, 76, 78, 80.

Cobb, J., delivered the opinion of the court:

At a special term of the superior court of Twiggs county in July, 1895, Elizabeth Nobles was tried for the offense of murder, and, upon conviction, was sentenced to death. The sentence "having been legally suspended and superseded by the order of the court, the case

tion to the jury as a separate and distinct issue from that of guilt or innocence of the offense charged, as required by Cal. Penal Code, § 1383. *People v. Lee Fook*, 85 Cal. 300.

The absolute right of a person accused of crime to have the question of his sanity tried by jury is not affected by a refusal of the court to order a preliminary inquiry as to such sanity upon the ground that he entertained no doubt thereof where the question of his sanity both at the commission of the offense and at the time of the trial was fairly and fully submitted to the jury who tried the indictment. *Webber v. Com.* 119 Pa. 223.

V. Disposition of the issue.

a. How tried; generally.

The method of settling a preliminary question as to the present sanity or insanity of a person accused of crime when it is not the subject of statutory regulation is within the discretion of the trial court. *State v. Peacock*, 50 N. J. L. 34; *State v. Reed*, 41 La. Ann. 581.

And the rule is the same when the statute merely provides that an insane person shall not be tried. *People v. Kleim*, 1 Edm. Sel. Cas. 15; *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

At common law in capital cases it was the more usual course when it appeared that the sanity of the accused was doubtful to inquire touching it by a jury, but inspection of the accused by the judge without a jury was allowable. *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224.

And inspection by the court is now one of the legal modes of trying the facts of present sanity or insanity of a person accused of crime, and refusal to receive the plea of lunacy in bar of the sentence, and to impanel a jury to try the truth of the plea, is not error where nothing appears in the record to show that the discretion of the court in adopting the mode pursued was erroneously exercised. *Bonds v. State*, 1 Mart. & Y. 143, 17 Am. Dec. 795.

And it is proper in a preliminary examination as to the present sanity or insanity of a person accused of crime to adhere to the common-law method of trial and verdict of a jury to be impaneled to try the issue. *People v. Kleim*, 1 Edm. Sel. Cas. 13.

And the inquiry as to the present sanity or insanity of the person accused of crime might be made by the aid of a quasi commission in the nature of one de *lunaticis inquirendo*. *People v. Kleim*, 1 Edm. Sel. Cas. 13.

The most discreet and proper course is to try an allegation of insanity after the commission of the criminal act before a jury in important cases. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And the general practice where a plea of present insanity is interposed in a criminal prosecution is to submit the issue to a jury impaneled for that purpose. *State v. Reed*, 41 La. Ann. 581.

And where upon the arraignment of a person ac-

came on to be heard before the court" on June 23, 1896, "for the purpose of passing sentence of death in accordance with the verdict of guilty rendered." At this term, Baughn, the plaintiff in error, as the next friend of the condemned woman, appeared, and, in her behalf, objected to the sentence of death being passed, on the ground that she was then insane, and in his application prayed "the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and impaneled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; that petitioner have the right to the court's process to compel the attendance of witnesses, and to

such other process as may be right and necessary; and that said sentence be postponed and superseded until the final adjudication of the question." The court declined to entertain the application, and refused "each and every prayer" thereof, and fixed the time for the execution of the sentence on August 7, 1896. Thereupon Baughn, in the same capacity as above stated, by petition, alleged that Elizabeth Nobles was then insane, and that it was contrary to the policy of the law and illegal that the sentence of death should be executed, and "prayed that the court cause jurors to be regularly summoned and impaneled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials

of murder it is suggested that he is a deaf mute and incapable of understanding the nature of a trial and its incidents and his rights thereon, it is proper to impanel a jury to try the truth of such suggestions, and in case of a finding that the suggestion is true the court may decline putting the prisoner upon trial. *State v. Harris, 8 Jones, L. 126, 78 Am. Dec. 272.*

So, in *Rex v. Pritchard, 7 Car. & P. 303*, in which a person deaf and dumb was to be tried for a capital felony, the judge ordered a jury to be impaneled to try whether he was mute by the visitation of God, and upon finding that he was so the jury was sworn to try whether he was able to plead, and upon a finding that he could plead and his plea by sign of not guilty, the judge ordered that the jury be sworn to try whether the person was now sane or not.

As a general rule where the question of the sanity or insanity of a person accused of crime at the time of the trial is raised it may be tried either by a special jury impaneled for that purpose or by the jury who are to try the indictment. *Webber v. Com. 119 Pa. 223.* And see *People v. Farrell, 81 Cal. 576*, and *Ley's Case, 1 Lewin, C. C. 230, supra, I.*

And in some instances the present sanity of a person accused of crime has been inquired into by the same jury which tries the main question of guilt or innocence and at the same time, but this is deemed objectionable as mingling together questions which ought to be kept distinct. *People v. Kleim, 1 Edm. Sel. Cas. 13.*

A defendant in a criminal prosecution who alleges insanity at the time of arraignment is not entitled, as a matter of legal right, to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for that purpose. *Webber v. Com. 119 Pa. 223.*

The court in a criminal prosecution in which present insanity is suggested can itself enter upon the inquiry as to its existence or submit the question to another jury impaneled for that purpose. *State v. Peacock, 56 N. J. L. 34.*

And the question of the defendant's insanity at the time of the commission of the act, and at the time of the trial of a criminal prosecution, may be tried along with the other questions in the case, though a different practice may obtain where the insanity is claimed to still exist, and probably should govern where the insanity occurred subsequently to the commission of the offense. *State v. Gould, 40 Kan. 253.*

And the court in a criminal prosecution may, when a plea of present insanity is interposed during the progress of the trial, permit the trial to proceed, and submit the question of present insanity, with that of guilt or innocence, to the jury. *State v. Reed, 41 La. Ann. 581.*

Under W. Va. Code, chap. 159, §§ 9, 10, however, where the court sees reasonable ground to doubt the sanity of a person accused of crime, the ques-

tion of his sanity must be tested by a jury. *State v. Harrison, 36 W. Va. 729, 18 L. R. A. 224.*

And when there is a reasonable ground for doubt of the sanity of the accused at the time of the trial it is the duty of the court to suspend the trial and impanel another jury to inquire into the question. *Gruber v. State, 3 W. Va. 609.*

And ordering a trial upon a plea of not guilty in a criminal case to proceed before the same jury that had disagreed and been discharged upon a special issue on insanity is error under a statute providing that in case of such disagreement the court shall order the trial to proceed upon a plea of not guilty, without providing that it should proceed before the same jury. *French v. State, 85 Wis. 460, 21 L. R. A. 402.*

And where a person on being called upon to plead remains mute, the court cannot hear evidence to prove that he does so through malice and then enter a plea of not guilty under 7 & 8 Geo. IV. chap. 28, § 2; a jury must be impaneled to try the question of malice, and it is upon their finding that the court is authorized to enter the plea. *Queen v. Israel, 2 Cox, C. C. 263.*

b. Procedure on trial.

In the absence of the exaction of any direct mode of procedure on the trial of an issue as to present insanity the court may mould it to correspond with the analogous methods of proceeding resorted to for the purpose of special issues. *State, ex rel. Chandler, 45 La. Ann. 606.*

Challenges for cause are allowable on the trial of a preliminary proceeding for the determination of the question of present insanity, as well as on the trial of the final issue. *Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.*

Peremptory challenges, however, are restricted at common law to the main issue, in which the life of the party is in jeopardy, and they cannot be made upon a collateral issue, for the determination as to the present insanity of a person accused of crime. *Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.*

And a preliminary proceeding to determine the present sanity of a person accused of crime is not a trial for any offense, within the meaning of the New York statute securing the right to peremptory challenge to every person arraigned and put on trial for any offense punishable with death or with imprisonment for ten years or any longer time, and a refusal to allow such peremptory challenges in such a proceeding is not error. *Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.*

The question for the determination of triers of challenges to jurors drawn for a preliminary proceeding for the determination of the question of present insanity, which they are to be sworn to determine, is whether the juror is or is not indifferent between the parties to the controversy. *Freeman v. People, 4 Denio, 9, 47 Am. Dec. 216.*

So, whenever a person's soundness of mind and

in said court, and that petitioner have the right to the court's process to compel the attendance of witnesses, and such other process as may be right and necessary, and that said sentence of death be suspended and superseded until the final adjudication of the question." The court refused to entertain the petition, and denied "each and every prayer" of the same. The error complained of is the refusal of the judge to entertain these petitions and grant the prayers therein contained, it being claimed that the question of the insanity of the convicted woman should be inquired of by a jury in the superior court, according to the forms of procedure usually incident to trials in that court, that the refusal of the judge to submit this question to a jury is a denial to the prisoner of due

process of law, and that there is no proceeding authorized by any statute law of Georgia which amounts to due process of law in such cases, the procedure provided in Penal Code, § 1027, not being judicial in its nature.

"A lunatic or person insane, without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged; provided, the act so charged as criminal was committed in the condition of such lunacy or insanity; but if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency." Penal Code, § 35. The section quoted clearly shows that under the law of this state no person can be legally convicted of a crime committed while in a moment of irre-

consequent accountability for his acts are in question the rule that he may control or discharge his counsel at pleasure should be so far relaxed as to permit them to offer evidence on those points even against his will. *State v. Patten*, 10 La. Ann. 290, 63 Am. Dec. 594.

And he should not be permitted to discharge them after the testimony in behalf of the state is closed, upon their offer to prove his insanity both at the time of and since the criminal act, which defense he repudiates without allowing them to offer proof on the question of insanity. *State v. Patten*, 10 La. Ann. 290, 63 Am. Dec. 594.

And a person accused of crime, who shows strong symptoms of insanity in court during the taking of an inquest under §§ 40 Geo. III. chap. 94, § 2, to try whether he is insane or not, need not be asked whether he would cross-examine the witnesses on the inquest or would offer any remarks or evidence. *Queen v. Goode*, 7 Ad. & El. 536.

So, it devolves upon the accused in a preliminary proceeding to determine as to his present sanity or insanity to make out affirmatively that he is not insane. *People v. Kleim*, 1 Edm. Sel. Cas. 18.

But where a jury is impaneled to try whether a person is insane or not at the time he is brought up to plead to the indictment the prosecution must begin and first call his witnesses to prove the sanity of the prisoner. *Reg. v. Davies*, 8 Car. & K. 323, 6 Cox, C. C. 326.

So, the jury on an inquest held to determine the sanity or insanity of a person accused of crime, who had refused to plead and shown symptoms of insanity, may form their own judgment of the present state of his mind from his demeanor during the inquest, and thereupon find him to be insane without any evidence being given. *Queen v. Goode*, 7 Ad. & El. 536.

And the testimony of a foreign witness cannot be taken upon commission to be read in a criminal prosecution, not upon trial of the indictment, but before commissioners appointed to examine and report as to the sanity of the accused. *People v. Haight*, 8 N. Y. Crim. Rep. 60.

But the jury on a special plea of insanity in a criminal prosecution under Wis. Rev. Stat. § 4697, and as amended by chap. 184, Laws of 1883, are required to acquit the accused of the offense charged if they should find that there was reasonable doubt as to whether or not he was so insane that he did not comprehend the nature or character of the act or know that it was wrong or unlawful, and they should not be directed to find him sane in case of such reasonable doubt. *Revoir v. State*, 82 Wis. 295.

And proof that a person accused of crime was deaf and dumb, and that she had been instructed in the dumb alphabet, but that she was not so far advanced as to put words together, and was then incapable of understanding the nature of the proceeding against her and making her defense, will

warrant a finding of insanity on a preliminary proceeding as to present sanity. *Rex v. Dyson*, 7 Car. & P. 305.

Neither the atrocity of the offense committed nor the supposed effect of the verdict in a preliminary examination as to the sanity of a person accused of crime either on the prisoner or on the community should be permitted to influence the jury in determining the question of present insanity. *People v. Lake*, 2 Park. Crim. Rep. 215.

And evidence that a person accused of crime had been confined in a lunatic asylum, at a time when he was in a state of maniacal irascibility, and that he was much addicted to stealing, and that he denied being insane, and that his conduct while in jail was different from that of other persons, does not show insanity which will render him incompetent to defend himself. *Robertson's Case*, 1 Swinton, 15.

So, the jury upon an inquiry as to the present condition of a person accused of crime concerning his sanity or insanity are called upon simply to say whether he is now sane or insane, and they have nothing to do with his condition at the time he is alleged to have committed it, except so far as the condition may aid in determining his present condition. *State v. O'Grady*, 8 Ohio Legal News, 187.

And an inquiry as to the mental condition of a prisoner pursuant to Iowa Rev. 1880, §§ 5015, 5019, providing therefor if a reasonable doubt arises as to his sanity, should be limited to the time he appears for arraignment, or to the occasion which renders the inquiry proper, and should not relate to the time at which the offense of which he is accused was committed. *State v. Arnold*, 12 Iowa, 479.

And the existence of lunacy or insanity which has not originated since the alleged commission of a murder need not be determined by a jury impaneled to determine whether or not the accused is of sound mind, under Neb. Crim. Code, § 454, limiting such trial to persons becoming insane after the commission of the offense, or § 553 applying solely to the sanity of a person under sentence of death. *Walker v. State*, 46 Neb. 25.

But where the court in a criminal action has no doubt that the defendant is sane at the time of the trial, and no request is made to have the question of insanity submitted to the jury, as a separate and distinct issue from that of guilt or innocence as provided for by Cal. Penal Code, § 1368, the court may allow evidence as to the defendant's sanity before and after the commission of the offense as bearing upon the question of his insanity at that time, though there was testimony as to his insanity at the time of the trial. *People v. Lee Fook*, 88 Cal. 300.

So refusal to charge the jury in a criminal prosecution that they might find a verdict either for or against the special plea of insanity, and charging instead that they might find the defendant guilty

sponsibility growing out of an unsound mind. If the person charged with the crime desires to avail himself of the provisions of this law, and urge his insanity as a defense to a crime for which he stands indicted, no special plea of any character is necessary, as this defense will be allowed under the plea of not guilty. *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480. "Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the asylum, there to remain until discharged in the manner prescribed by law." Penal Code, § 951. This section secures to a person charged with a crime the right to have

the question of his mental condition at the time of the trial inquired into before being required to plead to the indictment. *Long v. State*, 83 Ga. 491. "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity. The following oath shall be administered to the jury, to wit: 'You, and each of you, do solemnly swear (or affirm) that you well and truly try this issue of insanity between the state and A. B., now condemned to die, and a true verdict give according to the evidence. So help you God.' If it be found, by the inquiry of such jury, that the convict is insane,

under the evidence, is not error where the defendant filed a special plea of insanity but did not insist that it should be first tried, but went to trial on the general issue of not guilty relying upon his insanity to show that he was not guilty of the offense charged. *Anderson v. State*, 42 Ga. 9.

And an agreement entered into between the counsel in a criminal prosecution in which the accused had entered a plea of guilty that the evidence of the sheriff alone should be used under that plea is not violated by the court in asking certain questions of the defendant in relation to his plea where they are in conformity to Wilson's Texas Crim. Stat. §§ 211, 212, providing that a plea of not guilty shall not be received unless it plainly appear that the accused is sane and is uninfluenced by any consideration of fear or any persuasion or delusive hope of pardon. *Burton v. State*, 33 Tex. Crim. Rep. 183.

So, where an issue as to present insanity is submitted to the jury with the general issue if the jury finds the defendant insane it should return such verdict by itself without passing on the general issue, but if it finds him sane it should proceed to pass upon the general issue and return both verdicts together. *State v. Reed*, 41 La. Ann. 581.

But a verdict on the trial of a preliminary question as to the present sanity or insanity of a person accused of crime, that he was sufficiently sound in mind and memory to distinguish between right and wrong, is defective. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

A verdict of insane in an inquiry as to the present sanity or insanity of the person accused of crime under the Ohio statute need not be unanimous, a majority of three fourths only being required. *State v. O'Grady*, 3 Ohio Legal News, 137.

VI. Effect of the determination.

A trial of the question of present insanity is not a trial of an indictment but is preliminary to such trial, and the object is simply to determine whether the person charged with an offense and alleged to be insane shall be required to plead and proceed to the trial of the main issue of guilty or not guilty. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And where a court has jurisdiction of a criminal case, its jurisdiction to try such case cannot be taken away by the commencement of proceedings in the probate court for the purpose of having the question determined whether the defendant was sane or insane. *State v. Gould*, 40 Kan. 238.

And affidavits in a criminal prosecution tending to show that at the preliminary examination the defendant was in a state of great nervous excitement and mental derangement and oblivious to what occurred, and others tending to show that he was merely simulating or putting on an appear-

ance of mental derangement, do not raise a question of jurisdiction, and where such examination and the commitment and information based thereon are regular on their face the court has full jurisdiction to try the case. *People v. Bawden*, 90 Cal. 195.

So, the trial of the question of guilt or innocence in an indictment for crime will not be postponed because of an appeal on the issue of insanity. *People v. Moice*, 15 Cal. 329.

And when the accused is found to be sane upon a preliminary examination as to present sanity or insanity the court will proceed to try him on the indictment. *People v. Lake*, 2 Park. Crim. Rep. 215; *State v. O'Grady*, 3 Ohio Legal News, 137; *Gruber v. State*, 3 W. Va. 699.

And where a person called upon to plead to an indictment stands mute, and a jury is impaneled to try whether he is mute of malice or by the visitation of God, and a verdict of mute of malice is rendered, the court will order a plea of not guilty to be entered. *Reg. v. Schieler*, 10 Cox, C. C. 409; *Reg. v. Whitfield*, 3 Car. & K. 121.

And the trial will proceed in the usual manner. *Reg. v. Whitfield*, 3 Car. & K. 121.

So, the intention of the provisions of Texas Code Crim. Proc. title 12, chap. 1, that when upon the trial of an issue of insanity it is found that the defendant is sane the judgment of conviction shall be enforced as if no such inquiry had been made is that such judgment of the trial court shall be conclusive of that issue. *Darnell v. State*, 24 Tex. App. 6.

But the finding of a jury upon a preliminary issue to determine the mental capacity of a person accused of crime to the effect that the person was then sane cannot be taken into consideration upon the question of insanity set up as a defense to the prosecution. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

All evidence of present insanity of the prisoner in a criminal prosecution not intended to prove insanity at the time of the commission of the offense should be excluded on the trial of the issue as to guilt or innocence, however, where the question as to the sanity of the prisoner at the time of the trial had been submitted to a jury and he had been found to be sane. *Shultz v. State*, 13 Tex. 401.

But refusal to permit evidence to be given on a trial of an indictment that the person was insane at any time after the finding of a verdict upon a preliminary issue to ascertain his mental capacity finding him to have been sane, and the exclusion of the opinions of medical witnesses formed from observation of the prisoner after that time as to his sanity, are erroneous. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And an inquiry by a commission of medical experts as to the mental condition of a person accused of crime, appointed upon the suggestion of the as-

the sheriff shall suspend the execution of the sentence, and make report of the inquisition and suspension of the execution to the presiding judge of the circuit, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had." Penal Code, § 1047. The sections above quoted embrace all of the law of force in this state which relates to the subject of an inquiry into the mental condition of a person charged with or convicted of a criminal offense. If insane at the time the act is committed, he shall not be convicted. The section first above quoted gives him the right to have the question of his mental condition at this time inquired of strictly in accord with procedure usual in courts of justice in this state. Whether he be sane or insane at the time of the commission of the act, the section second

above quoted provides for him a trial according to the usual rules of procedure of force in this state on the question of his mental condition at the time that he is placed on trial, and guarantees to him that he shall not be tried while he is in a condition of insanity. At every stage of the trial at which an accused person could raise the question of his mental condition at common law before conviction, the law of force in this state gives the defendant the right to raise such question, and accords to him an opportunity to have the question tried according to the procedure usual in the courts of the state.

The question made in this record is, Can a prisoner, after conviction according to law of a capital offense, demand a trial by a jury in the superior court on the question of his mental condition, in order that the insanity, if

assisted district attorney, and a report thereon which forms a part of the record of the case, do not estop the state from entering into any further investigation as to his mental condition, the written report not being conclusive proof as to such condition. *State, ex rel. Chandler*, 45 La. Ann. 696.

So, where the jury disagree on the trial of a special plea of insanity in a criminal prosecution the trial that follows is to be conducted in the usual manner and the general verdict will conclude the special plea of insanity. *French v. State*, 93 Wis. 325.

And the issue of insanity cannot be again tried upon the trial of the principal issue where the statute provides that in such event the court shall proceed to trial upon the main issue. *French v. State*, 93 Wis. 325.

But the fact that it appeared to the court in a criminal prosecution that there was a question as to the sanity of the accused at the time of the commission of the offense does not create a manifest necessity for the discharge of the jury within the meaning of a statute authorizing it in case of manifest necessity, and in case of such discharge the accused cannot be tried again before another jury, but is entitled to his discharge. *Gruber v. State*, 3 W. Va. 699.

A finding that the accused was insane at the time an offense was committed by a jury impaneled to inquire as to his sanity at the time of the trial, however, is a good defense in bar of a further prosecution for the crime. *Gruber v. State*, 3 W. Va. 699.

And no trial ought to proceed to the condemnation of a man who by the providence of God is rendered totally incapable of speaking for himself or of instructing others to speak for him. *Kinloch's Case*, 18 How. St. Tr. 395.

The question on a trial had upon a suggestion that the defendant is insane at the time of his proposed trial is as to the present sanity of the defendant, and a verdict in such a trial is admissible and conclusive in a second trial as to the question of sanity or insanity at the time it was rendered, and may be received in evidence as tending to prove present insanity. *People v. Farrell*, 81 Cal. 576.

Though in West Virginia when the accused is found to be insane at the time of trial, the jury may then proceed to inquire as to his sanity at the time of the commission of the criminal act. *Gruber v. State*, 3 W. Va. 699.

So, there is a severance of the cases of two defendants jointly indicted when one of them is adjudged insane on a separate trial of that issue and ordered confined in the insane hospital and his trial postponed until his recovery, and the other is subsequently arraigned and tried alone. *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95, 38 L. R. A.

A verdict finding a person accused of crime to be mute by the visitation of God, however, is not an absolute bar to her being tried upon the indictment, and such person may be arraigned and sentenced, but great diligence and circumspection ought to be exercised, and if all means of conveying intelligence to the mind of such a person respecting the nature of the arraignment should prove ineffectual the plea of not guilty should be entered for the prisoner, and it would then become the duty of the court to inquire touching all those points of which the prisoner might take advantage and examine the proceedings with a critical eye and render her every possible service consistent with the rules of law. *King v. Steel*, 1 Leach, C. L. 451.

So, when in a preliminary examination a person is found insane the law interposes for the protection of his life until he is restored to reason, and in the meantime he will be kept in close confinement for the protection of society. *People v. Lake*, 3 Park. Crim. Rep. 215.

And the result should be certified to the proper court having jurisdiction where it will be the foundation of an order committing him to an asylum. *State v. O'Grady*, 8 Ohio Legal News, 137. And see *Com. v. Hathaway*, 13 Mass. 299; *Ex parte Trice*, 53 Ala. 548, *supra*, II; and *Webber v. Com.* 119 Pa. 223, *supra*, IV. a.

In England a finding of insanity of the accused in a proceeding to ascertain whether he was sane or insane under 39 & 40 Geo. III. chap. 94, § 2, warrants the issue of an order that the accused be detained in custody during her majesty's pleasure. *Reg. v. Davies*, 6 Cox, C. C. 326, 3 Car. & K. 323; *Rex v. Pritchard*, 7 Car. & P. 303; *Turner's Case*, cited in *Sheffield on Lunacy*, 409.

And the defendant on a trial for a misdemeanor, where he appears to be insane and the jury find him so, may be ordered to be confined by the court under that statute as well as in cases of treason, murder, and felony. *Rex v. Little*, Russ. & R. C. C. 430.

And a deaf and dumb person charged with crime may be detained to be instructed if the jury find that she is too ignorant to be put upon her trial. *Dyson's Case*, 1 Lewin, C. C. 64.

But where the jury in a criminal prosecution are of opinion that the person did not in fact do all that the law deems essential to constitute the offense charged they must find him not guilty generally, and the court has no power to order his detention under 39 & 40 Geo. III. chap. 94, § 2, although the jury should be clearly of opinion that the person was in fact insane. *Reg. v. Oxford*, 9 Car. & P. 525.

The imprisonment in the penitentiary of a person afflicted with epilepsy who had violated the

established, may operate to suspend the execution of the judgment in the case? The record shows that Elizabeth Nobles was convicted and sentenced to death in July, 1895, and that the sentence was not executed. She was called before the court in June, 1896, not for the purpose of being sentenced, because the sentence had been already imposed, but for the purpose of fixing a new time for the execution of the sentence. A person convicted of a capital offense is never sentenced, under the law of this state, but one time. The sentence is the conclusion of the record, and, once entered, the record is complete. It may be that the time fixed in the sentence expires, but the sentence stands in full force. Therefore the life of Elizabeth Nobles was absolutely forfeited by the verdict and the judgment or sentence which was rendered in July, 1895; and, if

execution ever takes place, it will be by virtue of this sentence, though at a different time from that originally named. What is commonly referred to as a "resentence" is only the fixing of a new time for the execution of a sentence. The language of the Penal Code (§ 1045) in reference to providing a time for the execution of the death sentence seems to be conclusive of the question that one sentence is all that is ever imposed in a capital case, and that that sentence is to be executed either at the time fixed therein, or at such other time as the judge or other lawful authority of this state shall fix thereafter. "Whenever, for any reason, any convict sentenced to the punishment of death shall not have been executed pursuant to such sentence, and the same shall stand in full force, the presiding judge of the superior court where the conviction was had, on the application of

penal laws of the state is not, in view of his affliction, unconstitutional as cruel and unusual punishment. *Fogarty v. State*, 80 Ga. 450.

So, in *Re Staudermann*, 8 Abb. N. C. 187, upon a report of the commissioners in lunacy that the defendant who was convicted of murder was an epileptic, but that he could not be considered to have arrived at that condition of diathetic permanency necessary to constitute complete insanity at law, and that his was a case of what the courts have always termed partial insanity, and his status was akin to that of the habitual drunkard who kills while in the delirium of mania a potu, and that no commission of experts previous to his arrest would have certified him as a fit subject for a lunatic asylum, the governor commuted the sentence of the prisoner to imprisonment for life.

A refusal to instruct the jury in a criminal prosecution that if the accused is proved to be *non compos mentis* the court is authorized to send him to an asylum is not error, however, where they were fully instructed as to the law of insanity. *State v. Robinson*, 27 S. C. 615.

And the Missouri statute providing for the restraint of persons who are acquitted on the ground of insanity has reference solely to insanity existing at the time of the trial, and the question is solely and exclusively for the determination of the court with which neither the jury nor counsel have anything to do, and where attention is called to it by counsel upon the trial of an indictment it is not improper for the court to state that it would never make an order to send a sane man to the asylum. *State v. Klinger*, 46 Mo. 224.

VII. Insanity after verdict.

Sentence should be stayed in a criminal prosecution where the accused after verdict and before sentence becomes insane. *State v. Brinyea*, 5 Ala. 241; *State v. Vann*, 84 N. C. 722.

The court may after the verdict and before sentence cause an investigation to be made as to the sanity of a person convicted upon suggestion of the district attorney, where doubts arise in respect to it both under the inherent power of the court and under La. Rev. Stat. § 1768, giving direct authority. *State, ex rel. Chandler*, 45 La. Ann. 696.

And an inquiry by a jury of the panel as to the sanity or insanity of a person accused of crime after the report of a medical commission appointed by the court to examine into his mental condition is not improper as violative of article 6 of the Louisiana Constitution of 1879 or as an attempt to deprive him of his liberty without due process of law. *State, ex rel. Chandler*, 45 La. Ann. 696.

So, where a person appears to be insane during his trial but not at the date of the commission of the crime for which he is being tried the jury may

say so in their verdict, when the court will delay judgment, or execution if issued will be stayed. *Com. v. Taylor*, 16 Phila. 430.

The question on an inquisition of insanity after a verdict of guilty in a criminal prosecution is not whether the defendant had a fair trial, but whether the defendant was incapable of comprehending the dangerous position in which he was placed and of taking intelligent measures to meet it, and whether the person at the time of his trial was so far of unsound mind as to be incapable of comprehending the nature of the charge against him and of properly presenting his defense, it being the same as that raised by a suggestion of insanity when the prisoner is called upon to plead. *United States v. Lancaster*, 7 Biss. 440.

And while the burden of proof on an inquisition of insanity after a verdict of guilty in a criminal prosecution rests with the defendant to satisfy the jury that he is in fact insane if the proof when all considered together leaves a reasonable doubt as to his insanity, he should have the benefit of such doubt. *United States v. Lancaster*, 7 Biss. 440.

And an issue to be submitted to the jury is the proper mode of ascertaining the truth of an allegation that the accused has become insane. *State v. Vann*, 84 N. C. 722.

The judge in a prosecution for homicide in which the accused has been found guilty of murder and alleges that he is a lunatic as a reason why sentence should not be pronounced against him however, may, if he is satisfied of the falsity, pronounce the sentence without impanelling a jury to ascertain the fact, but in case of doubt or difficulty a venire should be awarded to ascertain the fact. *Bonds v. State*, Mart. & Y. 143, 17 Am. Dec. 796.

But no right of trial by jury of the question of present insanity of a person accused of crime exists where the jury has found a verdict upon the general issue against the plea of insanity set up as a defense to conviction; the mode of trial rests in the discretion of the court, the plea at this stage being only an appeal to the humanity of the court to postpone the punishment until a recovery takes place or as a merciful dispensation. *Laros v. Com.* 84 Pa. 200. See on this point *BAUGHN V. STATE*.

And it is not error for the court to refuse to submit the issue of insanity to the jury under Cal. Penal Code, § 1388, when a defendant is brought up for judgment on conviction where the court entertains no doubt as to his sanity. *People v. Pico*, 63 Cal. 50.

And sentence will not be stayed in a criminal prosecution on the ground of the insanity of the accused where there is nothing to show that any change in his condition had taken place since the impanelling of the jury, as to stay it for the pur-

the solicitor general of the circuit, or other person prosecuting for the state, shall issue a habeas corpus to bring such convict before him; or if such convict be at large, said judge, or any judicial officer of this state, may issue a warrant for his apprehension; and upon the convict being brought before the judge, either by habeas corpus, or under such warrant, he shall proceed to inquire into the facts and circumstances of the case, and if no legal reason exists against the execution of the sentence, he shall sign and issue a warrant to the sheriff of the proper county, commanding him to do execution of such sentence at such time and place as shall be appointed therein, which the sheriff shall do accordingly; and the judge shall cause the proceedings to be entered on the minutes of the superior court of the county."

In the case of *Harris v. State*, 2 Ga. 290, where complaint was made that the prisoner was improperly sentenced under the provisions of the law contained in the section above quoted, the court says: "The sentence was

pose of an inquisition as to his sanity would be in effect to arrest judgment for the same reason which had been unsuccessfully urged before the jury in defense of the criminal charge. *State v. Brinyea*, 5 Ala. 241.

So, a plea of insanity at bar when a person accused of homicide is called for sentence, uncorroborated by the affidavit of any friend, counsel, physician, jailer, or attendant, must be disregarded where there is nothing in it to raise a doubt in the mind of the court as to the prisoner's sanity. *Com. v. Buccieri*, 153 Pa. 535.

And a new trial will not be granted in a prosecution for homicide on the ground of the insanity of the defendant during the progress of the trial preventing proper consultation with his counsel where there was no evidence of such insanity. *Com. v. Winnemore*, 1 Brewst. (Pa.) 356.

So, it has been held that a jury will not be impaneled to determine the sanity of one convicted of a criminal offense, where such question was directly put in issue on the trial. *Stover v. Com.* 92 Va. 780.

And that a commission to inquire into the sanity of a person convicted of murder in the first degree will not be allowed where the defense of insanity was made at the trial. *Com. v. Baranski*, 36 Pittsb. L. J. 363.

And that where the question of insanity has been passed upon by the jury, a motion to stay the sentence cannot be entertained. *State v. Brinyea*, 5 Ala. 241.

The case of *BAUGHN v. STATE*, recently affirmed by the Supreme Court of the United States, *sub nom.* *Nobles v. Georgia*, 184 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144), holds that a denial of a jury trial on an issue of insanity after verdict is not a denial of due process of law.

VIII. Insanity after judgment.

The general rule is that a person, though adjudged to punishment, cannot be punished for a public offense while insane. *People v. Schmitt*, 106 Cal. 43.

Where a person becomes a lunatic after conviction for a criminal act he can be removed to the asylum on proper proceedings had therefor. *Hill v. State*, 64 Ga. 453.

And a circuit-court judge has power after the expiration of a term to issue the writ of error coram nobis to reverse a judgment of conviction in a criminal case where it appears that the defendant, 88 L. R. A.

suspended, by the supersedeas consequent upon the first bill of exceptions, until the same was affirmed by this court by the dismissal of the case. It was then in full force. The court below therefore had the right under the Code, upon habeas corpus, to command the sheriff to do execution of the sentence." If we are correct in this interpretation, then on June 28, 1896, when the prisoner was brought before the court for the purpose of being sentenced, she was already under sentence of death, the same having been pronounced in July, 1895; and therefore an application for an investigation into her mental condition could have been had according to the exact terms of the law as embodied in Penal Code, § 1047, providing for such investigation; that is, she was a convict who had been sentenced to the punishment of death, and her presence before the court was simply for the purpose of fixing a time for the execution of such sentence. This being true, it is not necessary to decide what would be the right of a person who demanded an investigation into his mental condition in order

was insane at the time of the trial and it was not then made known; and if such fact is disputed by the state a jury may be impaneled in term to try the issue, and the venue of the trial may be changed to another county, but the change carries the whole case. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48.

So, where no plea of present insanity is interposed in a prosecution for homicide, and there is anything in the record or conduct of the accused to create a suspicion of such insanity, the appellate court will of its own motion inquire into his present mental state and make proper recommendation for commutation of sentence and removal to the insane asylum if he is found to be insane. *Green v. State*, 86 Tenn. 634.

And where there is evidence of present insanity upon an inquisition as to the sanity or insanity of a person accused of crime alleged to have supervened after his conviction and proof that since his conviction he presented by his acts, words, looks, and conduct evidence of insanity, an inquiry may be made into his past life to see if he had been insane or in a previous condition of insanity tending to explain and illustrate his present condition. *Spann v. State*, 47 Ga. 549.

Under the Georgia statutes in case of a convict becoming insane it is the duty of the sheriff, with the concurrence of the inferior court, to summon a jury of twelve men to inquire into such insanity. *Spann v. State*, 47 Ga. 549; *Nobles v. Georgia*, 184 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144), Affirming principal case.

No provision is made for the mode of trial, and if it appear on the inquisition that the prisoner is insane the sheriff must suspend the execution and report the inquisition and suspension to the judges who direct the report to be entered on the minutes. *Spann v. State*, 47 Ga. 549.

But the words "after conviction," in Ga. Code 1882, § 4666a, providing for determination of the question of insanity, are not to be construed as limited to persons who have also been sentenced by force of the preceding § 4666, which provides for an investigation after a convict has been sentenced. *Nobles v. Georgia*, 184 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144), Affirming principal case.

And the determination as to the insanity of a person after sentence and conviction is not insufficient to constitute due process of law on the ground that the investigation is not judicial in its

to establish the fact that he became insane after verdict and before sentence. If it were necessary to decide this question, it could be, with propriety, held that the prisoner was not entitled to be heard upon this question between verdict and sentence, because there was no necessity for such hearing. Without sentence the verdict can never be carried into effect. The moment that sentence is pronounced the right to apply for an investigation under § 1047 of the Penal Code is complete. We therefore treat this as the application of a person convicted and sentenced, to have the question of her mental condition tried by a jury in the superior court according to the forms of procedure incident to investigations in that court. Has a convict the right, after verdict and sentence, and his life, according to "due process of law," thus forfeited to the state, to demand, as "due process of law," that his mental condition shall be inquired into in order to determine whether the judgment of the court shall go into execution? "Inasmuch as the stage of criminal procedure

known as 'pleading' has been passed at the time when, after conviction, the issue as to insanity in bar of sentence is asked for, the point as to constitutional right may not be involved." Carr, Trial of Lunatics, p. 87.

In the case of *Laros v. Com.*, 84 Pa. 200, 210, the court says: "The last three assignments of error raise a single question upon the power of the court to inquire by inspection and *per testes* into the insanity of the prisoner since verdict. We have no precedents in this state, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defense to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation. The rights of the prisoner as an offender on trial for an offense are not involved.

character, the manner in which the question shall be determined being purely a matter of legislative regulation. *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144). Affirming principal case.

A trial of the question of the insanity of a convict suggested after verdict and sentence, however, is at common law in the discretion of the judge without any absolute right on his part to have the issue tried before a court and jury. *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. — (Advance Sheets, Dec. 15, 1897, p. 144). Affirming principal case.

And before the verdict of a jury and the judgment and sentence of the court in a criminal prosecution can be nullified by a finding in a proceeding to determine as to the present sanity or insanity of the accused it should be found that the prisoner is actually insane so as to be wholly unconscious of his situation. *Re Schneider*, 21 D. C. 433.

And an appellate court cannot act in a criminal case upon the evidence furnished by the present mental condition of the accused who has become insane, and upon that ground reverse a judgment against him which is otherwise legal, though there is nothing to preclude his being put in the state insane asylum. *People v. Schmitt*, 106 Cal. 48.

And refusal of the court in a prosecution for homicide to receive a plea of lunacy in bar of the sentence of death about to be pronounced is not error where the court upon inspection of the prisoner and upon consideration of the case again found nothing which renders it probable that the defendant was a lunatic, or which makes the matter doubtful. *Bonds v. State*, 1 Mart. & Y. 143, 17 Am. Dec. 795.

If there is nothing to raise a doubt in the mind of the court as to the sanity of the accused in a criminal prosecution when he is called for sentence, it is not only the right, but the imperative duty, of the court to disregard a plea of insanity in bar of the sentence. *Com. v. Buccieri*, 153 Pa. 5:3.

And refusal to permit a rearrrangement of the accused in a criminal prosecution at the commencement of a new trial is not error where he had been indicted for murder and on arraignment had pleaded to the indictment and been tried and convicted, and upon appeal the judgment had been reversed and a new trial ordered. *People v. McElvaine*, 125 N. Y. 596.

And refusal to appoint a commission to examine a report on the question of the present sanity of a person accused of homicide where counsel then tendered an oral plea of not guilty with a specification L. R. A.

tion alleging insanity at the commencement of a new trial after a previous arraignment and plea and trial and conviction and reversal is not error where no proof of insanity is given to support the demand for an inquisition, as it will be inferred that the court made the examination required of it, the determination of the question resting in the discretion of the court. *People v. McElvaine*, 125 N. Y. 596.

So, Pa. act May 14, 1874, Pub. Laws, 160, providing for the disposition and custody of insane persons charged with and acquitted or convicted of crime has no application to the case of a person convicted of murder in the first degree, and after sentence of death has been pronounced upon him he is remitted to the control of the governor either for execution of the sentence or pardon in the manner prescribed by law. *Ex parte Briggs*, 14 W. N. C. 341; *Ex parte Wilson*, 19 W. N. C. 37; *Baranoski's Case*, 9 Pa. Co. Ct. 264.

Nor does Pa. act May 8, 1883, Pub. Laws, 21, § 29, relative to the supervision and control of hospitals and homes in which the insane are placed for treatment, apply. *Baranoski's Case*, 9 Pa. Co. Ct. 264.

And the court cannot after conviction and sentence control the action of the governor by the appointment of a commission or otherwise, he being the sole judge of the circumstances which may influence him to exercise clemency or enforce the execution. *Baranoski's Case*, 9 Pa. Co. Ct. 264.

So, the supreme court will not appoint a commission to determine as to the sanity of a person accused of murder in the first degree upon the affidavit of physicians that they believed the prisoner to be insane and in an unfit mental condition to undergo capital punishment, where the governor had previously declined to interfere with the sentence of the court which tried him. *Ex parte McGinnis*, 14 W. N. C. 221.

IX. Appeals.

As a general rule no appeal from the determination in a proceeding to determine as to present sanity or insanity of a person accused of crime has been provided for.

Thus, the holding of the court upon a demand by the accused in a criminal prosecution, made after conviction upon a plea that he had become insane, for a jury trial of the question of his insanity, and asking for a continuance of the cause to prepare for trial, that he was entitled to a jury to inquire into the fact, and if it should be found favorably to him the judgment must be suspended until his san-

He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all, it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury." It is in the power of any person interested in the prisoner to call for an investigation, under Penal Code, § 1047, or the judge himself may order the investigation. The purpose of the legislature evidently was to carry out the principle referred in the decision above quoted, and provide a method for the trial of a question which simply involved a plea to the humanity of the court to postpone the punishment of an insane person until a recovery takes place.

In the case of *Jones v. State*, 18 Ala. 153, the court in dealing with the question of insanity at the time of trial, says: "Although we are of

opinion that the facts disclosed in the bill of exceptions might well have warranted the preliminary inquiry as to the prisoner's mental condition, yet this must be left to the sound discretion of the court. If amid the mystery and veil which shrouds the phenomena of mental aberration, so difficult to penetrate, the judge should be mistaken, and try an insane man (as we incline to think has been done in the case before us), it will present a case in which there may be a strong appeal to executive clemency." In the case of *Spann v. State*, 47 Ga. 551, in referring to the law now contained in Penal Code, § 1047, Judge McCay says: "The stay for insanity seems to depend on the discretion of the judge at common law. 1 Hale, P. C. 370. He may call in a jury if he pleases. The whole proceeding is merely a stay of execution, and is based rather upon the public will, and a sense of propriety, than on any right in the prisoner. . . . The whole proceeding is rather an inquiry based on public propriety and decency than a matter of right."

While the question as to whether the section under consideration was due process of law is

ity is restored, remanding him to prison and continuing the case that the issue might be *taus* tried, —is not appealable at the instance of the prosecution. *State v. Vann*, 84 N. C. 772.

So, where a verdict is rendered under 74 Ohio Laws, 839, § 1, Rev. Stat. 7240, 7241, providing that if the jury find the accused to be sane and no trial has been had on the indictment a trial shall be had thereon as if the question had not been tried finding a person to be sane, error will not lie to reverse such proceeding for alleged errors therein, either before or after conviction. *Inskeep v. State*, 36 Ohio St. 145, 35 Ohio St. 432.

And a verdict and judgment of a jury impaneled to try an issue whether the accused in a criminal prosecution is now sane, rendered after a verdict and judgment of conviction and an appeal therefrom adjudging him to be sane, is not appealable under the Texas statute, the right to appeal being given a defendant in a criminal action only from a judgment of conviction. *Darnell v. State*, 24 Tex. App. 6.

Nor can error committed on a trial as to present insanity be reviewed on bills of exceptions in New York and does not constitute ground for reversing the judgment afterwards entered on the trial of the indictment. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And the writ of certiorari does not lie from the finding of a jury summoned under Ga. Code, § 4606, to inquire into the sanity of a person who had been convicted of a capital offense and sentenced to be executed and who is alleged to have become insane after such conviction, proceedings thereunder being in the nature of an inquisition not judicial in character, and the statute providing that the inquiry is to be made by the jury and conferring no authority upon anyone to give any direction as to the inquiry, and making no provision for reviewing the same. *Carr v. State*, 96 Ga. 80.

So, in *Spann v. State*, 47 Ga. 549, the question whether certiorari would lie to review a determination upon an inquisition as to the sanity of a party accused of crime under the Georgia statute was discussed but not decided, but it was strongly intimated that it would not lie, the court saying that it would be a perversion of terms to call an inquisition of this kind the act of the court, and that the whole proceeding is rather an inquiry based on public propriety and decency than a matter of right.

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In California, however, it would seem that there may be an appeal on an issue as to present sanity or insanity. See *People v. Moice*, 15 Cal. 329, *supra*, VI.

As to right of appeal from the determination of the court as to whether or not the issue should be submitted, see *supra*, IV. c.

X. Effect of recovery.

Insanity intervening between the time of the commission of the offense and the trial of the accused therefor will not exculpate the person. *Jones v. State*, 18 Ala. 153.

And one who commits a crime and becomes insane is amenable therefor upon restoration to sanity upon the same footing as other persons committing criminal acts. *State v. Pritchett*, 106 N. C. 667.

The postponement of a trial of an insane person will not discharge him from a future trial when his disability shall be removed. *Kinloch's Case*, 18 How. St. Tr. 365.

And a person accused of crime who was adjudged insane and incapable of pleading and sent to an asylum may be required to plead and be put on trial upon his apparent restoration to sanity without making a formal inquiry as to his later condition. *State v. Pritchett*, 106 N. C. 667.

And though the authorities of the insane asylum have not certified that he has recovered. *State v. Pritchett*, 106 N. C. 667.

And where a person accused of crime has been determined to be insane at the time it was intended to try him by a jury summoned for that purpose, upon his subsequent apparent recovery the court may proceed to a trial of the case without having first instituted an additional inquiry into his personal sanity which would have resulted in a formal reversal or vacation of the previous judgment that he was insane. *People v. Farrell*, 31 Cal. 573.

A person accused of crime cannot be kept in an asylum until his recovery and then placed in jail to be again tried under Tenn. act of 1871, chap. 138, § 7, however, where the evidence as to his insanity was given under a plea of not guilty and related to the time of the criminal act charged and not to the time of the trial, as such statute relates to insanity at the time of the trial only. *Firby v. State*, 3 Bart. 353.

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not involved directly in the case of *Carr v. State*, 98 Ga. 89, still in passing upon the right of the superior court to review a proceeding under that section by certiorari, the majority of the court recognized the proceeding as being "rather an inquiry based on public propriety and decency, than upon any right of the [defendant] prisoner." The effect of that decision was to hold that no judicial investigation was required to be given to a person as a matter of right, and that all investigations after conviction were simply to inform the court imposing sentence as to the mental condition of the prisoner, for the sole purpose of determining whether it would be consistent with

public decency and propriety to take away the life of a person who had not mind enough to realize what was being done. There being no law in force in this state which authorizes or requires the judge of the superior court to enter into an investigation of the mental condition of Elizabeth Nobles at the time and in the manner prayed for in the petition filed in her behalf, the refusal by the judge to enter into such investigation was not a denial to her of "due process of law;" and there was therefore no error in declining to entertain such petition and in denying "each and every prayer" therein.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
NEW YORK INSTITUTION FOR THE
BLIND, *Respts.*,

v.

Asbhel P. FITCH, Comptroller of the City
of New York, *Appt.*

(154 N. Y. 14.)

1. An incorporated institution for the blind which has been supported and its property purchased and maintained mainly by appropriations from the state, although it may be only an educational institution so far as it educates paying pupils, is to be regarded, so far as it clothes, educates, and maintains indigent pupils at public expense or by donations from individuals, as a charitable institution subject to the visitation and the rules of the board of charities under Laws 1896, chap. 771, and also to the restriction under Const. art. 8, § 14, against payments by municipalities for any inmate not received and retained pursuant to rules established by the state board of charities.
2. An institution which is educational to some extent may be also a charitable institution within the meaning and intent of the Constitution and statutes respecting charitable institutions.
3. The fact that an institution is subject to the visitation of the superintendent of public instruction is not conclusive against regarding it as a charitable institution subject to the visitation of a board of charities.
4. The constitutional provision that the legislature shall provide for a system of free common schools wherein all the children of the state may be educated has no application to an institution wholly or partly under private control.

(O'Brien, J., *dissent.*)

(October 12, 1897.)

APPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming an order of a special term for New York County granting a writ

of mandamus requiring defendant to audit and pay a claim of relator for material furnished charity inmates of the relator institution. *Reversed.*

Messrs. Francis M. Scott and T. E. Hancock, for appellant:

It became the plain duty of the legislature, after the adoption of the Constitution of 1894, to bring the existing mandatory statutes making appropriations to charities into harmony with the new principle.

People, Inebriates' Home, v. Brooklyn, 152 N. Y. 899; *People, Inebriates' Home, v. Brooklyn*, 11 App. Div. 114; *People, Wayside Home, v. Kings County Supers.* 12 Misc. 187.

The relator is a charitable institution.

New York Inst. for the Blind v. How, 10 N. Y. 84; *Riker v. New York Hospital Soc.* 66 How. Pr. 246.

The adjectives "charitable" and "eleemosynary" are substantially synonymous, and comprehend the bounty of gratuitous education as well as maintenance.

1 Bouvier, Law Dict. 502; 1 Burrill, Law Dict. 278, 536; Black, Law Dict. 195, 418; *Jackson v. Phillips*, 14 Allen, 556; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397; *Vidal v. Philadelphia*, 43 U. S. 3 How. 127, 11 L. ed. 205; *Chapin v. School Dist. No. 2*, 35 N. H. 445.

All gifts for the promotion of education are charitable in a legal sense.

Gerke v. Purcell, 25 Ohio St. 243; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 398, 67 Am. Dec. 160; 3 Am. & Eng. Enc. Law, p. 128, and cases cited.

The functions of the superintendent of public instruction toward the relator do not exclude the jurisdiction of the state board of charities.

Rev. Const. art. 8, § 18.

Messrs. Bowers and Sands, for respondents:

The New York Institution for the Blind is not of a charitable, eleemosynary, correctional,

NOTE.—On the question what constitutes charitable institutions, see also *Creer v. Williams* (Ill.) 21 L. R. A. 454, and cases there referred to; also *Webster v. Wiggin* (R. I.) 28 L. R. A. 510; *Washingtonian Home v. Chicago* (Ill.) 29 L. R. A. 798; and *Philadelphia v. Overseers of Public Schools* (Pa.) 29 L. R. A. 600.

or reformatory character, and therefore is not subject to the visitation of the state board of charities.

A college or other institution primarily established for imparting instruction cannot be called a charitable or eleemosynary institution within the meaning and intent of §§ 11 and 14 of art. 8 of the Constitution.

Shelford, Mortmain, p. 28; *American Asylum v. Phœnix Bank*, 4 Conn. 177, 10 Am. Dec. 112; *Ang. & A. Corp.* 29; 1 Bl. Com. 471; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 640, 4 L. ed. 660; *Williams v. Williams*, 8 N. Y. 532.

Under the Constitution of 1895 the legislature may appropriate money for the education of persons in the New York Institution for the Blind, although such persons are not received and retained pursuant to rules made by the state board of charities.

The expression of a particular intent as to the education and support of the blind certainly governs the expression of a general intent as to care, support, and maintenance (nothing said about education) of inmates of charitable, eleemosynary, correctional, and reformatory institutions.

Hoey v. Gilroy, 129 N. Y. 188; *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012; *Standen v. University of Oxon.* W. Jones, 26; *Churchill v. Crease*, 5 Bing. 180; *De Winton, v. Brecon*, 26 Beav. 533; *State, Barlett, v. Trenton*, 38 N. J. L. 68.

The intent of the Constitution was to subject alone institutions distributing alms for the support and maintenance of the poor to the visitation of the state board of charities. It was not the intent of the Constitution to subject educational institutions to the supervision of such board.

Martin, J., delivered the opinion of the court:

The question presented in this case involves the consideration and construction of certain provisions of the Constitution and of the statutes by which the relator was organized and continued, and by which it has been supported and the management of its affairs controlled. These provisions of the Constitution are new, having gone into operation on the 1st day of January, 1895. So far as applicable here, they provide: "Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper." Article 8, § 9. "No county, city, town, or village shall hereafter give any money or property; or loan its money or credit to or in aid of any individual, association, or corporation; or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law." Article 8,

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§ 10. Section 11 of article 8 provides for a state board of charities, which shall visit and inspect all institutions of a charitable, eleemosynary, correctional, or reformatory character, except those for the insane and adult criminals. Section 13 provides that the visitation and inspection provided for therein shall not be exclusive of other visitation and inspection (then) now authorized by law. Section 14 declares: "Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages to charitable, eleemosynary, correctional, and reformatory institutions wholly or partly under private control, for care, support, and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rule shall be subject to the control of the legislature by general laws." After the adoption of the amended Constitution the legislature enacted a statute which, in substance, authorized the administrative boards or officers of counties, towns, and municipalities in their discretion to appropriate and pay to charitable, eleemosynary, correctional, or reformatory institutions, wholly or partly under private control, for the care, support, and maintenance of inmates, but to be made only for such as were received and retained pursuant to rules established by the state board of charities. Laws 1895, chap. 754. In the same year the legislature passed an act to revise and consolidate the laws relating to that board, which in substance declare that it should be its duty to visit, inspect, and maintain a general supervision of all institutions, societies, or associations which were of a charitable, eleemosynary, correctional, or reformatory character, whether state or municipal, incorporated or not incorporated, which were made subject to its supervision by the Constitution; that the institutions subject to its supervision should include all institutions, societies, and associations which were of a charitable, eleemosynary, reformatory, or correctional character or design; and that institutions for the deaf and dumb and blind should be subject to such visitation and inspection by the state board of charities as the Constitution provides. Laws 1895, chap. 771, §§ 2, 9, 11. It is upon these provisions of the Constitution and statutes that the appellant relies. His claim is that, as the inmates of the relator were not received or retained by it pursuant to the rules established by the board of charities, it was not entitled to the relief which has been awarded. That the relator was wholly or partly under private control, and that the inmates for whose clothing it seeks to recover were not so received or retained, are admitted.

This court has already held that the provisions of the Constitution relating to this sub-

ject operated presently, so that, from the time rules were established by the state board of charities, no payments for inmates not received or retained in pursuance thereof would be justified. *People, Inebriates' Home, v. Brooklyn*, 152 N. Y. 399. Indeed, it is practically conceded by both parties that if the relator is a charitable, eleemosynary, correctional, or reformatory institution, the decisions of the courts below were incorrect, and the orders appealed from should be reversed. That it is either a correctional or reformatory institution is claimed by neither. Thus, the single question to be determined by this court is whether the relator is a charitable or eleemosynary institution. To a proper understanding of that question, it is necessary to ascertain the nature of the New York Institution for the Blind, and the purpose for which it was organized and continued. To that end, a brief history of its organization, the management of its affairs, the manner in which it has been supported, and the class of persons who have been its inmates, seems to be required:

In 1831 Dr. Ackley, who had previously been active in organizing and carrying into operation institutions for the education of the deaf and dumb, turned his attention to the matter of the instruction of the blind. Associating with himself a number of other benevolent gentlemen, they sought to establish an institution wherein the unfortunate blind might be educated, and at the same time learn some useful trade or business by which to obtain a livelihood in after years. With this object in view, they procured the institution of the relator to be organized under and by chapter 214 of the laws of that year. The purpose of its organization, as stated in that act, was the instruction of children who were born blind, or might have become so by disease or accident, and it required the institution to apply its funds or property to that purpose alone. Its first work seems to have been commenced that year in a small room in Canal street, where children taken from the almshouse were instructed under the control of Dr. John D. Russ, who remained in charge of the institution until its utility was established. Its first president was Samuel Ackley, and there were associated with him, as managers and officers of the institution, gentlemen whose known philanthropy was such as to show quite plainly that the purpose of the institution was a benevolent one, and that it was not intended to be one of profit to the corporators. Although the education of the blind had previously been, to some extent, successfully attempted in Europe, the relator seems to have been a pioneer in that work in this country. An institution had been organized in 1829 in Massachusetts, through the exertions of Dr. John D. Foster, under the name of the New England Asylum for the Blind, which was subsequently known as the Perkins Institution and Massachusetts Asylum for the Blind, but it was not opened until 1832. It was first under the charge of Dr. Samuel D. Howe, who commenced in a private house on Pleasant Street, in the city of Boston, with six pupils. In 1833 a similar institution was organized in Philadelphia through the efforts of Robert Vaux. Thus, the idea of organizing special institutions for the instruction of the blind

seems to have occurred to humane and benevolent persons in New England, New York, and Philadelphia at about the same time, and without any apparent concert of action. All these institutions were organized and carried into operation through the efforts of the benevolent, and to accomplish a work of charity that had hitherto been neglected in this country.

In 1834 (chap. 316) the relator was authorized to receive four indigent blind persons from each "senate" district in like manner and at like expense to the state as provided by law for the indigent deaf and dumb. Such indigent blind persons, besides their literary or school education, were to be instructed in some trade or employment taught and carried on in the institution. At that time the deaf and dumb were furnished with board, lodging, and tuition, for which the state paid the institution in which they were maintained and educated. Laws 1822, chap. 284; Laws 1830, chap. 170. In 1836 (chap. 226) \$12,000 was appropriated to be paid to the relator, to purchase in fee simple the 2 acres of ground occupied by it, and to defray the expenses of repairing the buildings thereon, the conveyance to be made to the state; and it was to receive from each senate district four indigent blind persons in addition to the number then supported by the state, to be supported in like manner and at like expense. In the same year, by chapter 399, the preceding statute was amended and partially repealed. It made the appropriation of \$12,000 subject to the condition that the managers should raise \$8,000, which, with the \$12,000, was to be applied to the purchase of the premises occupied by the relator, to the erection of a workshop, and to repair the buildings thereon. It then provided that the title should be vested in the managers, but that the premises so purchased should be used by them solely for the benefit of the blind, and as provided by the 3d section of chapter 226, which required the managers to receive from each senate district four indigent blind persons in addition to the number then supported by the state. The managers were required to report to the legislature each year. In 1839 (chap. 200) the relator was authorized to receive from each senate district eight additional indigent blind persons, to be educated and maintained in the same manner as provided in the previous statutes; and the sum of \$15,000 was appropriated, to be paid in three annual instalments, upon condition that the managers should raise \$10,000, which sums were to be applied to pay for the labor and materials necessary to complete the structure upon the premises, and to remove the old buildings thereon. It also provided for clothing such pupils by the counties from which they were sent, the amount not to exceed \$20 for each pupil. In 1841 (chap. 175) the legislature appropriated to the relator the sum of \$5,000 for the purpose of leveling and grading the grounds belonging to it, providing necessary fixtures, and erecting and completing a wing to the main building, on condition that the relator should raise the sum of \$7,000, to be applied to that purpose. In 1845 (chap. 58) there was appropriated to the relator the sum of \$25,000, \$5,000 to be paid annually for the period of five years, and the managers

were required to report under oath to the legislature as to the expenditure of the money so appropriated. In 1848 (chap. 198) the act of 1881, organizing the relator, was amended by adding, "and also for the purpose of affording an asylum and employment for other blind persons." By the same act the legislature appropriated to the relator the sum of \$15,000, to be applied to the erection of workshops and other necessary buildings for providing an asylum and employment for the adult blind. In 1852 (chap. 338) the act incorporating the relator was continued, and it was provided that it should receive from each senate district four indigent blind persons to be maintained and educated at the expense of the state; the indigent blind persons then in the institution to form a part of the number to be admitted under that act. In 1859 (chap. 278) it was provided that the relator might sell or convey its real estate in the city of New York between Thirty-Third and Thirty-Fourth streets and Eighth and Ninth avenues, when the managers deemed it expedient; that \$100,000 of the amount received should be invested upon bond and mortgage, \$8,000 applied equally to the immediate relief of certain of the adult blind in the institution, the residue expended in the purchase of other real estate for the use of the institution and the erection of suitable buildings, and that any balance should be invested in stocks of the state, or of the cities of Brooklyn or New York, for the benefit and use of the relator. In 1858, \$16,640 was appropriated for the instruction of 128 pupils in that institution. And an examination of the various supply bills passed each year from 1853 to the present time discloses appropriations of from \$10,000 to \$50,000 made in nearly every year for the support of the indigent inmates of the relator, and that they were generally made under the title of "Appropriations for Charitable Institutions." In 1887 (chap. 744) the New York State Institution for the Blind at Batavia was established, and a general scheme for the care and education of the blind was inaugurated. By that statute the relator was to continue to have the custody, charge, maintenance, and education of the pupils intrusted to it by the state, to be compensated as before, and to receive the same amount from the counties for clothing, until the state institution should be ready to receive pupils, when a portion of them was to be transferred to it. The relator, however, was to retain and to continue to receive all pupils from the counties of New York and Kings, to be maintained and educated by it, and to be compensated by the state for their maintenance and education, and for their clothing by the counties from which they were sent. In 1870 an act amending the act incorporating the relator authorized it to receive all such blind persons from New York and Kings, between the ages of eight and twenty-five years, as the superintendent of public instruction should appoint, and the managers should deem of sufficient character and capacity for instruction, who were to be maintained, educated, and supported by the relator at the expense of the state, with a provision authorizing and directing the supervisors of those counties, where, in the opinion of the superintendent the parents or guardians

were unable to furnish them with suitable clothing, to annually raise and appropriate \$50 for each pupil to be paid to the institution, and applied in furnishing them therewith.

When the relator's claim arose, article 14 of title 15 of the consolidated school law (Laws 1894, chap. 556) provided that all persons possessing the necessary qualifications, who were residents of New York, Kings, Queens, Suffolk, Richmond, Westchester, Putnam, and Rockland counties, should be sent to the institution of the relator; that their board, lodging, and tuition should be paid by the state; that appointments to the institution should be made by the superintendent of public instruction, and where, in his opinion, the applicants were able to bear a portion of the expense, he might impose conditions by which some share of the expense of clothing and education should be borne by their parents, guardians, or friends. The period of instruction for such pupils was five years, but it might be extended to not exceeding eight. During the first thirty-nine years of its existence the whole number of pupils received by the relator was 1,001, being an average of about twenty-six a year. Assuming that each remained in the institution the full term of five years, the average number of pupils in the institution was 180, and about the same number as there were of the indigent blind, who were, before 1870, educated by the relator at the expense of the state. There are now in the institution 177 pupils, thirty of whom are residents of the state of New Jersey, and the remainder are from the counties of New York, Kings, Queens, Suffolk, Rockland, and Richmond. Of these ninety-five are from New York, and the bill presented by the relator for clothing shows that eighty-eight were indigent pupils; and hence that all the pupils in the institution from the county of New York, except seven, were indigent pupils, educated, maintained, and clothed by the state and county.

An examination of the history of the relator, of the statutes organizing and continuing it, and the statutes relating to the management of the affairs of its institution, including the manner of its support and the class of persons who became its inmates, shows that the purpose of its organization was a benevolent one, and that during nearly the entire time from its organization to the present it has been supported, and its property purchased and maintained, mainly by appropriations made by the state, and that it has been treated and regarded as one of the charitable institutions therein. Indeed, that its purpose was a benevolent one was practically admitted by Mr. Waite, who for many years had been the superintendent of the relator, as in his report for the year 1887 he, in substance, said that experience had proved that these schools were essential to the well being of society, and that private philanthropy and public policy could find no work more beneficent and wise in which to unite. The relator is doubtless, to an extent, an educational institution. But that fact alone does not justify the conclusion that it is not a charitable institution, within the meaning and intent of the Constitution and statutes. An institution may be in a sense educational, and at the same time be wholly or partly charitable,

as the education and maintenance of indigent pupils while being educated may be the subject of charity as well as support alone. An institution may be both educational and charitable, and, if so, it falls within the provisions of the Constitution and statutes, as it is to be observed that the provisions are that the board of charities shall visit and inspect all institutions which are of a charitable character or design; and hence, to fall within that description, it is not necessary that the institution shall be wholly charitable. It need only be an institution which is wholly or partly charitable in its character and purpose. Nor is the fact that institutions for the instruction of the blind are made subject to the visitation of the superintendent of public instruction controlling in determining this question. It may be conceded that this institution is partially educational, and subject to the visitation of the superintendent of public instruction, and yet by no means follow that it is not an institution which is charitable in its character and purpose, and therefore also subject to the visitation of the board of charities as the Constitution provides that the visitation by the board of charities is not exclusive of any visitation then provided by law, which would clearly include the visitation by the superintendent of public instruction.

The obvious purpose of the legislature in incorporating and continuing the relator, as well as in appropriating the money of the state to the purchase of its real estate, to the erection of its buildings thereon, and to the support of its indigent inmates, was to aid in providing for the education of the unfortunate blind, and, so far as necessary, to aid in supporting and maintaining them, at least while acquiring an education. A need existed on the part of these afflicted people for an education, if one could be acquired. To accomplish this, special schools, employing special methods and special appliances, were required. Without the assistance of the state or the benefactions of individuals, it could not be obtained. To supply this necessity the relator was organized, and the expense of the education of its pupils was defrayed by the state and private contributions, as will be seen from the statutes referred to, and the decisions of our courts in relation to bequests to it. *New York Inst. for the Blind v. How*, 10 N. Y. 84; *Riker v. New York Hospital Soc.* 66 How. Pr. 246, 254. It seems quite plain that an institution thus organized and maintained must be regarded as one of a charitable character, within the intent and meaning of the Constitution and statutes. That the New York Institution for the Blind was regarded by the framers of the present Constitution as a charitable institution, as well as educational, is manifest. The attention of the legislature and of the people had been previously called to the subject of the appropriation of the money of the state to the support of the deaf and dumb and blind. In 1891, Supt. Draper called especial attention to the fact that more than \$262,000 was annually appropriated to the support of these institutions, that the supervision of the state over them was inefficient, and then observed: "The unadvisedness of expending so

much money from the state treasury without close state supervision cannot anywhere be questioned." It is quite obvious that this, with other similar suggestions, the discussion of the subject by the public press, and the numerous petitions presented, called the attention of the convention to the necessity for a closer and more efficient supervision of these institutions. This was a subject which, in the language of the president of the convention, "deeply agitated the minds of the people of the state," and led the convention to the adoption of the provisions under consideration. The president, in stating what had been accomplished by the convention, among other things, said: "Besides that, we have secured the regulation of the state board of charities to this effect: That, wherever any public money is devoted to a private charity for the public service, it shall continue under public control, and the vigilant eye and the strong arm of the people shall be able to follow every dollar of the public money into every institution to which it is so devoted." Again, when we refer to the debates of the convention upon the subject, they show that it was its plain intent to include the relator among the charitable institutions of the state. While referring to the question of the jurisdiction of the state board of charities under the present Constitution, Mr. Lauterbach, who was chairman of the committee on charities, expressly stated that it would have jurisdiction of two institutions for the blind, obviously meaning the relator and the state institution at Batavia, as there seems to be no other in the state. The arrangement of the provisions of the Constitution, as well as the language employed, indicates the same purpose. It will be observed that §§ 9 to 15 of article 8, which contain the provisions as to the education and support of the blind, the deaf and dumb, and juvenile delinquents, relate only to charitable, eleemosynary, correctional, or reformatory institutions, while no mention is made of educational institutions which are not of a charitable character, and §§ 1 to 4 of article 9 relate to institutions within the state which are purely educational. Besides, the various officers of the state, whose duties have led them to consider the relation of the New York Institution for the Blind to the state have, with great uniformity, regarded it as one of the charitable institutions therein. It has been so treated by the several controllers of the state, the superintendents of public instruction, the boards of charities, and by the legislature as well, as will be seen by an examination of the reports of these officers and boards, and the various acts of the legislature appropriating the money of the state for the purchase and maintenance of its property, and for the support of the indigent inmates therein.

It is doubtful if it can be fairly said that the principle here involved has not already been decided by this court. In *New York Inst. for the Blind v. How*, 10 N. Y. 84, after reviewing the statute by which the relator was organized, and the subsequent statutes relating to its management and the support of its inmates, this court held that the relator was an institution for the support and education of the indigent blind, and was properly described as an

institution for the instruction and maintenance of the indigent blind of the city of New York. In *Riker v. Leo*, 115 N. Y. 98, 102, that case was referred to by Judge Gray, who said: "It was held that though the act of incorporation did not bring the objects of the institution within those described in the will, that 'subsequent legislation had so far modified the charter of the corporation in those particulars that when the will was made these several circumstances had been ingrafted upon it and might well enter into a description of its general scope and purposes.'" In *People, Inebriate's Home, v. Brooklyn*, 152 N. Y. 399, Andrews, Ch. J., quite thoroughly and exhaustively examined and discussed the history of the public charities of the state, and the origin and purpose of the provisions of the present Constitution relating to that subject. The opinion in that case shows quite plainly that the purpose of the framers of the present Constitution was to bring under the supervision of the board of charities all corporations or institutions of the state that were charitable, or of a charitable character or design, which were wholly or partly under private control, and to prohibit the payment of any public money for the care or maintenance of any inmate of such an institution who was not received and maintained pursuant to rules established by that board. It also shows that the institutions for the care and education of the blind were regarded as charitable institutions, within the meaning of the Constitution and statutes passed in pursuance of its provisions. The opinion in that case is an interesting one, has an instructive and important bearing upon the question under consideration, and seems to practically dispose of it.

Moreover, when we consider the decisions in other jurisdictions, and the doctrine laid down by text-writers, as to what is a charitable institution or a charitable use or trust, they seem to lead to the same conclusion. Thus, in *American Asylum v. Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112, where a corporation had for its sole object the education and instruction of the deaf and dumb, which supported and instructed indigent persons of that class gratuitously, received a pecuniary compensation from pupils of ability to make it, derived its means of dispensing charity from the donations of individuals and of the public, and applied its funds exclusively to the general object of its institution, it was held that it was an institution of a charitable or eleemosynary character. *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, is to the effect that a gift to be employed in founding an institution for the education of the youth of a county is a charitable gift. In *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205, it was said that donations for the establishment of colleges, schools, and seminaries of learning, especially for orphans or poor children, were charities in a judicial sense. In *Chapin v. School Dist. No. 2*, 85 N. H. 445, it was held that a gift to promote education was a charity. *Gerke v. Purcell*, 25 Ohio St. 229, is to the effect that a charity, in a legal sense, includes, not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science

and art, without any particular reference to the poor, and that schools established by private donations, and which are carried on for the benefit of the public, not with a view of profit, are institutions of purely public charity. The opinion in that case by Judge White is an instructive one upon this question, and he cites many authorities which have a direct bearing upon the question as to what is a charity or a charitable institution. A gift designed to promote the public good by the encouragement of science, learning, and the useful arts, without any reference to the poor, is a charity. *American Academy of Arts & Sciences v. Harvard College*, 12 Gray. 583. To establish a professorship of the fine arts in a university, or to found an agricultural college, is a charity. *Cresson's Appeal*, 30 Pa. 437; *Price v. Maxwell*, 28 Pa. 23; *Taylor v. Bryn Mawr College*, 34 N. J. Eq. 101. In *Jackson v. Phillips*, 14 Allen, 539, 556, Gray, J., referred to the definition of the word "charitable," as given by Mr. Binney, who defined a charitable or pious gift to be, "Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense,—given from these motives and to these ends,—free from the stain or taint of every consideration that is personal, private, selfish." That definition was approved by the supreme court of Pennsylvania in *Price v. Maxwell*, 28 Pa. 35. The judge then referred to the rule of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States, which is, "A gift to a general public use, which extends to the poor as well as the rich." *Jones v. Williams*, 2 Ambl. 652; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *Mitford v. Reynolds*, 1 Phill. Ch. 191, 192; *Perin v. Carey*, 65 U. S. 24 How. 506, 16 L. ed. 711. He then gave his own definition of the word "charity," as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." In *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 526, 542, 4 L. ed. 681, 635, Chief Justice Marshall held that that college was an eleemosynary and private corporation. In *Angell & Ames on Corporations* it is said: "Eleemosynary corporations are such as are instituted upon a principle of charity: their object being the perpetual distribution of the bounty of the founder of them to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent, and sick, or deaf and dumb. And of this kind, also, are all colleges and academies which are founded where assistance is given to the members thereof, in order to enable them to prosecute their studies or devotion with ease and assiduity." Section 39. Morawetz, in his work on Corporations, says: "The distinguishing feature of charitable corporations is, that they are formed for the administration of charitable trusts, and not for the profit of the corporators

themselves; for example, corporations formed for the management of free hospitals and asylums for the relief of the poor, insane, blind, or otherwise helpless." Section 4. Kent, in speaking of eleemosynary corporations, says, "In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations." 2 Kent, Com. p. 274. In Burrill's Law Dictionary, in defining the word "charitable," it is said: "This word in the expressions 'charitable uses,' 'charitable trusts,' is understood in a very large sense, comprising not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and for any other useful and public purpose, as well as donations for pious or religious objects." In Grant on Corporations, 115, it is said: "The legal definition of charity . . . is a gift to a general public use, which extends to the rich as well as poor . . . [and] property held for public purposes is held for charitable uses, in the legal sense of the term 'charity.'" *Atty. Gen. v. Heelis*, 2 Sim. & Stu. 76; *Atty. Gen. v. Dublin*, 1 Bligh, N. R. 812, 857. It is doubtless true that in many of the authorities cited the word "charitable" has been given a broader and more comprehensive meaning than should be applied to it as it occurs in the Constitution and statutes relating to the subject under consideration. We think that, in determining the question before us, it should be given only its usual and ordinary meaning, and that, when so understood and applied, the relator must be regarded as a charitable institution, so far as it clothes, educates, and maintains indigent pupils at public expense, or by donations from individuals. So far as it educates pupils who pay for their tuition, board, and maintenance, it is not to be regarded as a charitable, but only as an educational institution. As to those pupils, the board of charities has no jurisdiction or power of supervision. Being to an extent charitable as well as educational, it clearly falls within the provisions of the Constitution and statutes, as an institution of a charitable character or design. The legislature has not attempted, by general laws or otherwise, to control the rules established by the board of charities, and hence the last sentence of § 14 of article 8 of the Constitution has no application to this case.

The contention of the respondent, that the various appropriations for the support and education of indigent blind pupils in its institution have been made in pursuance of the constitutional obligation to provide for the education of all the children of the state, cannot, we think, be sustained. That provision is as follows: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." Article 9, § 1. Manifestly, this provision has no application whatever to the appropriations made by the state for the support and education of the indigent blind who have been inmates of the institution of the relator. In the first place, that provision is new, having gone into effect in 1895, and, as nearly all the appropriations

made for the care and education of the blind by the relator were anterior to that time, they could not have been based upon it. Besides, that provision relates only to the public or common schools of the state, and has no application to an institution wholly or partly under private control. It seems manifest that the appropriations prior to January 1, 1875, were made independently of the Constitution, because until that time there were no constitutional restrictions upon the power of the legislature to make appropriations of that character. After the amendment which went into effect in 1875, they were made under the special provision of the Constitution as amended, which permitted the legislature to make such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it might seem proper. Since the adoption of the Constitution of 1894 the appropriations have been made in pursuance of a similar provision contained in that instrument. That the legislature had power to devote the money of the state to those purposes, under the Constitution as amended in 1874, was clearly recognized in *Shepherd's Fold of Protestant Church v. New York*, 96 N. Y. 187, 145. In that case Rapallo, J., said: "The general scheme of the constitutional provisions referred to seems to be that the general funds of the state shall not be given to local charitable institutions, except in aid of the blind, the deaf and dumb, and juvenile delinquents." That such institutions were regarded as charitable is to be plainly implied from the language employed. Again, the provision of the Constitution as to the education of all the children of the state in its common schools is a general one, while the provisions for the education and support of the blind, the deaf and dumb, and juvenile delinquents are special, relating only to the classes enumerated. Therefore it is obvious that, as to persons belonging to those classes, the special provisions must govern, to the exclusion of the general one, and the former must be regarded as exceptions to the latter. The claim that, if the institution of the relator is charitable, then all the appropriations made to it by the state since the act of 1870 have been violative of the Constitution, seems wholly untenable. In *Shepherd's Fold of Protestant Church v. New York*, 96 N. Y. 187, 145, it was held that § 10 of article 8 of the Constitution did not prevent the application of state money to corporations or private institutions for the benefit of the blind, the deaf and dumb, and juvenile delinquents, as it made an exception from the general prohibition in favor of those objects. That seems to be the plain reading of the Constitution. Moreover it was held in that case that under § 11 of article 8 the counties, towns, and municipalities of the state might devote money raised by local taxation to the support of the poor, and that the payment of money by a municipality to a private corporation for the support and education of orphans or friendless children, or for training and educating the children of poor clergymen, came within the exception permitting it to make provision for the support of its poor, and was not in conflict with that section. Within the principle of that case, it seems clear that the state

could appropriate its funds for the education and support of the blind, and that counties might appropriate the sum required for clothing the indigent pupils therein who were residents of the county making the appropriation.

If it be said that the 8d section of the act of 1870, requiring the counties of New York and Kings to appropriate money to enable this institution to furnish its indigent pupils with suitable clothing, is mandatory, and hence in conflict with, and abrogated by, § 14 of article 8 of the Constitution as amended in 1894, the answer is that chapter 754 of the Laws of 1895 is the law which controls; and as it was intended to give effect to the amendments of the Constitution in that respect, and to cover the whole subject, it operated as a repeal of that section. If, however, this was not so, and the Constitution abrogated § 8 of the act of 1870, and § 280 of the charter of Greater New York is unconstitutional, I do not perceive how it would in any way change the character of the institution of the relator. It would simply furnish another reason why the decision in this case should be reversed, as in that event the supervisors would not be authorized to raise the amount specified.

Another argument presented by the respondent is that the charter of Greater New York authorizes the board of education to distribute a ratable proportion of the school fund to every pupil in the relator's institution, and hence it must be regarded as educational, and not charitable. The defect in this argument lies chiefly in the assumption of the respondent that an institution cannot be educational, and at the same time a charitable one. We have already seen that very many of the educational institutions of the land have been held to be charitable as well. When title 4 of chapter 18 of the charter of Greater New York, which contains the provisions referred to, is examined, it shows conclusively that many, if not all, the charitable institutions of the city of New York which are to any extent educational are given a ratable proportion of the school fund. It gives a portion of that fund to the schools maintained by the Five Points House of Industry, by the Ladies' Home Missionary Society of the Methodist Episcopal Church, by the New York Orphan Asylum, by the Children's Aid Society, by the Roman Catholic Orphan Asylum, by the two half-orphan asylums, by the Society for the Reformation of Juvenile Delinquents, by the Leake & Watts Orphan House, by the Almshouse for the City of New York, by the Association for the Benefit of Colored Orphans, by the Female Guardian Society, by the New York Juvenile Asylum, by the New York Infant Asylum, by the Nursery and Child's Hospital, and by the orphan asylums and industrial schools in the city of Brooklyn. To say that the appropriation of a portion of the school fund to the education of the inmates of these institutions changed their character from charitable institutions to institutions that are purely educational seems quite absurd.

Any discussion of the question whether the statutes applying a portion of the common-school fund to other than the common schools of the state are unconstitutional or otherwise

is wholly out of place at this time. If it be assumed that they are unconstitutional, provided those institutions are charitable in their character or design, it would only prove that the legislature had again overstepped the limits of the Constitution, and passed certain statutes which were unauthorized. If such were the case, similar instances are not so rare as to render the enactment of such a statute sufficient evidence that these institutions were not of a charitable character or design to overcome the facts which so clearly show such to have been their purpose. Besides, when we examine § 661 of the same act we find that it expressly provides that no payments shall be made by the city of New York to any charitable institution wholly or partly under private control for the care, support, secular education, or maintenance of any child surrendered to it, except upon a certificate that such child has been received and is retained by such institution pursuant to the rules and regulations established by the state board of charities. It is true, as claimed, that the Constitution permits the legislature to make provision for the education of the blind; but to say that it, without qualification, permits the legislature to provide for separate education of the blind in an institution wholly or partly under private control, is incorrect. All the provisions of the Constitution relating to this subject should be read together. When so read, it becomes obvious that the power of the legislature to authorize counties to pay for the care, support, or maintenance of the blind is limited to the constitutional provision which forbids such payments for any inmate of a charitable institution wholly or partly under private control, who is not received and retained pursuant to the rules established by the state board of charities. The question here is not whether the legislature may make provision for the education of the blind, and appropriate money of the state for that purpose, but is whether a county or city can pay its money to a charitable institution wholly or partly under private control for the care, support, and maintenance of its inmates who are not received and retained therein pursuant to rules established by the state board of charities. Such payments are expressly forbidden by § 14 of article 8 of the Constitution as amended in 1894. The unqualified declaration of the Constitution is that payments by counties or cities to charitable institutions wholly or partly under private control for care, support, and maintenance may be authorized, but not required, by the legislature, but that no such payments shall be made for any inmate of such institution who is not received and retained pursuant to the rules established by the state board of charities. This declaration of the organic law is plain and unambiguous, and expressly forbids the appropriation of money by the counties and cities of the state to any such purpose unless the inmates are received and retained in the manner stated. Its manifest purpose is to make all appropriations of public moneys by the local political divisions or municipalities of the state to institutions under private control subject to the supervision and rules of the state board of charities.

These considerations lead to the conclusion that the relator was, to an extent, a charitable institution; was, so far as it was charitable, subject to the visitation of the board of charities, and the rules adopted by it; and that no payment could have been properly made to the relator for the maintenance or support of any indigent inmate not received and retained by it pursuant to the rules of that board.

Therefore it follows that *the orders of the Appellate Division and Special Term should be reversed*, and the relator's motion for a peremptory writ of mandamus be denied, with costs to the appellant in all courts.

O'Brien, J., dissenting:

The defendant, as controller of the city of New York, has in his hands the moneys raised by taxation for the purpose of furnishing clothing to blind pupils from that city receiving instruction in the New York Institution for the Blind, under § 8 of chapter 166 of the Laws of 1870. The institution has presented to the controller the proper bills and vouchers upon which to draw the money, but he has refused to audit or pay them for the sole reason that the state board of charities has notified him that the institution has not complied with certain rules and regulations formulated by that body with respect to charitable, correctional, and reformatory institutions. There is nothing in the record or in the printed rules of the board to show what particular rule is claimed to apply to this institution, or has been disregarded. The managers of the institution assert that it is an educational, and not a charitable, corporation; that it is engaged in the business of educating blind children, and is in no just sense a charitable institution. Moreover, they contend that it would be derogatory to its reputation, standing, and success as an educational institution engaged in the training and instruction of a special class of pupils, who are collected from all parts of the country and from other countries to group it with poorhouses, asylums, and reformatories, rather than strictly educational institutions, where it properly belongs. That such a classification would convey a false impression of the character and objects of the institution, and thus embarrass and hinder its work, is, of course, quite possible. These objections to the position of the controller and the state board of charities are fully set forth by the managers in the papers that appear in the record, and upon which the court, at special term, granted a peremptory writ of mandamus, requiring the controller to audit and pay the bills. The appellate division has affirmed the order, and the controller appeals to this court.

The controversy, in one aspect, turns upon the single question whether the relator, the New York Institution for the Blind, is a charitable or an educational institution. If it is to be classed with the former, and is fairly within the meaning of the provision of the Constitution hereafter referred to, then the state board of charities is entitled to participate with the managers in its government, and has jurisdiction over it for the purpose of prescribing rules and regulations and exercising visitatorial powers; but, if it is to be

classed with the latter, it has not. The officers of the institution have stated in the moving papers, as matters of fact, as already noted, that to classify the institution as one dispensing charity in some form, or as one the inmates of which are beneficiaries of charity in some form, would impair its reputation and usefulness as an institution of learning, which it is claimed is its true character. The specific grounds or reasons upon which the managers base this contention have not been stated in such a manner that we can fully appreciate their force, but it is quite obvious that we should not resort to any strained or refined construction of the Constitution or the statutes in order to bring the institution within that class of corporations known and designated as charitable or reformatory. The true character of the corporation must be ascertained from the objects and purposes for which it was created, and the nature of the business in which it is now engaged. The class to which any corporation properly belongs must be determined primarily from its powers and duties as enumerated in the charter. The object of its existence, and the general functions which it may legally exercise and discharge, are always supposed to be found in the statute from which its corporate life is derived.

The relator was incorporated under chapter 214 of the Laws of 1831, for the purposes clearly stated in the statute in these words: "All such persons as now are or hereafter may become members of the said institution shall be and are hereby constituted and appointed a body corporate and politic, in fact and in name, by the name and style of the New York Institution for the Blind, for the purpose of instructing children who have been born blind, or who may have become blind by disease or accident, and by that name they and their successors shall and may have succession, and shall be in law capable of suing and being sued, pleading and being impleaded, defending and being defended in all courts and places whatsoever, in all manner of actions, suits, matters, complaints, and causes whatsoever." The purpose for which the corporation was created was therefore the instruction and education of children who have been born blind, or who may have become blind by disease or accident. It was not created for the purpose of administering any charity, or of dispensing alms for the relief of poor persons. It was a purely private corporation, organized for a purely educational work, namely, the instruction of a particular class of children. It has nothing whatever to do with the maintenance or care of that class known as the "indigent blind," composed of persons of all ages and conditions. They are, no doubt, objects and beneficiaries of charity, and as such maintained and cared for by the state, as a public charge, in whole or in part. So far as this class are concerned, public moneys are raised and paid for care and maintenance, and not for education. The indigent blind are beneficiaries of public charity in the same sense as the inmates of almshouses and poorhouses, though they may be maintained in separate and special institutions. Those institutions are primarily charitable in their nature. The inmates, as a general rule, have passed the educational period of life, and

whatever of instruction or mental discipline they may receive is merely incidental to the main object, which is personal relief. Money contributed by the state or any of its political divisions for the purpose of educating blind children is in no sense charity, while that contributed for the support of the indigent blind is, or may be. The duties and obligations of the state with respect to education should not be confused with those that concern the care and support of the poor and unfortunate. The two obligations rest upon distinct theories, and have been assumed upon principles and for reasons that differ widely from each other. The state, through the Constitution, has taken upon itself the duty of imparting to every child within its jurisdiction, whether rich or poor, an education sufficient to enable him to discharge the duties of good citizenship, and to earn his living in some lawful calling. The legislature is commanded to provide for a system of free schools in which all children may be educated. Article 9, § 1. That the state owes as much to the unfortunate child who has been born or becomes blind as it does to the child that can see is a proposition which, it may be assumed, no one will deny. The blind child becomes a citizen, and must engage in the struggle for existence, as well as the more fortunate one who can see. The state is bound to educate them both, but it is obviously impossible to discharge this duty in the same way, or under the same system. The conditions that surround the two children differ so widely that, while one may be educated in the common schools, the other must be educated in a different school, with different modes of instruction and different rules of discipline. It was to meet this obvious want in the case of blind children that the relator was incorporated. The state has not assumed this duty of education from any motives of charity and benevolence. The obligation rests upon a very different, and much more selfish, principle. It is really the principle of self-protection. Since a free state, founded upon the popular will, cannot exist unless sustained by intelligent and educated citizenship, the state itself assumes all the duties and obligations incident to such training and education. Hence every child may claim from the state, as a right, such an education as will enable him to become a good citizen, and that term obviously implies reasonable fitness for all the duties of life. The state may in some cases furnish books for the child, and even clothing, but in doing so it dispenses no charity, but simply discharges an obligation which it has assumed. For every dollar that the state expends in the education of children unable to educate themselves, it is supposed to receive an equivalent in a more elevated standard of citizenship. But no one can claim charity as a right. Contributions for the support of the poor and unfortunate, whether they proceed from public or private sources, are purely voluntary, and founded solely upon motives of religion and humanity. The demands of charity, whether upon individuals or the state, are always addressed to that conscientious sense of duty to relieve human suffering and to administer aid to those who are in distress. While civilized governments in modern times do not disregard

its claims, yet they are founded upon a duty of imperfect legal obligation. But the obligation to educate the children who are to become the future citizens is found in the express mandate of the Constitution, and enforced by compulsory laws. Institutions that receive public or private funds for the support of the poor are properly classed as charitable institutions, since they dispense or administer charity in some form to those who are dependent upon it, and the inmates of such institutions are the beneficiaries and recipients of charity. But blind children who are educated wholly or partially by the aid of public moneys are not the beneficiaries of any charity any more than the other children of the state who are educated at the public expense; and institutions for the education or instruction of blind children are not properly classed as charitable institutions, any more than academies or schools receiving state aid. Since all the children of the state may claim the benefit of an education as a right secured to them by the Constitution, the blind child, who happens to receive instruction in a private institution to which the state has contributed money, to a limited extent, because it cannot in that case fully perform the duty of education itself, cannot properly be classified as a pauper. He stands upon the same footing as every other child in the state, and is simply a beneficiary of its policy of free education. The general government, through the action of Congress, has made provision for the support and military education of young men selected from congressional districts according to law: but it has never been supposed that the institutions in which they are educated are of a charitable nature, or that the young men themselves were the objects or beneficiaries of any charity. Keeping always clearly in view the broad distinction between education and charity, we may now examine the statute under which the money in question was raised, in order to ascertain the object and purpose to which it was devoted. It was clearly intended for one or the other of these objects,—that is, charity or education,—but it is important to determine which. The material parts of the act of 1870, and under which this controversy has arisen, are as follows:

"Sec. 1. The managers of the New York Institution for the Blind are hereby authorized to receive, upon the appointment of the superintendent of public instruction, made for a term not exceeding five years, all blind persons, residents of the counties of New York and Kings, between eight and twenty-five years of age, who, in the judgment of the board of managers of said institution, shall be of suitable character and capacity for instruction, and shall have charge of their maintenance, education, and support, and shall receive compensation therefor from the state in the same manner as is now provided by law. The term of such appointments may be extended from time to time, by the superintendent of public instruction, on the recommendation of the board of managers of the said New York Institution for the Blind, for such further period as they may deem advantageous in each individual case

"Sec. 2. Application for admission into the

institution shall be made to the board of managers, and each application shall set forth the age, the fact of blindness, and that the applicant is a legal resident of the town, county, and state claimed as his or her residence, with such other information as the board may require; and each application shall be sworn to by the applicant, or his or her parents or guardian, and shall be signed by at least one member of the board of supervisors of the county in which the applicant may reside, and also be recommended by the president and superintendent of the said institution, and transmitted by the said institution to the superintendent of public instruction.

"Sec. 8. The supervisors of the county of New York or Kings, from which state pupils shall be sent to and received in the said institution, whose parents or guardians shall, in the opinion of the superintendent of public instruction, be unable to furnish them with suitable clothing, are hereby authorized and directed in every year while such pupils are in said institution, to raise and appropriate \$50 for each of said pupils from said counties respectively, and to pay the sum so raised to the said institution, to be by it applied to furnishing such pupils with suitable clothing while in said institution."

It will be seen that the institution is not obliged to receive any of the persons mentioned in the statute. It is a private institution, and may receive them or not at discretion. It has no power or right to receive them for any purpose but that of instruction or education. It can admit only such as are within certain age limits, embracing the educational period of life, and then only for a limited time. It cannot receive them otherwise than upon the appointment of the superintendent of public instruction, who is the head of the educational department of the state. The children must, in the judgment of the managers, be of suitable character and capacity for instruction. The superintendent cannot properly appoint the persons described, and the managers cannot properly receive them into the institution, except for the purpose of education. They may or may not be poor children, since the statute is silent on that point. The superintendent may make the appointment according to his own judgment, but, whether they are rich or poor, the manifest purpose of placing them in the institution is education. They cannot enter for the purpose of support, or as beneficiaries of charity. It is true that when received the state pays for their education and support, but support and maintenance are in that case merely incidental to education. The children cannot be educated without being kept in the institution, and so education and support must go together, and the state pays for all. But this is not charity. It is the discharge of the obligation which the state has assumed, to furnish to all children an education to fit them for the duties of citizenship. None of the children thus instructed are the beneficiaries or recipients of charity, any more than the children educated in the free common schools. In both cases the state is discharging the obligation, but in different ways and by different methods, since the circumstances and conditions of the children

are different, but the theory and principle upon which it acts are in both cases the same. The sole purpose of collecting these blind children in this institution and retaining them there was, not relief from poverty or want, but to impart to them some useful knowledge, which is the end and aim of all education. Since the enactment of the statute of 1870 the state has paid to this institution nearly a million and a quarter dollars out of the public treasury for the education of blind children. This vast sum was not a contribution by the state to charity, any more than the many millions which were paid during the same time for the support of free common schools. In each case the money was really raised and paid for the same general purpose, and in pursuance of the same general policy. The difference was in the methods employed to accomplish the same result, which was education. The private institutions which received and educated these blind children under contract with the state were not for that reason charitable institutions, any more than the schools and academies in which the other children of the state were educated. They cannot be properly classified otherwise than as educational institutions. The state makes use of them as instrumentalities for discharging the obligation enjoined by the Constitution to provide for the education of all the children of the state. Most clearly the relator is not a charitable institution unless it is engaged in administering some charity of which the inmates, or some of them, are the beneficiaries. What charity does it dispense, and what alms do the inmates receive? Whoever asserts that the institution is of a charitable nature should be able to answer these questions clearly and satisfactorily. The institution receives no money from the public for which it does not render a full equivalent, and therefore it receives nothing for charity. It is beyond dispute that the work in which it is engaged is the education of blind children of a certain age, under contracts with their parents or guardians, which include, not only instruction, properly so called, but support for the time during which the educational process is in operation. From the nature of the case, it is impossible to educate these children in one place and support them in another. The main object, which is education, includes the incident of support for the time being, since the two things are inseparable. The institution does nothing for charity. It educates blind children, for a fixed compensation, under an agreement, express or implied, purely as a matter of business. The state is one of its patrons, for the reason that, having assumed the obligation to educate the blind as well as all other children within its borders, it can discharge that obligation as well or better by employing the relator than by building and maintaining like institutions of its own. Hence it sends, through its constituted authorities, children to this institution, under contracts, and when they are received they are on precisely the same footing as the children placed there by parents or guardians. It pays for their instruction, and incidentally for their support, while in the institution, not from any motives or upon any principles of charity, but in order to promote its own interests, by preparing the

children to assume the duties of citizenship, to engage in the affairs of life, and, so far as possible, to help themselves in the world, instead of becoming a charge upon the public. It was only upon this theory that the legislature could lawfully have authorized the payment of the large sum already mentioned to this institution, since, as we shall presently see, if the relator is a charitable institution, and the money was given and received for a charitable purpose, the legislature, in appropriating it, and the state controller, in disbursing it, violated the plain restrictions of the Constitution; and yet no question is raised here as to the legality and propriety of these payments by the state.

The contention of the defendant is limited to the money raised by the county, under the 3d section of the act, for the purpose of furnishing clothing to certain of the pupils admitted upon the appointment of the superintendent of public instruction, when in his opinion the parents or guardians of any of the children so admitted shall be unable to furnish it. The argument is that, since this money raised by local taxation is to be paid to the institution for the purpose of defraying the expense of clothing such children as may be unable to procure the proper clothing otherwise, it is a gift for charitable purposes, and the institution receiving it becomes a charitable institution. This contention is, I think, quite inadmissible. The discipline of the institution, requiring a uniform dress, is incidental to the process of education, and, from the nature of the case and the circumstances in which the children are placed, a part of the obligation which the state has assumed, and may devolve upon the locality. But money paid for clothing under such conditions is not charity, any more than money paid for books or other means of instruction would be. Should the state or a county assume the obligation to furnish books or even clothing for certain poor children, in order to enable them to attend the common schools, it would not be a gift to charity, and the schools would not thereby be converted into charitable institutions, nor could the children benefited by the contribution be properly classed as paupers. They would, indeed, be properly classed as beneficiaries of the system of free education enjoined by the Constitution, but that is quite a different thing. The obligation to maintain a system of free education for all may properly carry with it many incidental things involved in or connected with the main object. The consideration of the provision of the present Constitution on this and kindred questions is now in order, as it is upon these provisions that the contention of the defendant mainly rests. They are to be found in certain sections of article 8, and, so far as they have any relation to the questions in this case, read as follows:

"Sec. 9. Neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or

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which may hereafter be held by the state, for educational purposes.

"Sec. 10. No county, city, town, or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law.

"Sec. 11. The legislature shall provide for a state board of charities, which shall visit and inspect all institutions, whether state, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional, or reformatory character, excepting only such institutions as are hereby made subject to the visitation and inspection of either of the commissions hereinafter mentioned, but including all reformatories except those in which adult males convicted of felony shall be confined; a state commission in lunacy, which shall visit and inspect all institutions, either public or private, used for the care and treatment of the insane (not including institutions for epileptics or idiots); a state commission of prisons who shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors."

"Sec. 13. Existing laws relating to institutions referred to in the foregoing sections and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the Constitution, shall remain in force until amended or repealed by the legislature. The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law.

"Sec. 14. Nothing in this Constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages to charitable, eleemosynary, correctional, and reformatory institutions, wholly or partly under private control, for care, support, and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities. Such rules shall be subject to the control of the legislature by general laws." Article 8.

"Sec. 1. The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Article 9.

"Sec. 4. Neither the state nor any subdi-

vision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." Article 9.

It will be seen upon a careful reading of these sections that two vital points involved in this case, and which, in my opinion, control the decision, are made perfectly clear.

1. The prohibition against payments of public money by cities or other political divisions of the state to institutions where the inmates have not been received and retained therein pursuant to rules established by the state board of charities applies only to charitable, correctional, or reformatory institutions, wholly or partly under private control, for care, support, or maintenance. The institutions subject to visitation and regulation by that board must belong to the class specified, and the inmates must have been received and retained therein for the purpose specified; that is, for care, support, and maintenance. The relator is an educational institution, and the inmates are received and retained therein for the purpose of education and instruction, and not as poor persons, or for care, support, or maintenance. We have already seen that they could not lawfully have been placed in this institution for any such purpose. If their parents or guardians were unable to support or maintain them, they should have been placed in some institution for the indigent blind. The state, in selecting children for instruction in this institution, cannot take into consideration the poverty or wealth of the child. The relator is not an asylum for the relief of poverty or want, in any form or in any degree, but a school for the education of the blind; and the state, when extending the benefits of such an institution to a limited number of the children that it assumes to educate, has no right to place upon them, or any of them, a badge of pauperism, any more than the general government has the right to send the West Point graduates out into the world as poor scholars or the beneficiaries of charity.

2. The restrictions contained in the Constitution upon the payment of public moneys to private institutions, except that contained in § 4 of article 9, have no application to appropriations or moneys for the education of the blind. The broad and sweeping prohibition of the section last referred to against payments to certain religious institutions doubtless applies to all public moneys or property, and to every form of public aid; but obviously it has no application to this case, since the relator is not an institution that comes within the words of the section.

It is suggested that it was the intent and purpose of the constitutional provisions above cited to subject all institutions receiving public aid in any form, whatever their character may be, to visitation and regulation by the state board of charities, but this proposition is clearly indefensible. Schools, academies, colleges, and other educational institutions receive public money from the state or localities, but no fair-

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construction of the Constitution can bring them within the scope of the powers vested in the department of charities. Nor is it at all necessary, in furtherance of any sound public policy, to resort to any strained construction to accomplish such a result. They are all subject to visitation by the head of the educational department, and thus every public interest is amply protected. Laws 1894, chap. 556, art. 14, § 40.

There is another view of the case that is entitled to great weight in the inquiry whether the relator is a charitable institution, or one for educational purposes. It cannot be held that it is of a charitable nature without condemning as unconstitutional and void the acts of the legislature passed in every year since the enactment of the statutes of 1870, the action of the state controller in paying the money so appropriated to this institution, and all existing laws providing for or requiring such payments. This result must inevitably follow the conclusion that the relator is a private charitable institution, if that view should prevail.

1. It was held in the case of *Shepherd's Fold of Protestant Church v. New York*, 96 N. Y. 187, that the state could not appropriate and pay from its treasury public money for the support of the poor in a private charitable institution, for the reason that the Constitution forbids it, but that such prohibition did not apply to moneys raised by local taxation. In so far as the state is concerned, the Constitution is the same now as it was then. But we have seen that the state has appropriated, and that the state controller has paid, in every year since the act of 1870 was passed, moneys to this institution, as compensation for the support of the children placed there by the superintendent of public instruction, which amount in the aggregate to the sum above stated. Now, if the relator is a charitable institution, and the money was paid for the support of the poor, or as charity to relieve distress, the Constitution was clearly violated, and the money paid without authority of law. It is only upon the theory that the money was paid to a private educational institution as compensation for the education of blind children that the payment by the state of such a large sum of money to the relator can be justified or defended. In my opinion, it was properly appropriated and paid upon that principle, since the payment of money for the education of the blind is expressly excepted from the restrictions of the Constitution.

2. The 8d section of the act of 1870, which requires the city of New York to raise the money in controversy to defray the expense of clothing certain children placed in this institution, is clearly mandatory; and, as mandatory laws for such payments by cities or counties to charitable institutions are now forbidden by the Constitution, the statute is abrogated entirely. *People, Inebriates' Home, v. Brooklyn*, 152 N. Y. 399. But if it should be considered as a statute requiring the city to raise money for the education of blind children, as I think it should be, the Constitution does not invalidate it.

3. The act of 1870, in so far as it requires the city of New York to raise and pay money for clothing pupils in this institution, has vir-

tually been superseded by the recent statute known as the "Charter for Greater New York," which requires the city in each year to raise and pay to the relator \$50 for each state pupil in the institution from that city whose parents, in the opinion of the superintendent of public instruction, shall be unable to furnish them with suitable clothing, to be by it applied to furnishing such pupils with suitable clothing while in said institution. This is also plainly a mandatory enactment, and is clearly a violation of the Constitution, if the relator is to be classed as a private charitable corporation. But if the money thus provided for should be regarded as a contribution for the education of the blind within the limits of the new city, as it clearly should be, the validity of such a provision is beyond question. But it is only upon this theory, which is wholly inconsistent with the defendant's contention, that the statute can be maintained. Laws 1897, chap. 878, § 280, ¶ 22, subd. 6.

4. The charter also contains another provision which, in its relation to the question under consideration, is worthy of notice. By § 1161 the board of education is required to distribute to the managers of this very corporation a ratable proportion of the school fund to every blind pupil in the institution, without regard to age. Assuming, for the purpose of the argument, that it is a charitable institution, as claimed by the defendant, this enactment is clearly in violation of the Constitution, for two reasons: (1) It is mandatory, requiring a local board to distribute funds in its hands or under its control for local school purposes to a private charitable institution for charitable purposes; (2) it diverts the school fund to charitable uses in disregard of the express inhibition of the fundamental law. Const. art. 9, § 3. *People, Roman Catholic Orphan Asylum Soc., v. Brooklyn Bd. of Edu.* 18 Barb. 400; *Gordon v. Cornes*, 47 N. Y. 608; *People, Schenectady Astronomical Observatory, v. Allen*, 42 N. Y. 404. It is only upon the theory that the institution is a school for the education of the blind that a statute virtually providing that the pupils shall share in the public moneys for school purposes in the same way and in the same proportion as the children educated in the common schools can be upheld. It ought not to require argument to prove that money raised by taxation for school purposes, or derived from the income of the school fund, cannot be devoted to charity, or paid for the benefit of a charitable institution. Such a diversion of a fund would be a manifest fraud upon the taxpayers, even if there were no constitutional restrictions in the way; and yet that is precisely what the legislature has done by this section of the charter, if the relator be a charitable institution, and the money is to be paid to it for a charitable purpose. But if the legislature has authorized it to be paid to an educational institution, and for the purpose of educating blind children, as I think it has, then it was devoted to the very purpose for which it was intended when raised. This provision of the charter cannot be sustained upon any other principle, under the restrictions of the Constitution. It is quite apparent from what has been stated that the legislature, the recent commission of eminent citizens charged with the important duty of

preparing a charter for the new city, as well as the chief financial officer of the state, have all acted upon the theory, in dealing with this institution, that it was an educational, and not a charitable, corporation. This theory underlies all the legislation referred to, and, in administration, has been assumed or adopted by every agency of the state.

The learned counsel for the defendant have evidently overlooked an important feature of this case, which has been incidentally referred to in the preceding discussion, but which should perhaps be stated with more distinctness. The legislature, in providing money for the education of the blind, is a law to itself. It is left perfectly free to act as it may think proper, and is not bound by any of the constitutional restrictions or limitations referred to. The language of the Constitution is so clear on this point that it is impossible to misconceive the meaning. "Nothing in this Constitution contained shall prevent the legislature from making such provisions for the education and support of the blind . . . as it may deem proper." Thus, the legislature is given free scope in making provision for the education of the blind. It may grant money for that purpose to public or private institutions, to be raised by general or local taxation. It may direct the payment of such money to such institutions without any conditions whatever, except such as it may itself see fit to impose. The constitutional condition that payments shall not be made unless the inmates are received and retained under the rules of the state board of charities is in that case silent. Neither that nor any of the other restrictions have any application to grants of money for the education of the blind. All appropriations for that particular purpose are subject only to the judgment and discretion of the legislature. In the case at bar the legislature has enacted that certain moneys raised by local taxation shall be paid to the relator. It has granted the money and made it payable without any conditions whatever. But the defendant, as the administrative officer who has charge of the fund, refuses to pay it over unless certain conditions have been complied with by the relator. These conditions, by the very words of the Constitution, have no application to moneys raised for this particular purpose, and the legislature itself has not attached any such conditions to the grant. Thus, the defendant, of his own will, requires the relator, before it can receive the money granted to it by the legislature, to comply with certain conditions or rules that, so far as the relator is concerned, have no foundation in the Constitution or any statute. The legislature has provided, as we have seen, by general laws, that institutions for the education of the blind shall be subject to visitation by the superintendent of public instruction, but that is not made a condition of the payment of the money in question. It has also provided that charitable institutions shall be subject to visitation by the state board of charities (Laws 1896, chap. 546, art. 1, §§ 2, 10), but that is not made a condition upon which the relator is to receive the money in question. One of these statutes (Laws 1895, chap. 771, § 11) provides that institutions for the blind shall be subjected to such visitation

by the state board of charities as the Constitution provides. It provides for inspection of charitable institutions, and those include only such institutions as are devoted to the care and support of the indigent blind, as part of the poor, not blind children who are being educated at the public expense in whole or in part. The relator has charge of a large number of blind children who have been placed there and are paid for by parents or guardians. That class constitutes the vast majority of the pupils. If there were no others, surely no one would then claim that it was a charitable institution. It would be absurd to assert that, when every pupil paid his own way, there was any element of charity connected with the relator's operations. Manifestly, it would then be a private school for the blind, and nothing else. But how can it be said that when the state becomes a patron of such a school, and sends children there that it has assumed an obligation to educate, and makes contracts for their education and support while in the institution, just as parents and guardians make contracts, the character of the institution is changed from a private school to an institution of charity? It is more reasonable to say that the state may educate a few of its unfortunate blind children in a private school for that purpose, without classifying them with the objects and beneficiaries of charity. But, apart from all this can there be any doubt that it is perfectly competent for the legislature to pass a mandatory act providing for the support and education of the blind by taxation upon a city, town, or county, and directing the money to be paid to a private institution, such as the relator is, irrespective of any rules of the state board of charities? The Constitution answers the question by expressly enacting that nothing therein contained shall prevent the legislature from doing that very thing, and, if it may do that, then the relator is entitled to receive the money in question without compliance with any conditions whatever, since the restriction upon payments by localities without compliance with the rules of the board of charities has no application to such a case. The plain meaning of the Constitution is that the legislature may place blind children in such institutions as it may think proper, whether public or private, charitable or noncharitable, and provide for their education and support with public money raised either by general or local taxation, and it may direct that money to be paid to the institution in which such children have been placed without compliance with the rules of the board of charities, or any other condition whatever. Nothing in the Constitution can prevent the legislature from executing its own policy, whatever it may be, when making provision for educating the blind. The relator is most clearly a private corporation or institution of some kind. It has no public or political functions of any kind to perform. It has no relations with the state save those which every other private corporation has. The income which it receives and the funds which it has or owns are derived solely from the prosecution of its corporate business, which is the education of blind children. It does not depend upon or derive anything, so far as appears, from charitable gifts or donations, pub-

lic or private. It is not engaged in dispensing the gratuities of the benevolent or charitable grants from the state, but is conducting its operations with its own means. It receives pupils from parents and guardians and from the state, and educates them for pay. It receives nothing from charity, and gives nothing to charity. Whatever moneys it receives from the state or from localities it receives for the same purpose and in the same way as that from parents and guardians, and it renders to the state the same services and returns the same equivalent. It is not bound by any law to receive pupils from the state, or to retain those which it has received; but may discharge the state pupils at any time; and then, certainly, it would be nothing but a purely private school supported by the private contributions of the parents and guardians, and certainly it would then be impossible for any reasonable man to consider or classify it as a charitable institution. But the true character of the institution, whether charitable or educational, is not to be determined by the presence or absence of a few state pupils, but by the general objects of its incorporation, and the nature of the business in which it is engaged. It cannot be a charitable institution to-day and an educational institution to-morrow, depending always upon the circumstance whether the state is or is not one of the patrons of the school. It is always either the one or the other, and, if it is not charitable when no state pupils are retained, it is not made such by the mere fact that the state makes use of it for the purpose of discharging its obligation to provide for the education of all the children within its limits. There is nothing to show that any of the state pupils could not have been supported and maintained by the parents and guardians at home, but that would not comply with the policy of the state to see to it that even blind children should receive the benefit of an education, so far as possible.

The restrictions with respect to payments by localities to charitable, correctional, and reformatory institutions without compliance with the rules of the state board of charities had no reference whatever to such institutions as the relator. This, I think, is clear, not only from what has been said, but from the very language of the Constitution itself, and the relation which the restrictive words bear to the rest of the section in which they appear. The first sentence of the section takes every provision of the education of the blind out of every restriction in the Constitution, and leaves the legislature at liberty to deal with that subject at discretion. The rest of the section deals with the other classes of persons and other institutions, namely, orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control; and localities are permitted to make provision for the care, support, maintenance, and secular education of their inmates. Having taken these specified institutions out of the general restriction in § 10 of the article against loans or gifts of money by cities, towns, or villages to individuals, associations, or corporations, the remainder of the section simply regulates the manner in which such gifts or grants to such institutions shall be made. It provides—First, that the legislature may authorize, but shall

not require, them; and, secondly, that the money shall not be paid to the institution unless the inmates are received and retained therein pursuant to the rules of the department of charities. The framers of the Constitution, in prescribing the regulations, applied them specifically to "charitable, eleemosynary, correctional, and reformatory institutions, wholly or partly under private control," and again to "such institutions;" but it is manifest that these terms are simply descriptive of the institutions specifically named in the preceding part of the section (that is, orphan asylums, homes for dependent children, and correctional institutions), and were not intended to include schools for the education of the blind. This section of the Constitution simply provides that the legislature may authorize, but not require, localities to provide for the support and secular education of the inmates of orphan asylums, homes for dependent children, or correctional institutions, but that payments shall not be made to them unless the inmates are received and retained under the rules of the board of charities. The restriction applies only to those institutions specifically named in the section, for the benefit of which localities were permitted to raise money. It could not possibly apply to the relator, since by the express words of the first part of this section the legislature was completely emancipated from all restraints when providing for the support and education of the blind. We are concerned in this case with but one question, and that is whether a financial officer like the defendant may withhold money in his hands from the relator, when it has been appropriated by the legislature unconditionally, until it complies with the regulations of the state board of charities; in other words whether the restrictions upon payments by localities to charitable institutions has any application to the relator. It seems very clear to me that it has not. It was manifestly intended for another class of institutions, since all restrictions upon legislative provisions for the education of the blind were removed, and the whole subject left with the legislature. It seems to me impossible, therefore, by any fair process of reasoning or argument, to classify this institution among those designated in the Constitution as charitable, correctional, or reformatory, or to include the pupils placed and retained therein among the beneficiaries of charity, or to apply the restrictions of the Constitution to such a case.

This discussion has assumed a scope and extent that might seem at first view to be wholly unnecessary. The only purpose has been to elucidate a question of some public importance, closely related to legislation and administration, and with respect to which there is not only a wide divergence in the views of counsel, but apparently some conflict of opinion among ourselves. If the discussion has contributed anything tending to reconcile opposing views, or to point out the correct solution of the question, it is to be hoped that the fault of prolixity may be overlooked. The order should be reversed, with costs.

Gray, J., absent.
88 L. R. A.

Henry W. SAGE, *Appt.*,

v.

Mayor, etc., of the City of NEW YORK,
Respt.

(154 N. Y. 61.)

1. **Meadows, pastures, and marshes below high-water mark** did not pass as appurtenant to the grant by Governor Nichols October 11, 1867, to the village of New Harlem of lands bounded on one side by the Harlem river, together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, and other profits, commodities, emoluments, and hereditaments belonging to the lands "within the said bounds and limits set forth."
2. **The title to lands** described in a deed as bounded by a navigable river where the tide ebbs and flows ends at high-water mark.
3. **The privileges or easements of riparian proprietors** upon tide water include the right of access to the navigable part of the water in front as against all but the government as trustee for the people at large.
4. **A riparian owner's right of ingress and egress** to his water front does not include a right to compensation for an interference therewith caused by the public improvement of the water front for the benefit of navigation.
5. **Absolute power to improve a water front** for the benefit of navigation exists in the state or its municipal grantee as a trustee for the public free from any interference by a riparian owner whose sole right as against such authority is the statutory right of pre-emption in case of a sale.
6. **A public grant of lands bounded by tide water** is impliedly subject to those paramount uses to which the government as trustee for the public may be called upon to apply the water front for the promotion of commerce and the general welfare.
7. **The Constitution of 1777** being adopted before the Constitution of the United States had been adopted is a result of all the legislative power that the people of the state could exert untrammelled by any higher law.
8. **Grants of land made by the King of Great Britain** or by persons acting under his authority, made before October 14, 1775, are ratified and confirmed by the Constitution of 1777.
9. **Lands made by filling up a water front** and constructing piers in a municipal improvement of the water front for the benefit of navigation do not constitute an accretion to the land of a riparian proprietor but remain the property of the city for the benefit of the public as dry land just the same as when it was land under water.

(October 12, 1867.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court,

NOTE.—As to rights of riparian owners with respect to wharves and navigable water fronts, see also *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89, and note; *Hastings v. Grimshaw* (Mass.) 12 L. R. A. 617, and note; *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632, and note; *Lewis v. Portland* (Or.) 22 L. R. A. 738.

First Department, affirming a judgment of a Special Term for New York County in favor of defendants in an action brought to restrain defendants from using certain property alleged to belong to the plaintiff, without making compensation for it. *Affirmed.*

Statement by Vann, J.:

The plaintiff, as the owner of a parcel of land lying between Ninety-Fourth and Ninety-Fifth streets, on the Harlem river, which is a navigable stream, where the tide regularly ebbs and flows, traces his title back to a grant made by Gov. Nichols on the 11th of October, 1667, whereby he conveyed to the inhabitants and freeholders of the village of New Harlem certain lands bounded on one side by the "Harlem river, or any part of the said river on which this island [of Manhattan] doth abut, . . . together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting, and fowling, and all other profits, commodities, emoluments, and other hereditaments belonging to the said lands and premises within the said bounds and limits set forth belonging or in any wise appertaining." Said grant was confirmed by Gov. Dongan on the 7th of March, 1686; and under this title, by an unbroken series of conveyances, the plaintiff on the 1st of October, 1861, became seised and possessed of all the premises in question, so far as they consist of uplands, or lands which, in a state of nature, were above water. By virtue of this title he also claims all the rights and easements which ordinarily belong to a riparian owner of lands bounded by a navigable river in which the tide ebbs and flows. He further claims to have acquired from the same source title to the tideway, and for some distance into the stream beyond. The city of New York claims title to the land formerly under water, which used to lie between high and low water mark in front of the uplands belonging to the plaintiff, by virtue of a grant made by Gov. Dongan on the 26th of April, 1686, whereby he conveyed to the mayor, aldermen, and commonalty of the city of New York "the waste, vacant, unpatented, and unappropriated lands lying and being within the said city of New York and on Manhattan island aforesaid, extending and reaching to the low-water mark in, by, and through all parts of the said city of New York and Manhattan island aforesaid, together with all rivers, rivulets, coves, creeks, ponds, water, and watercourses in the said city and island, or either of them," except such portion as had been previously conveyed. Said grant provided that the grantees might, "at any time or times hereafter when it to them shall seem fit and convenient, take in, fill, and make up and lay out, all and singular, the lands and grounds in and about the said city and island Manhattan, and the same to build upon or make use of in any other manner or way as to them shall seem fit, as far into the rivers thereof, or that encompass the same, as low-water mark aforesaid." This grant was confirmed by Gov. Montgomerie on the 15th of January, 1780, as well as by an act of the colonial legislature passed on the 14th of October, 1782 (Laws 1782, chap. 584), which, in

turn, was confirmed by the first Constitution of the state (§ 35). By chapter 50 of the Laws of 1775 the division of the township of Harlem from the city of New York specifically left the tideway in the latter. The city of New York further claims title to the lands under water in front of, and outside of, the tideway, and extending into the river for a considerable distance, by virtue of certain grants from the state. By chapter 285 of the Laws of 1852 the city was authorized to lay out an exterior street along the Harlem river, and the title of the people was thereby conveyed to the city "in and to lands under water from low-water mark to and including the said exterior street," subject to a pre-emptive right to purchase by the adjacent owner in case of a sale by the city. Pursuant to chapter 768 of the Laws of 1857, a bulkhead line, or line of solid filling and pier line, was established in the Harlem river, outside the line of low-water mark; and subsequently, under the provisions of chapter 574 of the Laws of 1871, the state, through the commissioners of the land office, conveyed to the city lands under water in said river out to a line parallel with, and 300 feet outside of, the bulkhead line so established. The city claims that, pursuant to said grants and statutes, it has become lawfully seised, and that it now owns in fee all the lands under water in front of the plaintiff's upland as far out into the river as the exterior line above mentioned. In 1887 a plan for the permanent improvement of the water front of the Harlem river between Ninety-Fourth and Ninety-Fifth streets and the adjacent neighborhood was determined upon and adopted by the commissioners of docks, and approved by the commissioners of the sinking fund, pursuant to chapter 517 of the Laws of 1884. The defendants, conforming to said plan, are now building a sea wall along the waters of the Harlem river beyond the line of low-water mark between Ninety-Fourth and Ninety-Fifth streets, and are filling in behind said wall, and expending thereon large sums of money. They intend to continue and complete the wall in conformity to said plan.

The premises claimed by the plaintiff consist in part of lands made entirely out of the Harlem river, and in part of lands still under water, all of which at the date of the Nichols patent, in 1667, was either between high and low water mark, or else was land under water out in that stream beyond the tideway. The filling in of this land was done pursuant to said legislation for the improvement of the water front of the city of New York, and is in accordance with the plan adopted by the dock department. The outer portion of said improvement consists of bulkheads, docks, and piers, traversed by a marginal street, 125 feet wide, running parallel with the river, and situate below the old low-water mark. Between said marginal street and plaintiff's uplands there is a piece of filled-in land, comprising part of the block lying between Ninety-Fourth and Ninety-Fifth streets, which is not appropriated by said plan and improvement to any public use. No proceedings have been taken to acquire any property or rights of the plaintiff, nor has compensation been made to him, or provided for his benefit. The main issue,

according to the pleadings and the facts agreed upon by the parties, relates to the title to these constructed premises, being the bulkhead, docks, and piers, the lands covered by the marginal street, and those unappropriated to public use, all of which the plaintiff claims under the Nichols charter, while the defendants claim the same under the Dongan and Montgomerie charters, and the various acts of the colonial and state legislatures relating to the subject, as confirmed by the Constitution of 1777. According to the deeds constituting the chain of plaintiff's title to the upland, the grants ran to high-water mark until 1852, when a conveyance running to low water mark was given; and in 1861, when the plaintiff took title, his conveyance purported to cover the lands under water as far out as the bulkhead-line established by the harbor commissioners. No claim is made that the plaintiff, as owner of the upland, has applied to the sinking fund commissioners for any grant of the land in controversy. Upon these facts, which were stipulated, the plaintiff asked at the trial—the demand in the complaint being somewhat broader—that the defendants should be restrained from using said docks and bulkheads and the lands covered by the marginal street until compensation should be made to him therefor, and that he be adjudged to have title in fee simple absolute to the intermediate piece of land lying between the marginal street and his upland not appropriated by the plans of the defendant or the statutes of the state to any public use. The special term dismissed the complaint, holding that the title of the plaintiff under the ancient grants ran only to high-water mark; that his riparian rights as owner of the uplands were subordinate to the right of the public authorities to build thereon and make improvements below low-water mark, essential to navigation and commerce, without compensation; and that the acts of the defendant were not unlawful. The judgment entered upon the decision of the trial court was affirmed by the appellate division, one of the learned justices dissenting, and the plaintiff now comes here.

Mr. William C. DeWitt, for appellant:

The title of the plaintiffs vested in them all the rights and easements upon the river incident to riparian ownership under the most favorable circumstances.

The Nichols grant to Harlem preceded the Dongan grant or charter to the city of New York about twenty years.

The title of the state to the bed of the rivers and arms of the sea is subject to the riparian rights in favor of the owner of the uplands.

Hedges v. West Shore R. Co. 150 N. Y. 156; *Van Dolsen v. New York*, 21 Blatchf. 455; *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 87, 15 L. R. A. 618; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 87, 26 L. R. A. 378.

The plaintiffs have riparian rights appurtenant to their property, which are appropriated and destroyed by the use to which the city proposes to put the property acquired between the bulkhead line and high water mark.

Yates v. Milwaukee, 77 U. S. 10 Wall. 504, 19 L. ed. 986; *New York v. Hart*, 95 N. Y. 443; 38 L. R. A.

Langdon v. New York, 93 N. Y. 129,—and the other and older cases have been greatly modified, if not altogether abrogated, by the reversal of *Gould v. Hudson River R. Co.* 6 N. Y. 522, at the hands of this court.

Since the decision of the court of appeals in the case of *Rumsey v. New York & N. E. R. Co.* 133 N. Y. 79, 15 L. R. A. 618, it must be held that the mayor, aldermen, and commonalty of the city of New York in the construction of streets, wharves, docks, and piers upon the tideway granted to them by the Dongan and Montgomerie charters are bound in law to compensate riparian owners for all damages thereby inflicted upon their estates.

Rumsey v. New York & N. E. R. Co. 133 N. Y. 79, 15 L. R. A. 618; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 26 L. R. A. 378; *Duke Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418; *St. Louis v. Rutz*, 188 U. S. 246, 84 L. ed. 946; *Kane v. New York Elev. R. Co.* 125 N. Y. 184, 11 L. R. A. 640; *Ashby v. Eastern R. Co.* 5 Met. 868, 38 Am. Dec. 426; *Providence Steam-Engine Co. v. Providence & S. S. Co.* 12 R. I. 348, 34 Am. Rep. 652; *Chapman v. Oshkosh & M. R. Co.* 33 Wis. 629; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Holton v. Milwaukee*, 81 Wis. 38; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 114; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018.

A street may not be encumbered by a railway without additional compensation to the owner of a fee.

Wager v. Troy Union R. Co. 25 N. Y. 531; *Craig v. Rochester City & B. R. Co.* 39 N. Y. 404, 39 Barb. 494; *People, Dunkirk & P. R. Co., v. Cassiday*, 46 N. Y. 49; *Kelsey v. King*, 38 How. Pr. 39; *Uline v. New York C. & H. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, 54 Am. Rep. 661; *Broicstedt v. South Side R. Co.* 55 N. Y. 221. See also *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591; *Murdock v. Prospect Park & C. I. R. Co.* 73 N. Y. 579; *Milhou v. Sharp*, 27 N. Y. 627, 84 Am. Dec. 314; *Davis v. New York*, 14 N. Y. 521, 67 Am. Dec. 186.

The construction of the marginal street, constituting the second class of land erected out of the water, cannot, by any sound construction, be included in the water grants contained in the Dongan or Montgomerie charters, which must be in law, as they are in terms, confined to commercial uses; and the act of the legislature authorizing the construction of this street is subject to the constitutional provisions requiring compensation to be made where private property is taken or where damages are inflicted upon private rights.

Bedlow v. New York Floating Dry Dock Co. 113 N. Y. 274, 2 L. R. A. 629; *Smith v. Rochester*, 92 N. Y. 477, 44 Am. Rep. 393; *Ledyard v. Ten Eyck*, 36 Barb. 102.

The intermediate piece of land unappropriated to any public use, lying between the interior line of the marginal street and the upland banks of the riparian owner with which it is actually intermingled, is to be treated as alluvian or reliction or accession, and has become in law and equity the property of the plaintiffs. The alluvial soil added by a river to your land becomes yours as the law of nations.

Justinian, Lib. II., title I., § 20; *St. Clair*

County v. Livingston, 90 U. S. 23 Wall. 66, 69, 23 L. ed. 63, 64; Code of Napoleon, Book II. of Property, § 55; Hale, *De Jure Maris*, 1st pt. chap. 6; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 578; *Saulet v. Shepherd*, 71 U. S. 4 Wall. 502, 18 L. ed. 442; *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 110, 19 L. ed. 856; *King v. Lord Yarborough*, 1 Dow & C. 178.

Alluvion or reliction becomes the property of the riparian owner so long as he is not instrumental in causing it, whether it arises from artificial or natural causes. And if it be caused by the hand of man, either by a stranger acting unlawfully or by those possessed of lawful authority, it matters not whether the accretion be gradual or sudden, imperceptible or obvious.

St. Clair County v. Livingston, 90 U. S. 23 Wall. 66, 69, 23 L. ed. 63, 64; *Steers v. Brooklyn*, 101 N. Y. 56; *Ledyard v. Ten Eyck*, 86 Barb. 102; Gould, *Waters*, § 155, p. 814; *Adams v. Frothingham*, 8 Mass. 362, 3 Am. Dec. 151; *Halsey v. McCormick*, 18 N. Y. 147; 3 Washb. Real Prop. 65; *Wetmore v. Atlantic White Lead Co.* 87 Barb. 87; *Udall v. Brooklyn*, 19 Johns. 175; *Stryker v. New York*, 19 Johns. 179; *Kingsland v. New York*, 43 Hun. 599.

The owner of flats takes accretions caused by building walls.

Adams v. Frothingham, 8 Mass. 362, 3 Am. Dec. 151; Angell, *Tide Waters*, 2d ed. 251, 252 *et seq.*

The defendants having mapped, taxed, and assessed the unappropriated lands as the property of the plaintiffs and not the property of the city, and especially having by judicial procedure caused said lands to be assessed for moneys to be devoted to the purchase of lands for parks and streets, to be owned by them in fee simple, and having collected such taxes and assessments from the plaintiffs, and, furthermore, having sold to the plaintiffs the said land, by a good and sufficient deed of conveyance in the form of a lease for one thousand years given in writing for an adequate consideration, the title to said lands must be adjudged in the plaintiffs, as against the defendants, and the defendants are estopped from claiming the same.

Dunham v. Townshend, 48 Hun. 580, 118 N. Y. 287; *Embury v. Conner*, 8 N. Y. 511, 58 Am. Dec. 325; *Sherman v. McKeon*, 88 N. Y. 274; *Bartholomew v. Finnemore*, 17 Barb. 428.

Messrs. Francis M. Scott and Theodore Connolly, for respondents:

The land in the tideway is owned in fee absolute by the defendants.

The grant in the Dongan charter was ratified and confirmed by the Montgomerie charter and the general act of 1732, chap. 584, validated the latter's patent and grants theretofore given to the city of New York.

The city possessed an absolute, unqualified title to the tideway.

Towle v. Remsen, 70 N. Y. 308; *Furman v. New York*, 5 Sandf. 16, 10 N. Y. 568; *New York v. Hart*, 95 N. Y. 443; *New York v. Mott*, 60 Hun. 423.

The land in question belonging to the city is subject to no easement.

It is not understood to be denied that Parliament could have done what the plaintiff says the Crown could not do, and that is, to make a

gift of the tideway free from all obligations and easements in favor of anyone.

4 Coke, Inst. 36; 1 Bl. Com. 90, 160, 161, 224; *Com. v. Alver*, 7 Cush. 53; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71; *Langdon v. New York*, 93 N. Y. 129; Gould, *Waters*, § 21; *Duke Bucicuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418.

We have in this case ratifications and confirmations which are equivalent to a parliamentary grant. First, we have the confirmatory act of 1732 by the colonial legislature (*Laws 1732*, chap. 584), confirming all the prior royal grants to the city, and the Constitutions of the state of New York, both having the full effect of a parliamentary grant.

Langdon v. New York, 93 N. Y. 155.

The Nichols patent to the inhabitants of Harlem is, by its very terms, under the rules of the common law and the decisions of the courts, only to high-water mark on the Harlem river.

Langdon v. New York, 93 N. Y. 129; *New York v. Hart*, 95 N. Y. 450.

The tideway belonged to the Crown.

Gould, *Waters*, 2d ed. §§ 4, 19, 23; *People, Burnham, v. Jones*, 112 N. Y. 606; *New York C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83, 17 L. R. A. 516.

Plaintiff has no claim based on accretion. Accretion is an increase by imperceptible degrees.

Mulry v. Norton, 100 N. Y. 424; *Halsey v. McCormick*, 18 N. Y. 147.

The grievance, if any, of plaintiff, must be redressed by an attack upon the grants, which cannot be done collaterally. Such attack must be in a direct proceeding to set them aside.

E. G. Blakales Mfg. Co. v. E. G. Blakales's Sons' Iron Works, 129 N. Y. 155; *New York C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83, 17 L. R. A. 516.

The city's title to all the filled-in land between the bulkhead as it was established under the act of 1852, and the present line of filling, has been the settled law since 1861, but if any property rights of the plaintiff have been destroyed, their only remedy is at common-law for trespass.

Van Zandt v. New York, 8 Bosw. 875; *Williams v. New York*, 105 N. Y. 420; *Langdon v. New York*, 93 N. Y. 129; *Kingsland v. New York*, 110 N. Y. 569.

The taxes and tax sales by the city's officers do not estop the city from claiming title.

The fact that the city has taxed this property for various public improvements such as are stated in the stipulation and statement of facts will not avail the plaintiff to make title.

New York v. Law, 125 N. Y. 890; *Ross v. Boston*, 4 Allen, 57; *St. Louis v. Gorman*, 20 Mo. 593, 77 Am. Dec. 586; *McFarlane v. Kerr*, 10 Bosw. 249; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *People, Dunkirk & F. R. Co., v. Cassilag*, 46 N. Y. 46; *Smith v. New York*, 68 N. Y. 552; *People, New York Elav. R. Co. v. Commissioners of Taxes & Assessments*, 82 N. Y. 459; *People, Muller, v. Brooklyn Assessors*, 93 N. Y. 808.

There can be no estoppel in favor of one who has full knowledge of the facts and is not misled by the representation.

Baker v. Union Mut. L. Ins. Co. 43 N. Y. 283;

Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 157; *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 478; *Shapley v. Abbott*, 42 N. Y. 448, 1 Am. Rep. 648; Bigelow, Estoppel, 5th ed. 1890, 626, 627.

Vann, J., delivered the opinion of the court:

The lands granted by Gov. Nichols to the inhabitants of the village of New Harlem were bounded on the east by the Harlem river, which was made by specific mention the limit of the conveyance in that direction. After the lands intended to be conveyed had been thus definitely bounded in the deed, a clause followed, which, in the profuse language of ancient documents, described the appurtenances so fully as to give rise to the claim now made, that the boundaries of the grant itself were enlarged thereby. As the western shore of the river below high-water mark consisted largely of "meadows, pastures, and marshes," it is argued that by including those words, with many others, in the description of the appurtenances, it was intended to include the meadows, pastures, and marshes adjoining the bank of the river, as a part of the grant. Whatever force the argument might otherwise have, it completely fails in this instance, because the long description of appurtenances is ended and limited by the words, "within the said bounds and limits set forth;" thus making it clear that there was no intention to push the bounds of the grant out into the river, or to extend them beyond its western bank. When lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark, as the law stood at the date of the Nichols charter, and as it stands to day. *New York v. Hart*, 95 N. Y. 443; *Wheeler v. Spinola*, 54 N. Y. 877, 885; *Roberts v. Baumgarten*, 110 N. Y. 380; *Barney v. Kenkuk*, 94 U. S. 324, 336, 24 L. ed. 224, 227; Hale, De Jure Maris, 96; Moore, Foreshore & S. 782; 2 Bl. Com. 347; Comyns, Dig. tit. Grant, G, 7, 12; Devlin, Deeds, § 1028; Gerard, Titles to Real Estate, 851; Gould, Waters, § 175; 3 Kent, Com. 427, 432; 4 Am. & Eng. Enc. Law, 2d ed. p. 820. The grantees in that instrument therefore took title to the uplands lying upon the river, but not to the tideway, or to any land below high-water mark. In other words, they became simply riparian proprietors upon tide water, with such title, rights, and privileges only as belong at common law to the owners of upland washed by waters where the tide ebbs and flows. While the title of such owners did not extend beyond the dry land, they were entitled, as against all but the Crown as trustee for the people at large, to certain valuable privileges or easements, including the right of access to the navigable part of the river in front for the purpose of loading and unloading boats, drawing nets, and the like. *Rumsey v. New York & N. E. R. Co.* 138 N. Y. 79, 15 L. R. A. 618; *Saunders v. New York C. & H. R. R. Co.* 144 N. Y. 75, 87, 26 L. R. A. 878; Angell, Tide Waters, 22, 64. These riparian rights were property belonging to the riparian owner, who could not be deprived of them without his consent, or by due process of law, although he could only use them subject to the rights of the public. The 88 L. R. A.

title to the tideway and to the land beyond continued in the English Crown, as a public trust, after the Nichols charter, the same as before, for nearly twenty years, and until the year 1686, when Gov. Dongan granted to the city of New York all the land between high and low water mark; and his grant was subsequently confirmed by Gov. Montgomerie, by the colonial legislature, and by the first Constitution. The title to the remaining lands now in controversy, still further out in the river, continued in the Crown, as a prerogative right, until, by the Revolution, and the treaty of peace between the colonies and England, it passed to the state of New York, which subsequently, by various legislative acts and proceedings had thereunder, granted it to the city of New York. *Martin v. Waddell*, 41 U. S. 16 Pet. 867, 10 L. ed. 997. As all of these grants were made after the date of the Nichols charter, according to the general rule they could have no effect upon the riparian rights of the grantees named therein, or of their successors in title, as that would violate vested rights, by taking away property from one and giving it to another without due process of law. Whatever the common law may have been prior to Magna Charta, after the date of that venerable instrument even the King of England could not grant to one subject that which he had already lawfully granted to another. While the English Parliament, being restrained by no Constitution that it cannot override if it so wills, can take the property of an individual for public use without making compensation, it is not claimed that any of the grants under consideration were made pursuant to an act of Parliament. As the colonial governors and legislatures derived their powers from the Crown, they could not interfere with private property any more than the Crown itself. *Martin v. Waddell*, 41 U. S. 16 Pet. 867, 10 L. ed. 997; *Johnson v. McIntosh*, 21 U. S. 8 Wheat. 595, 5 L. ed. 694. But while the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, when the interest of the whole people requires an improvement of the water front for the benefit of navigation and commerce it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tide-water front for that purpose, without compensating the riparian proprietor, other than by giving him the pre-emptive right of purchasing in case of a sale. The foundation of the rule does not seem to have been clearly pointed out, although a review of the authorities demonstrates its existence.

In *Lansing v. Smith*, 4 Wend. 9, it was held by the court of errors that the owner of lands adjacent to the shore of the Hudson river at Albany, who had erected a wharf upon the same after a grant of land under water from the commissioners of the land office, could not maintain an action on the case against those to whom subsequently the legislature gave the privilege of erecting a pier in the river for the purpose of constructing a basin to protect boats, although such pier entirely encompassed the wharf on the side of the water so as to leave no communication between it and the

river, except through a sloop lock at one extremity of the basin, and although the privileges of the owner of the wharf were materially impaired by the construction of the pier. The court declared his loss to be *damnum absque injuria*, and that the grant of the right to erect a wharf implies a reservation to the legislature of the right to regulate the use of it and of the adjacent waters. It was further held that the grant of the right to erect the pier, although subsequent to the former grant, did not violate that provision of the Constitution of the United States which provides that no state shall pass a law impairing the obligation of a contract, nor that provision of the Constitution of this state declaring that private property shall not be taken for public use without just compensation, and that the first grant did not preclude the legislature from making a great public improvement for the benefit of commerce without compensating the adjoining owner. In *Furman v. New York* the facts are imperfectly stated, and the decision very meager, as reported in 10 N. Y. 567, but both are very full as reported in 5 Sandf. 16. In that case the legislature authorized the city of New York to lay out streets and wharves 70 feet wide in front of the East and Hudson rivers, and provided that they should be built according to a plan adopted by the city, by and at the expense of the owners of the land adjoining, in proportion to the breadth of their several lots, and that, upon filling up and leveling the lands under water in front of their uplands to the extent provided, they should become the owners of the made ground in fee simple, and entitled to the crannage and wharfage. After compliance by the owner, and a conveyance to him from the city of the new land thus made by wharfing out, the city, under authority from the legislature, tendered to him a grant of the land under water for a certain distance, still further out into the stream in front of his premises, with notice that, if he refused to accept it at a certain valuation, the said land would be granted to any person willing to take it. The statute under which this action was taken provided that after such a grant the grantee should build streets and wharves covering the land under water embraced in the grant. A bill was filed by the owner of the upland and of the made lands under the first grant to restrain the city from making the proposed second grant, but it was dismissed on the merits at the special term, and the judgment was affirmed at the general term and by the court of appeals. Upon the argument of the appeal the point was distinctly made that the plaintiff, as a riparian owner, had the right of ingress and egress to his water front, that the proposed action of the city would be an invasion of the rights of private property, and that he could not be deprived of that property without adequate compensation. In *People v. New York & S. I. Ferry Co.* 68 N. Y. 71, it was held that public grants to individuals, under which rights are claimed in impairment of public interests, are to be construed strictly against the grantee, who, although he can exclude all individuals from the permanent occupation of lands under tide water held by him under such grant, cannot exclude the state, which still has the right to regulate the use of

the premises in the interest of the public, and for the protection of commerce and navigation. The court said: "Gore was the owner of the upland adjoining the lands under water embraced in the grant. The ownership of the adjacent upland, however, gave him no title to or interest in the lands under water in front of his premises. The titles to lands under tide-waters, within the realm of England, were, by the common law, deemed to be vested in the King, as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse. The King, by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right." In *Toule v. Remsen*, 70 N. Y. 303, it appeared that the city of New York, prior to 1807, had title to the tideway, and in that year the state granted it land under water in front of the tideway, with a proviso giving the preemptive right to the owners of adjacent lands in all grants made by the city of lands under water. In 1837 the city granted to one who claimed to be the owner of the upland the water lots in front, consisting partly of the tideway and partly of land below low-water mark, reserving certain rents, payable annually, and with a condition that, if it should appear at any time that the grantee was not seised of an estate in fee simple of the adjoining land above high-water mark, the grant should be void. The grantee did not in fact own the upland, and when this was established by litigation the commissioners of the sinking fund canceled said grant and in 1859 gave the plaintiff a conveyance of the same lots upon payment of the back rent. In an action of ejectment brought by the second grantee against the first, who had in the meantime constructed bulkheads and streets, the complaint was dismissed; and the judgment of dismissal was affirmed by this court, which held that the city, by accepting title to lands beyond the tideway, with said proviso, did not consent to qualify its title to the tideway so that it could thereafter only grant land therein to the persons to whom it could grant the adjoining lands under water. It was further held that under the Dongan and Montgomerie charters the city had an absolute fee to the tideway, and could grant it to anyone that it chose, regardless of the wishes of the owner of the upland. In *New York v. Hart*, 95 N. Y. 443, the question to be decided was whether the owners of the uplands situated on the Harlem river, in the former village of Harlem, had an equitable claim to priority of purchase of lands under water in front of their premises in case the city sold the same; but incidentally the title to the tideway, and the effect of the Nichols, Dongan, and Montgomerie charters was involved. The court held that the Nichols charter conveyed only to highwater mark, and that by the Dongan charter the city of New York acquired title to the tideway on the whole circuit of Manhattan island, and held it as an absolute fee. By an interesting historical ar-

gument the court showed that Harlem was established as a village within the general limits of the city itself, for the promotion of agriculture and the recreation and amusement of the city of New Amsterdam, and drew the inference from the surrounding circumstances that the Nichols grant should receive a limited construction. In the language of Judge Finch, who prepared the opinion: "The city was to be the seaport, and for this purpose its water front was to girdle the island, while the village was meant for a rustic hamlet, whose inhabitants should own cattle rather than ships. Without pursuing the subject in its details it is enough to say that we have discovered no adequate reason for straying from the general rule in construing the Harlem patents, and are satisfied that the river line was at high-water mark, and so the city owned the tideway. Its title to so much of the lands in dispute as constituted the portion of the tideway adjacent to and in front of the upland owned by the defendants was thus established. That title in its origin was absolute. The city could sell the strip to whom it pleased, and it was unburdened with any pre-emptive privilege amounting to a legal right in anyone." After referring to the pre-emptive right given by statute to owners under grants theretofore made by the city of lands beyond the tideway, and to the equitable rights thereunder, the learned judge continued: "But those owning the upland in front of whom lay the absolute ownership of the city in the tideway, and who were already or might be cut off from the water by their ownership, had no such equity. A pre-emptive right in the extension without one in the tideway would do them no good by reason of that interposed strip, and would simply make the latter valueless to the city or its other grantee by in turn cutting off from both the water front." The court, with some hesitation, sustained the equity of pre-emption claimed, solely upon the ground that the city had granted both the filled-in land outside of the tideway, and a part of the tideway itself, to the claimant. This, however, was the utmost concession of rights to the riparian owner, as is evident from the last sentence of the opinion: "If thus some little shred or faint shadow of riparian right on navigable waters is preserved in this state through the sense of justice of the state and its municipal grantee, while on the longer coasts of other states the right is firmly pushed to low-water mark, and shielded by the law, we do not think the little thus gained is unwise or inequitable, or an occasion of regret." Reference is made to the important case of *Whitney v. New York*, which, although decided in this court in 1855, is not reported in the regular series, but may be found in 6 Abb. N. C. 329, note. See also *People v. Tibbets*, 19 N. Y. 523; *People, Loomis, v. Canal Appraisers*, 88 N. Y. 461; *Kerr v. West Shore R. Co.*, 127 N. Y. 269, 277; *Canal Appraisers v. People, Tibbets*, 17 Wend. 571; and *Van Zandt v. New York*, 8 Bosw. 375.

These cases establish the absolute power of the city to improve the water front for the benefit of navigation, free from any interference by the riparian owner, whose sole right, as against the state or its municipal grantee as the trustees for the public, is the pre-emptive right to

purchase, in case of a sale, when conferred by statute. While such are the strict powers of the corporation, in practice it has used them with that forbearance and moderation that are naturally expected of government, whether state or local, acting for the benefit of all the inhabitants. There is no evidence in this case that the corporation intended to use any part of the lands in question for its private advantage, or for any purpose except to aid the commerce of a great city; and it was admitted by the learned counsel for the corporation, in his argument of this appeal, that the defendants could not lawfully use these lands, except for commercial purposes.

The elementary writers follow the authorities cited. Thus, Mr. Gerard, in his valuable work on Titles to Real Estate, says, referring to the state of New York: "It has been established in this state by judicial decision, that the legislature of the state has an inherent right to control and regulate the navigable waters within the state. . . . The individual right of the riparian owner was considered . . . as subject to the right of the state to abridge or destroy it at pleasure, by a construction or filling in beyond his outer line, and that, too, without compensation made." Page 853, 4th ed. See also Gould, *Waters*, §§ 188, 143; Angell, *Tide Waters*, 80; Moore, *Foreshore & S.* 538; Hale, *De Portibus Maris*, 85; Hale, *De Jure Maris*, 22.

The cases in this state that are relied upon by the plaintiff do not vary the rule established by the line of authorities already referred to. *The Rumsey Case*, 183 N. Y. 79, 15 L. R. A. 618, while it substantially overthrows the early case of *Gould v. Hudson River R. Co.* 6 N. Y. 522, does not pass upon the rights of a riparian proprietor as against the state itself, or one of its political divisions, in improving the water front of a great port for important public purposes. It simply decided that an owner of land on a public river can recover damages from a railroad company for building an embankment across his water front, and depriving him of access to the navigable part of the stream. The court, however, was careful to limit its decision to the case then in hand, which was against a private corporation with private interests to serve, and to declare that the "principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river or with the power of Congress to regulate commerce under the provisions of the Federal Constitution." *The Saunders Case*, 144 N. Y. 75, 26 L. R. A. 378, was also against a domestic corporation organized to make money for its stockholders by conducting the business of a common carrier of passengers and freight. It did not involve the right of the state to promote navigation by furnishing greater facilities for commerce. *Langdon v. New York*, 93 N. Y. 129, and *Williams v. New York*, 105 N. Y. 419, are not analogous, as they rest upon grants from the state of lands under water, with covenants for the enjoyment of wharfage, acted upon at great expense by the grantee. The fact that no claim for compensation in those cases was made upon any other ground is significant. In *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984, much was said

that favors the theory of the plaintiff, but all that was decided is that a wharf built by a riparian owner on the bank of a navigable river in the state of Wisconsin under a statutory permit cannot be declared a nuisance without a judicial trial. The later case of *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, held that the public authorities may build wharves and make other improvements necessary to navigation below high-water mark upon navigable waters in the state of Iowa without the consent of the adjacent proprietor, and without making him compensation. In other states some of the authorities are in accord, while others are opposed to the rule adopted in this state. *Stevens v. Patterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Payne v. English*, 79 Cal. 540; *Hess v. Muir*, 65 Md. 601; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 682; *Ladies Seaman's Friend Soc. v. Hoistead*, 58 Conn. 144; *Miller v. Mendenhall*, 48 Minn. 95, 8 L. R. A. 89; *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61. The want of harmony is probably owing to the difference in the rule as to the ownership of the tideway, which is held in some jurisdictions to belong to the state, and in others to the riparian proprietors. This also accounts for the want of harmony in the Federal courts, as they follow the courts of the state where the case arose, unless some question arises under an act of Congress. *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1181; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224, 228; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412.

The only limitation that is placed by the courts of the United States upon the power of the several states over lands covered by tide water within their respective limits is not for the protection of riparian owners, but to protect the public in the use of such waters, and Congress in its paramount right to control navigation. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018. While the case last cited is relied upon by the appellant, it is really of little aid to him, as it simply announced the law of Illinois, but not that of New York. The case of *Duke Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, also much relied upon by the appellant, is not in point, because it turned upon the construction of the statute, rather than upon the common law. In that case a lessee from the Crown of land on the river Thames, including some land under water, claimed damages under an act of Parliament which authorized the construction of an embankment along the river bank in front of his property for the purpose, not of navigation, but of making a new street. 25 & 26 Vict. chap. 93. The act required compensation to be made for such damage, if any, as should "be sustained by him by loss of river frontage, or otherwise by reason of such embankment and roadway, or other the exercise of any of the powers of this act." As no claim was made except under the act, which expressly recognized the loss of river frontage as the subject of damages, the case is not regarded as an important authority upon the question now before us, notwithstanding the somewhat sweeping language used in the decision.

While we think it is a logical deduction

from the decisions in this state that, as against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tide water for the benefit of commerce, the principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the organized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of pre-emption, when conferred by statute, and the right to wharfage, when protected by a grant and covenant on the part of the estate, as in the *Langdon and Williams Cases*. I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the Crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner. The implication springs from the title to the tideway, the nature of the subject of the grant, and its relation to navigable tide water, which has been aptly called "the highway of the world." The common law recognizes navigation as an interest of paramount importance to the public. Thus, when the King used to grant an exclusive right of fishing in navigable tide water, as once he lawfully might, if, in the course of time, the nets or weirs interfered with navigation, they became a nuisance, and could be abated as such. The grant was silent upon the subject, yet the courts held that whatever impeded the superior right of navigation was impliedly excepted from the effect of the grant. So, as it seems to me, when any public authority conveys lands bounded by tide water, it is impliedly subject to those paramount uses to which government, as trustee for the public, may be called upon to apply the water front for the promotion of commerce and the general welfare. The purpose for which the supreme authority holds the title to lands under tide water is inconsistent with the power to grant any easement or right to those lands that will prevent it, when the necessity of commerce demand, from "wharfing out" to deep water, so that vessels can load and unload, and the interests of navigation be promoted. It is a reasonable inference from the nature of the grant in question made by Gov. Nichols, the circumstances surrounding him when it was made, the pursuits of the grantees, the situation of the port of New York, with its growing commerce, that it was well understood by both parties that the gratuitous conveyance was not putting a curb on the commerce of the chief city of the continent for all time. Twenty years later, when his successor granted the tideway to the city of New York, with the right to build thereon, there seems to have been neither complaint nor question from the inhabitants of Harlem. Nearly two centuries had passed before any claim to the tideway was made in hostility to that grant, so far as

we are advised. The plaintiff now seeks to establish an easement over the tideway against the city; and in order to do so he must also establish it against the English Crown as well as the state of New York, and show that the sovereign, as *parens patriæ*, alienated a right that was essential to the most important public functions. We think that no such limitation upon the prerogative of the sovereign was intended, and that the conveyance of the uplands in question to a subject should, from public considerations of the highest importance, be held to have been made with the implied reservation of the right to freely improve the navigation of the great seaport, within the general limits of which said uplands were situated. The permanent control of navigable waters, if alienable at all, should only be so by an instrument showing a clear and undoubted intention to that end; and in the absence of express language the strict construction required by law in favor of the sovereign, as trustee, limits the effect of the grant by reserving or excepting therefrom the right to fill in the land out to deep water, and build wharves thereon, in aid of navigation, and as an indispensable incident to commerce. *People v. New York & S. I. Ferry Co.* 68 N. Y. 71. This conclusion makes the riparian rights subordinate to those of the public for commercial purposes, and leaves unfettered the commerce of the city of New York. The inconvenience to the riparian owner may sometimes be serious, but private convenience must often suffer in order to develop the highest utility of a great waterway. It may be safely assumed that no public authority will make an extreme or oppressive use of its rights, or unnecessarily inflict injury upon a citizen.

Aside from the authorities cited, and the inferences drawn therefrom, we see no answer to the claim of the defendants that the Dongan and Montgomerie grants were confirmed by the first Constitution adopted in this state. In 1732 the colonial legislature enacted "that all and singular, letters patent, grants, charters, and gifts, sealed under the great seal of the colony of New York, heretofore made and granted unto the mayor," etc., "of the city of New York, be, and are hereby declared to be, and shall be, good, valid, perfect, authentic, and effectual in the law against the King's majesty, his heirs and successors, and all and every person and persons whomsoever, according to the tenor and effect of the said letters patent, grants, charters, and gifts." Laws 1732, chap. 584. In cannot, in reason, be doubted that this specific act, confined to grants made to the city of New York, was intended, among other things, to confirm the Dongan and Montgomerie charters, the latter of which was less than two years old when the statute was passed. The effect of that act, standing alone, upon a grant made in violation of Magna Charta, it is unnecessary to now consider: for it was confirmed by the Constitution of 1777, which was the result of all the legislative power that the people of the state of New York, untrammelled by any higher law, could exert. The Constitution of the United States had not then been adopted, and the laws of England were no longer in force within the state, except as they were continued and confirmed by the Consti-

tution of the state. There was no restriction, therefore, upon the power of the people to accomplish whatever could be effected through a fundamental act of legislation. The simple but weighty words of its 1st section were literally true, when it declared "that no authority shall on any pretense whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them." By the 85th section of that Constitution such acts of the legislature of the colony of New York as were in force on the 19th of April, 1777, which was the day before the Constitution was adopted, were continued in force, and made the law of this state. The natural effect of this supreme enactment was to give the force of law to every unrepealed act standing upon the statute books of the colony. But the Constitution did not stop there, for by the next section it indirectly confirmed all grants of land made by the King, or by persons acting under his authority, prior to the 14th day of October, 1775, by providing "that all grants of land within this state made by the King of Great Britain, or by persons acting under his authority, after the 14th day of October, 1775, shall be null and void; but that nothing in this Constitution contained shall be construed to affect any grants of land within this state made by the authority of the said King or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day." When the two successive sections, from which quotations have been made, are read in connection with the act of 1732, and in the light of the notoriety of the Dongan and Montgomerie charters, we think it was the intention of those who adopted our first Constitution, which did not require compensation for private property taken for public use, to ratify and confirm those grants, made for commercial purposes of the highest importance, and so essential to the prosperity of the city of New York.

If we have reasoned accurately thus far, the claim of title by the plaintiff, through alluvion or accretion, cannot be sustained. The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as the ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water, and making it dry. *Mulry v. Norton*, 100 N. Y. 424, 432, 58 Am. Rep. 206; *Halsey v. McCormick*, 18 N. Y. 147; Angell, *Tide Waters*, 71; 1 Am. & Eng. Enc. Law, 2d ed. p. 467. The city was not a wrongdoer in filling up the water front and constructing piers, as its action was justified by its ancient charters, as well as by legislation to which there is no constitutional objection. The land thus made, without trespassing upon the rights of anyone, did not become the property of the plaintiff through accretion, but remained the property of the city for the benefit of the public as dry land, just the same as when it was land under water. It is claimed that *Stears v. Brooklyn*, 101 N. Y. 51, is in conflict with these views. In that case, however, the city of Brooklyn had wrongfully built a pier in front of plaintiff's premises; and it was held that the pier, by accretion, became added to the plaintiff's land, in

so far as it was in front thereof. Steers owned to the water line, and the city of Brooklyn, which had no ownership in the shore waters, as they had never been conveyed to it, had no right to build a pier in front of his premises. It was therefore a trespasser, in thus building the pier and shutting him off from the water privileges which before he had enjoyed as an easement to his bulkhead, and which he had a right to use as against the city of Brooklyn and all the world except the state, or its lawful grantee, acting for the public. An increase owing to the action of a wrongdoer is an exception to the doctrine that to gain title by accretion the growth must be by imperceptible degrees, and through natural causes. The *Steers Case* stands upon that exception, and has no application to the case now before us. Here the increase was neither imperceptible nor unlawful, and hence the plaintiff took nothing therefrom, and, as we think, the defendants can be deprived of nothing thereby.

We have examined with great care all of the exceptions relied upon by the appellant, but we find none calling for a reversal, and the judgment should therefore be affirmed.

All concur, except Gray, J., absent.

Medora A. HARROUN *et al.*, Admsrs., etc.,
of Fred J. Harroun, Deceased, *Repts.*,
v.

BRUSH ELECTRIC LIGHT COMPANY,
Appl.

(122 N. Y. 512.)

When four of the five judges composing a court are declared by the Constitution to be a quorum, their agreement in a decision, the other being absent, makes the decision unanimous, within the meaning of a statute requiring leave to appeal from unanimous decisions.

(March 2, 1897.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, which affirmed a judgment of the Supreme Court for Monroe County in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Dismissed.*

The facts are stated in the opinion.

Mr. Charles Roe for appellant.

Mr. George F. Yeoman for respondents.

Bartlett, J., delivered the opinion of the court:

This is a motion made by the plaintiff to dis-

miss the appeal. The action is to recover damages for the death of plaintiff's intestate, resulting from injuries caused by the alleged negligence of defendant. The jury rendered a verdict for \$5,000 in favor of plaintiff. A motion for a new trial on the minutes was denied. From the judgment upon the verdict, and the order denying a new trial, an appeal was taken to the appellate division of the fourth department, which resulted in an affirmance. The order of affirmance reads: "Opinion by Follett, J. Adams, J., not sitting. All concurred, except Adams, J., not sitting." 12 App. Div. 126. A motion was subsequently made before the appellate division for a reargument or for permission to appeal to this court, which was denied, all the members of the court concurring; Adams, J., not sitting. 14 App. Div. 19. Notwithstanding this decision, and without application to a judge of this court for leave, the defendant took this appeal. The sole question presented is whether, under the circumstances as stated, there was a unanimous decision of the appellate division. It is argued by the defendant and appellant that article 6, § 2, of the Constitution provides that the state shall be divided into four judicial departments; that there shall be an appellate division of the supreme court, consisting of seven justices in the first department, and five justices in each of the other departments; that in each department four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision; that no more than five justices shall sit in any case. This being so, it follows, says the appellant, that in the fourth department the appellate division consists of five justices, and that a quorum of four hearing a case, and affirming it on the vote of all, it cannot be regarded as a unanimous decision, under the provisions of § 191 of the Code of Civil Procedure, subsec. 2. We are of opinion that a quorum of four justices, holding an appellant division, are, in contemplation of law, the appellate division, and that their unanimous vote of affirmance is a compliance with the provisions of the Constitution and Code. When the Constitution provides that four justices shall constitute a quorum, it is, in effect, conferring upon four the powers with which five were invested. A quorum is the number of the members of a body competent to transact business. A judicial or legislative body having a quorum present proceeds ordinarily as if every member was sitting in his place, and exercises all the powers with which it is invested. Any other rule would greatly embarrass the transaction of business in case of illness or voluntary or enforced absence among the members. Any other construction of the statute would be unreasonable, impracticable, and result in great public inconvenience.

It follows that *this appeal is unauthorized, and it should be dismissed*, with costs.

All concur.

NOTE.—As to quorum of court, see *Williams v. Benet* (S. C.) 14 L. R. A. 825; *Cowan v. Murch* (Tenn.) 84 L. R. A. 533.

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UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

H. H. PECK *et al.*, Receivers of the Southern Malleable Iron Company, *Appts.*,

v.

J. M. ELLIOTT, Jr.

(47 U. S. App. 606, 79 Fed. Rep. 10, 24 C. C. A. 425.)

1. A proceeding by receivers of a corporation to enforce the liability of a stockholder is ancillary to the receivership suit, and the jurisdiction thereof depends upon the jurisdiction in the original case.
2. The legal character of the liability of a stockholder does not prevent its enforcement by receivers in a proceeding which is wholly ancillary to the original receivership suit in equity.
3. The rule against an implied power of a corporation to increase the amount of its capital when that is definitely fixed by the charter or statutory articles of incorporation has no application where the power

to determine upon the capital to be engaged is made one of the matters for internal regulation by by-law.

4. An increase of the capital of a corporation by an amendment of a by-law is valid when by the constitution of the corporation it is given power to fix the amount of capital by by-law.
5. The power to increase the capital of a corporation by by-law, which is given by the act of March 23, 1875, is not repealed by the act of March 27, 1883, making a different provision for an increase of stock, even if that applies to a corporation under a former act.
6. It will be presumed that the law requiring payment of a tax on the increase of the capital stock of a corporation has been complied with, when the stock has been increased and there is no evidence that the tax has not been paid.
7. The failure of a corporation to pay a tax required on the increase of its capital stock cannot be set up by a subscriber to such

NOTE.—Power to increase capital stock of corporations.

I. In general.

II. Power of directors.

III. Constitutional and statutory provisions.

I. In general.

It has been fully established that corporations cannot increase the amount of their capital stock beyond the amount, if any, which has been fixed by law, except when expressly authorized by law to make such increase. In other words, there is no implied power.

The cases are unanimous in holding that a corporation has no power to increase or diminish its capital stock unless expressly authorized to do so. No such power can be claimed by implication. *Rose-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.* 72 Fed. Rep. 957; *Granger's Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Einstein v. Rochester Gas & E. Co.* 146 N. Y. 44.

The officers, directors, and stockholders of an incorporated company cannot, even by a unanimous agreement made under an honest misapprehension of their powers, increase the capital of the company. *People, Jenkins, v. Parker Vein Coal Co.* 10 How. Pr. 543, Affirming 10 How. Pr. 186.

A corporation cannot increase its capital stock at will in any manner or to any extent unless it is authorized to increase by its charter, and then only in the manner prescribed. *Lathrop v. Kneeland*, 46 Barb. 432.

Such unlawful issue of stock is good cause for canceling the charter, and therefore the stock thus illegally issued cannot be regarded as valid. *People, Jenkins, v. Parker Vein Coal Co.* 10 How. Pr. 543, Affirming 10 How. Pr. 186.

A holder of unauthorized stock issued in excess of the limit fixed by the charter of the company is not entitled to any of the rights or subject to any of the liabilities of the holder of valid stock. *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 971.

A subscription to stock is void, and creates no liability when the stock has been issued without authority in an attempt to increase the capital. *Rose-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.* 72 Fed. Rep. 957; *Grangers Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Clark v. Turner*, 73 Ga. 1.

When a corporation has issued valid certificates of stock to the full extent of all the shares which by 88 L. R. A.

law and the constitution of the company it may issue, its powers are exhausted, and it cannot be compelled to issue others. *Smith v. North American Min. Co.* 1 Nev. 423; *Mechanics' Bank v. New York & N. H. R. Co.* 18 N. Y. 598.

Subscriptions for shares of stock taken after the corporation has issued the full amount of its authorized capital are void. *Cartwright v. Dickinson*, 38 Tenn. 476, 7 L. R. A. 706.

All stock issued in excess of the limit fixed by the charter of the corporation is unauthorized and void. *Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 971.

So, a subscriber to increased stock which is *ultra vires* the corporation cannot be required to pay assessments on it even when the company is insolvent. *Kampman v. Tarver*, 87 Tex. 491. In this case a suit by a stockholder to obtain the cancellation of illegal shares issued on an attempted increase of stock is sustained.

The attempt of a mutual insurance company to raise a guaranty capital represented by bonds and mortgages which should be liable for losses after other available means have been exhausted was held illegal. In *Trenton Mut. L. & F. Ins. Co. v. McKelway*, 12 N. J. Eq. 138, because the charter provided only for a mutual company which should pay losses out of the premiums contributed by the members, and a percentage on the amount of their insurance.

The court cannot pass on the necessity of an increase of stock which has been voted by a corporation in pursuance of statutory authority when the legislature has not authorized it to do so. *Jones v. Concord & M. R. Co.* 67 N. H. —, 30 Atl. 614.

Although a corporation which has issued the full amount of stock authorized by its charter cannot lawfully issue any additional shares, yet when it has taken some of its original stock in settlement of obligations, a resolution to increase its stock and take subscriptions for a part of that amount may be sustained as a release of old stock rather than a creation of new stock. *City Bank v. Bruce*, 17 N. Y. 507.

The increase of stock was held lawful in *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227, where the articles of incorporation authorized such increase, and it was made by vote of the stockholders and there was no statutory inhibition against it. The questions involved in this case related more to the disposal of the stock without proper consideration than to its issue.

stock as a defense against his liability when he has become president of the corporation by virtue of that stock alone.

8. A resolution of the members of a corporation for the increase of its capital stock is a sufficient by-law for that purpose.

9. A transfer of a patent right to a corporation in partial payment of a subscription to stock as a mere device for evading a condition that the stock must be taken at par, followed by a retransfer to the subscriber at a nominal consideration, is insufficient to relieve him from liability to pay for the stock at its par value.

(March 2, 1897.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the Eastern District of Tennessee in favor of defendant in a proceeding to enforce payment of an unpaid stock subscription. *Reversed.*

Before Taft and Lurton, Circuit Judges, and Sage, District Judge.

A peculiar kind of stock provided for by Massachusetts statutes, known as special stock, is limited in amount to two fifths of the actual capital subject to redemption at par after a fixed time. The questions that arise concerning this are not specially applicable to the subject of the increase of regular stock.

So far as the issue of increased stock is considered with respect merely to the validity of its disposition and the sufficiency of the consideration received for it the questions belong rather to the subject of bonus stock or stock issued in fraud of creditors.

II. Power of directors.

The absence of an implied power on the part of corporations to increase their stock is accompanied by an absence also of any implied power on the part of directors to make such increase, even if the corporation has power to make it.

The main case of *PECK V. ELLIOTT* is the most striking case on the subject. It does not deny the rule above stated, but holds that the directors can increase the capital by amending a by-law when they had the power to fix the amount by by-law in the first place.

That the directors have no implied power to increase the capital stock is decided by all the cases that have considered the subject. *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 233, 21 L. ed. 902; *Payson v. Stoever*, 2 Dill. 428; *Finley Shoe & Leather Co. v. Kurtz*, 34 Mich. 89.

Directors do not have the power to order an increase of stock and open books for its subscription without the assent of the shareholders where the charter confers on the corporation the power to increase the stock but is silent as to the mode in which it shall be done. *Eldman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

The power of directors to increase the capital stock of a corporation, without the consent of the stockholders, beyond the amount named in its charter, is denied, although the charter provides that the stock "may be increased from time to time, at the pleasure of said corporation." "To change this without the consent of the associates would be to commit them to an enterprise which they never embraced, and would be manifestly unjust," and it would "make them members of an association in which they never consented to become such. It would change the relative influence, con-

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Statement by Lurton, Circuit Judge:

The Southern Malleable Iron Company is a manufacturing company, incorporated in August, 1890, under the general law of Tennessee. In November, 1893, H. H. Peck and Charles D. McGuffey were appointed receivers under a bill filed in the United States circuit court for the southern division of the eastern district of Tennessee, by the Northern Bank of Kentucky, a judgment creditor, with a levy on certain assets. The object of the bill was to preserve the property as an operative unit plant, collect in its debts, complete certain valuable contracts, and sell the property as a whole, including its goodwill, for the satisfaction of all its debts according to priority of lien. The appellants under this bill were appointed receivers, and placed in possession of all its assets of every kind. During the course of the proceedings usual to such a creditors' bill, the receivers filed a petition, alleging the total inadequacy of the assets to pay the debts, and setting out that the appellee, J. M. Elliott, a director and president of the corporation, was a subscriber to the capital

and profit of each member. If the directors alone could do it, they could always perpetuate their own power." *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 233, 21 L. ed. 902.

But the assent and acquiescence of all the stockholders cures an irregularity in the adoption of a resolution to increase the stock of a corporation by the board of directors, instead of by the stockholders themselves. *Bailey v. Champlain Min. & P. Co.* 77 Wis. 453.

An unauthorized overissue of shares was held, in *Sewell's Case*, L. R. 3 Ch. 181, to be confirmed by subsequent resolutions of the company, and parties assenting thereto were held bound by the allotment to them of their part of the overissued shares.

Express authority by statute which authorized the issue of bonds, providing that "directors may confer on any holders of such bonds the right to convert the principal due or owing thereon into stock," is held to give the directors power to issue such stock in exchange for bonds, although they could not increase the stock directly. *Belmont v. Erie R. Co.* 52 Barb. 663; *Ramsay v. Erie R. Co.* 38 How. Pr. 193.

III. Constitutional and statutory provisions.

By constitutional provision in Colorado all fictitious increase of stock or indebtedness is void, and the stock of a corporation cannot be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock given at a meeting held on thirty days' notice.

The Constitutions of Alabama, Arkansas, California, Idaho, Montana, Missouri, Pennsylvania, Washington, and some other states, are substantially the same as that of Colorado on this subject. Statutory provisions are found in different states on the same matter.

A constitutional provision declaring that all fictitious increase of stock shall be void, and that no stock shall be issued except for money, labor done, or money or property actually received, inhibits an increase of stock to represent an increased value of the property of a corporation in which the original capital was invested,—at least when there is no accumulated money surplus, or visible, tangible property in excess of the authorized stock which it is proposed to make the basis of the additional stock. *Fitzpatrick v. Despatch Pub. Co.* 33 Ala. 604.

But stock issued and disposed of for a valid con-

stock of said company to the extent of 120½ shares of \$100 each, and was indebted on that account in a balance due thereon of \$6,997.82, and that the insolvency of the corporation rendered it necessary that this stock liability should be enforced. Leave of court was asked to file this petition in the principal cause, and that J. M. Elliott be made a defendant thereto by proper process, and for a decree against him to the extent of his unpaid stock liability. An order was accordingly made by the Honorable David M. Key, district judge, holding the circuit court, allowing the petition to be filed, and ordering that process should issue as prayed. It may not be out of place to say that, after the filing of the original bill, other bills were filed by creditors, including one for a foreclosure of a mortgage on the property of the company made to secure an issue of bonds. Subsequently all these bills were consolidated, and ordered to proceed under the name and style of "*Ross-Meehan Brake Shoes Foundry Co. v. Southern Malleable Iron Co. et al.*" Elliott was duly made a defendant to the proceeding begun by the receivers, and filed his answer, denying the jurisdiction of the court; denying

the jurisdiction to proceed against him by petition or bill in equity; and denying his liability as a stockholder. Proof was taken, and, upon a final hearing, the petition of the receivers was dismissed. 73 Fed. Rep. 957. From this decree, an appeal has been prosecuted, and errors assigned by the receivers.

Messrs. H. D. Peck and Wheeler & McDermott, for appellants:

All by-laws made by corporations are subject to repeal and amendment as changes of time and circumstances may require.

Beach, Corp. § 323; *Newling v. Francis*, 3 T. R. 193; 1 Thomp. Corp. § 960; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, 567.

When, therefore, the legislature confers a power to be exercised by by-law, it is to be presumed that it intended the ordinary incidents to the exercise of a power in that way, to wit, that the by-law might be repealed or amended by the same power which made it.

1 Thomp. Corp. § 960.

The act of 1883 permits the board of directors to increase the capital stock of a corporation, by amendment to the charter under their

consideration, although at less than par, is not fictitious within Tex. Const. art. 12, § 6, prohibiting fictitious increase of stock. *Mathias v. Pridham*, 1 Tex. Civ. App. 58.

An increase of stock to be sold for less than the nominal par value in order to supply a fund actually required for the use of the company is not a fictitious increase within the meaning of the Constitution. *Stein v. Howard*, 65 Cal. 616.

Section 11, art. 12, of the California Constitution, providing that the issue of stock except for money paid, labor done, or property actually received, and that all fictitious increase shall be void, with the further provision that the stock shall not be increased except in pursuance of general law nor without the consent of persons holding the larger amount in value of the stock at a meeting called on sixty days' notice, is not self-executing, and does not, without legislative action, abrogate Cal. Civ. Code, § 366, providing for an increase of stock by a meeting or by the written assent of the holders of three fourths of the stock. *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

A constitutional provision restricting the increase of the stock and indebtedness of a corporation is held, in *Gloninger v. Pittsburgh & C. R. Co.*, 139 Pa. 13, to be inapplicable to corporations previously chartered with unrestricted power to make such increase, unless they have waived the right and become subject to such restriction by accepting the benefits of later legislation. The question involved in this case was in respect to the issue of bonds.

The same was held in *Ahl v. Rhoads*, 84 Pa. 319, where the question was concerning a mortgage. There are also other similar decisions respecting the effect of a Constitution on other provisions of prior charters.

The limitation of the power to increase the stock of a corporation, imposed by art. 576, chap. 3, tit. 20, 1 Sayles's Tex. Civ. Stat. which authorizes an increase "not exceeding double the amount of its authorized capital, by a vote of the stockholders in conformity with the by-laws," is not removed by the provisions of art. 573, which allows them to amend their articles generally. *Tarver v. Stevenson*, 32 U. S. App. 97, 66 Fed. Rep. 633, 13 C. C. A. 681.

The limitation of the increase of stock to double the amount of its authorized capital, to be made 38 L. R. A.

by a vote of the stockholders in conformity with the by-laws, under Tex. Rev. Stat. art. 576, controls the more general provisions of arts. 571 and 573. *Kampman v. Tarver*, 87 Tex. 491.

Limitation of the right of a railroad corporation without authority of the general court to increase its capital stock beyond a fixed maximum is made by Mass. Pub. Stat. chap. 112, § 61. *Com. v. Boston & A. R. Co.*, 142 Mass. 146.

A charter fixing the capital stock of a corporation at \$1,000,000, and providing that it may be increased to not exceeding \$5,000,000 at the discretion of the stockholders, may be amended by statute so as to authorize the board of directors to increase the capital stock at their discretion, and such amendment does not release a prior subscription to the stock. *Payson v. Withers*, 5 Biss. 239; *Payson v. Stoevoet*, 2 Dill. 437.

The grant of corporate power to increase capital in a charter of a corporation is not invalid because it is in conflict with previous general laws, but it may operate to repeal them so far as they are in conflict with it. *Jones v. Concord & M. R. Co.*, 67 N. H. —, 30 Atl. 614.

It is one of the implied conditions upon which a stockholder enters into his contract that the power of the legislature may be exercised to vary the manner in which the capital stock shall be increased. *Payson v. Withers*, 5 Biss. 239.

An amendment of the charter is held to be the only mode of increasing the capital stock of a corporation under the Tennessee general incorporation law, as amended by the act of 1883, chap. 163, § 19. *Ross-Meehan Brake Shoes Foundry Co. v. Southern Malleable Iron Co.*, 73 Fed. Rep. 957.

An attempt to increase the capital stock of a corporation before the amount of its original capital has been actually paid in is held void in *Page v. Austin*, 10 Can. Sup. Ct. 140, 167, on the ground that the statute expressly provides that it may be done only when the capital stock has been paid in.

The question of the power of corporations to increase their stock, which is discussed in this note, has not been extended to include questions of the power to reduce their capital stock which involve different effects, or the matter of compliance with the conditions and requisites of making a valid increase of stock, or the estoppel of stockholders against contesting such increase which they have acquiesced in.

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hands duly certified, acknowledged, and recorded. This is not the same as increasing the stock by the corporation itself, to wit, the stockholders when duly assembled in corporate meeting.

Chicago City R. Co. v. Allerton, 85 U. S. 18 Wall. 285, 21 L. ed. 903.

The act of 1875 did not confer upon the directors the power, either to originally fix, or subsequently increase, the stock of such corporation; that power could only be exercised by the stockholders when duly assembled.

The legislature desiring to broaden the power of the corporation in this respect has added to the power existing under the act of 1875, the additional power of increasing the stock by a vote of the board of directors only, and without resorting to the stockholders.

The circumstances of this case are such as to estop Mr. Elliott from setting up the defense of illegality in the issue of stock.

Handley v. Stuts, 139 U. S. 424, 35 L. ed. 233; *Veeder v. Mudgett*, 95 N. Y. 295.

Messa, White & Martin, for appellee:

The chancery court is without jurisdiction, because the legal remedies already invoked had not been exhausted or prosecuted to that stage where the complainants had a right to appeal to equity.

The original bill, shows the obtaining of a judgment, and the issuance and levy of an execution, but no sale or further step taken. This is not enough to give equity jurisdiction. The law requires that the legal remedies should be exhausted.

National Tube Works Co. v. Ballou, 146 U. S. 517, 523, 36 L. ed. 1070, 1072; *Cates v. Allen*, 149 U. S. 451-457, 37 L. ed. 804-807; *Jones v. Green*, 68 U. S. 1 Wall. 830, 17 L. ed. 553; *High, Receivers*, §§ 403, 404, and notes; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 858.

The question of jurisdiction may be raised by plea or answer.

Wylie v. Coze, 56 U. S. 15 How. 416, 14 L. ed. 753.

The court will *sua sponte* decline jurisdiction for its own protection.

Hipp v. Balin, 60 U. S. 19 How. 271, 15 L. ed. 633; *Thompson v. Central Ohio R. Co.* 73 U. S. 6 Wall. 184, 18 L. ed. 765; *Oelrichs v. Williams* ("Oelrichs v. Spain"), 82 U. S. 15 Wall. 211-227, 21 L. ed. 43, 44; *Lewis v. Cocks*, 90 U. S. 23 Wall. 466, 470, 23 L. ed. 70, 71.

A receiver can only pursue the remedies given to other litigants.

Wait, Insolvent Corp. § 231; *High, Receivers*, § 207, and note; *Freeman v. Winchester*, 10 Smedes & M. 577.

Receivers' suits brought against stockholders must be at law.

3 *Thomp. Corp.* §§ 8418, 8419, 8421, 6962.

This is purely a legal demand. The defendant has the constitutional right to a jury trial, where the amount involved is over \$20.

7th Amend. U. S. Const.; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873.

The jurisdiction of the Federal courts of equity cannot be enlarged or extended by state statutes, or by agreement of parties.

Scott v. Neely, 140 U. S. 106, 35 L. ed. 858; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804; 38 L. R. A.

Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873.

There must be an assessment or call by someone where the contract is to pay for the stock when the same is called for. It is not due until called for.

3 *Thomp. Corp.* §§ 8386, 8492, 3586, 8537, 8752; *Harkins v. Glenn*, 131 U. S. 819, 833, 33 L. ed. 184, 192; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264; *Bell's Appeal*, 115 Pa. 88; *Scovill v. Thayer*, 105 U. S. 143, 155, and 156, 26 L. ed. 968, 973, and 974; *Glenn v. Macon*, 32 Fed. Rep. 7.

On a contract made by appellee with the insolvent company before the receivers could bring a suit in their own names, the court would, by decree, have to vest them with the title, or give them special authority to sue in their own names.

5 *Thomp. Corp.* §§ 6962, 6977, 6979, 6980; *Wait, Insolvent Corp.* § 226; 1 *Fost. Fed. Pr.* 2d ed. p. 418, § 245, and p. 428, § 249; *High, Receivers*, §§ 202, 207, 208, and note; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790; *Dick v. Struthers*, 25 Fed. Rep. 103.

This suit must fail because the corporation had not been exhausted.

Blake v. Hinkle, 10 Yerg. 218; *Cook, Stock & Stockholders*, 2d ed. § 200; *Wait, Insolvent Corp.* § 97; 3 *Thomp. Corp.* §§ 3340, 3351, 3355-3357, 3371, 3762; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Taylor v. Bowker*, 111 U. S. 110, 28 L. ed. 368; *Wahler v. Seligman*, 13 Fed. Rep. 415; *Tarbell v. Griggs*, 3 Paige, 207, 33 Am. Dec. 790.

The stock subscribed for was void because over-issued stock, being in excess of the fixed capital of the corporation.

When the iron company attempted to increase its capital stock, the law required it, in order to do so, to amend its charter and go through with all the proceedings and formalities necessary to obtain its original charter, and pay for the privilege of doing so.

Stevenson v. Ewing, 87 Tenn. 46.

It would require a very plain and positive statute to authorize directors to increase the capital stock of a corporation without the assent of the stockholders.

Chicago City R. Co. v. Allerton, 85 U. S. 18 Wall. 233, 21 L. ed. 902.

If the power to change the capital stock is not granted by the legislature, it could not be obtained by any act of the corporation.

Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325.

Where the governing statute required an amendment of a charter increasing the capital stock of a corporation to be recorded, it was held that the amendment did not take effect until it was duly recorded. Signing and acknowledging it were not sufficient to give it validity.

Wood v. Union Gospel Church Bldg. Assn. 63 Wis. 9; 1 *Thomp. Corp.* §§ 225, 227, 238-240.

If promoters cannot clothe with corporate powers original capital, unless they comply with the governing statute, then how can they launch additional and new capital into the enterprise without following the statute. A failure to comply substantially with the governing statutes makes both alike void.

Congress & E. Spring Co. v. Knowlton, 108 U. S. 49, 26 L. ed. 347; *Chicago City R. Co. v. Alerton*, 85 U. S. 18 Wall. 233, 21 L. ed. 902; *Kampman v. Tarver*, 87 Tex. 491; *Day v. Mill-Owners' Mut. F. Ins. Co.* 75 Iowa, 695; *Sutherland v. Olcott*, 95 N. Y. 93; *Winters v. Armstrong*, 37 Fed. Rep. 508.

The debt of the Northern Bank of Kentucky, the original complainant and principal creditor, was created before appellee became a stockholder, and it does not affirmatively appear that any of the debts were made after appellee became a stockholder. So that, if there is any estoppel at all, it must rest upon the sole fact that the appellee subscribed for the supposed stock, and for a short time acted as president of the corporation, and voted his stock.

The stock subscribed was not estopped.

Scovill v. Thayer, 105 U. S. 148, 26 L. ed. 968; *Winters v. Armstrong*, 37 Fed. Rep. 508.

To recover on stock paid for in property taken at an overvaluation, the contract made between the corporation and the stock subscriber must be impeached for fraud and set aside, and to do this, pleadings must be formulated, setting forth wherein the contract is fraudulent.

Kelley Bros. v. Fletcher, 94 Tenn. 1; *Shields v. Clifton Hill Land Co.* 94 Tenn. 123, 26 L. R. A. 509; *Phelan v. Hazard*, 5 Dill. 45; *Coit v. North Carolina Gold Amalgamating Co.* 119 U. S. 845, 30 L. ed. 420.

Increased stock of a going corporation issued to keep it on its feet may be issued and subscribed for at what the old stock is worth at the time, and creditors cannot complain of this transaction.

Clark v. Berer, 139 U. S. 96, 35 L. ed. 88, Affirming 81 Fed. Rep. 670; *Morrow v. Nashville Iron, S. & C. Co.* 87 Tenn. 262, 3 L. R. A. 37; *Handley v. Stutz*, 139 U. S. 417, 35 L. ed. 227.

Lurton, Circuit Judge, delivered the opinion of the court:

The jurisdiction of the court to entertain this petition of the receivers against the appellee depends upon its jurisdiction in the original case, to which this proceeding was wholly ancillary. This petition is auxiliary to the original suit. It is a petition by the receivers asking the aid of the court to enable them to collect an asset of the corporation. It was filed by direction of the court under an order made in the principal cause. The jurisdiction of the court in the principal cause is not questioned, and cannot be in this collateral suit. *Compton v. Wabash R. Co.* 31 U. S. App. 486-529, 15 C. C. A. 397, 68 Fed. Rep. 263; *Mellen v. Mo line Malleable Iron Works*, 131 U. S. 352-367, 33 L. ed. 178-183; *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. Rep. 66. The fact that the circuit court had possession of all the assets of the Southern Malleable Iron Company, for the purpose of winding up its affairs as an insolvent corporation, is the fact which made it admissible to bring a debtor of that corporation into the court, to the end that his debt might be ascertained and payment coerced. For the purpose of collecting choses in action, the circuit court might direct its receivers to institute independent suits in that court or in the courts of the state, or cause

such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defenses to the claim. Such a proceeding would not involve any question of citizenship, or amount in controversy, or mode of trial. The complete jurisdiction of the court over the res, the property and assets of this corporation, involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Kwing*, 159 U. S. 36, 40 L. ed. 67, a case which arose upon a like proceeding in the same court, and in which certain questions were certified by this court under the court of appeals statute.

We come, then, to the merits of the case. The defense to this stock liability is that the stock subscribed for by the appellee was increase stock, and that there was no power in the corporation to increase its capital. In Tennessee, prior to 1870, all charters were granted by special legislation. Such charters, as in other states, usually defined definitely the amount of the capital stock of the company, or fixed a maximum beyond which it should not go. By article 11, § 8, of the Tennessee Constitution of 1870 it is provided as follows: "No corporation shall be created, or its powers increased or diminished, by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created."

The "general law" under which the Southern Malleable Iron Company was organized was approved March 23, 1875, and is chapter 142 of the Acts of Tennessee for 1875. That act prescribes a form of application to be followed whenever the corporation is one for the purposes of profit, and that the general powers of such corporations shall be those prescribed by § 5 of the act. The act contains no requirement that the application for incorporation shall anywhere state the amount of the capital stock proposed to be invested in the business. On the contrary, the only provision of the act of 1875 touching the matter of capital stock is found in § 5, where it is said: "The corporation may, by by-laws, make regulations concerning the subscription for, or transfer of stock; fix upon the amount of capital to be invested in the enterprise; the division of the same into shares; the time required for payment thereof by subscribers for stock; the amount to be called for at any one time."

Judge Clark, who heard this case in the court below, was of opinion that this power should be construed as authorizing the corporation "to fix only the original or initiatory stock of the company," and that this corporation, having, by a by-law, settled upon "the amount

of capital to be invested in the enterprise," was without power to subsequently increase this capital by an amendment of the by law. He was further of opinion that the fact that Elliott, by virtue of this new stock, became a member of the corporation, a director, and its president, did not estop him from denying the validity of the new stock, although creditors of the corporation were dependent upon its collection for the satisfaction of claims presumably contracted upon the faith of the increased capital. This latter conclusion was grounded upon the proposition that, where the corporation is totally without power to increase its stock, the void act of increase cannot be adopted or ratified or the subscriber estopped in favor of creditors. *Scovill v. Thayer*, 105 U. S. 148, 26 L. ed. 968. That changes in the amount of the capital stock do involve changes in organization, and in the relative relation of the original stockholders towards the corporation and each other, is very evident. That such changes cannot occur without the consent of the shareholders affected is also elementary. How such consent is to be given depends upon the organic law of the corporation. In the absence of some other binding provision in the Constitution, that consent would have to be unanimous. But if the stockholder becomes such under a charter or statutory provision which subjects him, by the action of the directors or of a majority of the members of the corporation, to the liability of such change of relation growing out of an increase of stock, he cannot complain. He has so contracted. *Cook, Stock & Stockholders*, § 280; 1 *Thomp. Corp.* § 78; *Payson v. Withers*, 5 Biss. 276; *Payson v. Stoecker*, 2 Dill. 427; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, 587; *Rend v. Memphis Gayoso Gas Co.* 9 Heisk. 545-558. In the case last cited, where a large increase in the capital stock had been authorized, after the defendant in error had become a subscriber, Judge Nicholson, referring to the effect upon the relative rights of original subscribers, said: "One of . . . [the terms of his subscription] was that after the organization the board of directors would have the power . . . [under the charter] to increase the capital stock from time to time, . . . not exceeding one million of dollars. But [said the judge] such increase of the capital stock could work no change in the rights or liabilities of the original subscribers, for the reason that the corporation continues to be the same entity, and for the further reason that it was part of the contract of the original subscribers that the directors should have the power to increase the capital stock."

Where the capital is fixed in the charter, whether the charter be by special act of legislation, or under a general organization statute, the limit so settled by the charter itself cannot be exceeded unless authority to make an increase be plainly conferred in the charter or by statute. *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 236, 21 L. ed. 908; 2 *Thomp. Corp.* §§ 2076-2079; *Morawetz, Priv. Corp.* § 454; *Beach, Priv. Corp.* § 468. The reason is plain. Where the amount of the capital stock is definitely fixed by the charter itself, a departure therefrom would be to alter the charter itself. The general rule that the powers of

a corporation are those definitely granted and those necessarily implied from the character of the business it is authorized to carry on has application to any change of the authorized capital, and no authority to alter the capital thus defined will be implied. This is the limit of the rule against the power to increase by implication, as laid down in the authorities cited above.

Mr. Morawetz in his very carefully prepared text states the principle thus: "A corporation has no implied authority to alter the amount of its capital stock, where the charter has definitely fixed the capital at a certain sum." *Morawetz, Priv. Corp.* § 484.

So Mr. Beach says: "It is well settled that a corporation has no implied authority, either by resolution of the shareholders or by law, to alter the amount of its capital stock where the charter has definitely fixed it at a certain sum." *Beach, Priv. Corp.* § 468.

The cases cited in support of the text of both of these authors are all cases where the amount of the capital was definitely fixed in the constitution of the company. The case before us is that of an incorporation under a general law which does not impose any limitation whatever upon the capital which incorporators may venture in their business. Neither does it require that the corporators shall in the constituting instrument state what their capital is or is to be. No provision is made for any registration or other mode of publishing the amount of the capital of any company organized under this statute. The marked distinction between this and all other such acts to which attention has been called lies in the fact that, under this law, the amount of the capital of any company formed thereunder constitutes no part of the organic law, but is distinctly made a matter for corporate regulation, and relegated to the field covered by that branch of corporate law constituting the by-laws of the company. A by-law may regulate the exercise of a corporate power, but it cannot enlarge or alter the powers conferred by the charter or by statute. A by-law in its nature is subject to amendment, alteration, and repeal. It cannot destroy or impair a right, and must therefore be a reasonable exercise of the internal management of the corporation. Rights may vest in members or others under a by law which cannot be devested by subsequent alteration. A by-law is a subordinate law. It must not conflict with law, constitutional, statutory, or common, and must not conflict with the Constitution of the corporation as found in its charter. Subject to these qualifications, a by-law is distinguishable from the charter of the corporation in the fact that it is subject to alteration. These principles are primary, and need no support.

If a corporation is given power to determine upon its capital stock as a matter of internal regulation, it is difficult to see why one determination is the exhaustion of the power. Any matter which is the proper subject of regulation by by-law may be so regulated from time to time as the corporate interests demand. The right to alter such a regulation when once made may involve vested rights, and for that reason be inadmissible without consent of all affected. But the right to alter or amend a regulation which is the proper subject of cor-

porate legislation through by-law must depend upon questions wholly foreign to those involved by the assumption of powers not expressly granted. Hence it is that the rule invoked against an implied power of increase where the amount of the capital is definitely fixed by the charter or the statutory articles of incorporation has no application where the power to determine upon the capital to be engaged is made one of the matters for internal regulation by by-law.

But it is said that in Tennessee there was a well-settled, definite, public policy, which forbids the granting of an unlimited power of increasing the capital of such artificial creations. This public policy is supposed to be indicated by what is said in reference to old legislative charters, wherein it is said was always found a definite amount of capital. Whether this is so or not may be matter of dispute. But, assuming it to be so, we find by the 19th section of this act of 1875 a very marked departure from any former policy in respect to the increase of the capital of such old legislative charters. That section provides "that any corporation heretofore chartered by an act of the general assembly which may desire to change its name, increase its capital stock, or obtain any powers granted by this act, shall have the right to do so, by the board of directors of said corporation copying such amendment and making an application," etc. Then follows a form of application and a direction that, when the same has been acknowledged, probated, and filed with the secretary of state in the manner provided for articles of original incorporation, the desired amendment shall become *ipso facto* a part of such old charter. The whole matter is set in motion by the directors, and no one may deny or question the granting of the powers thus applied for. By the subsequent act of 1888, being chapter 163 of the Acts of 1888, this same easy mode of increasing capital stock is extended to corporations theretofore created under the general act of January 30, 1871, which gave to chancery courts the power to organize corporations. Now, whether § 19 of the act of 1875 and the act of 1888 be construed as working an increase of capital stock by the mere application of the directors, or as merely conferring a power of increase to be subsequently exercised by the members of the corporation to be affected, we shall not stop to consider. In one event the directors alone would be able to increase the stock of any such company to any extent they saw fit. Upon the other construction the applying corporation, acting alone through its directors, would obtain an unlimited right of increasing its capital stock, whenever the members chose to exercise it. It is thus very evident that, when this act was passed, there was no definite legislative policy prohibiting the granting of a right to increase the capital of such companies, to be exercised at the will of the corporation concerned. The liberality of the legislature in this respect towards these old legislative irrevocable charters would not lead us to expect any less liberality towards the new brood of corporations anticipated under the legislation then in hand, especially as the same act reserved the right to repeal, alter, or amend the law under which they were to organize.

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Neither does the power to increase imply or involve the power of decrease. Very different questions of public policy are involved by a power of diminishing capital invested in such companies. The rights of creditors would be affected by a decrease. Their rights are not injuriously involved by an increase. To decrease the capital of such a company would be, in most cases, to withdraw capital pledged to the fortunes of the adventure. These reasons have led the courts with great unanimity to hold that the power of increasing the capital does not involve or imply the power to decrease. *Sutherland v. Olcott*, 95 N. Y. 94; *Moses v. Ocoee Bank*, 1 Lea, 898-406; *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35-42; *Seignouret v. Home Ins. Co.* 24 Fed. Rep. 382; *Spelling*, Priv. Corp. § 770; *Smith v. Goldworthy*, 4 Q. B. 430; *Cook, Stock & Stockholders*, § 281; *Morawetz*, Priv. Corp. § 434. That an increase in the capital stock goes to the very foundation of the organization, and changes the relation between original subscribers and the corporation, must be admitted. It furnishes a consideration which might move the legislative authority to withhold or regulate the power. But in the last analysis this is a matter which affects members alone. If they become such, subject to such changes, they cannot complain. No question of public policy is involved by this consideration. Under this act, the power of increase is vested in the whole corporation to be exercised by the shareholders. Under such a power, the directors alone cannot authorize an increase. *Chicago City R. Co. v. Allerton*, 85 U. S. 18 Wall. 233, 21 L. ed. 903; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Brice, Ultra Vires*, 3d Eng. ed. 280.

These considerations lead us to the conclusion that where, by its constitution a corporation is given power to fix upon the amount of capital stock to be engaged in its business by by-laws, an increase of capital by an amendment of the by-laws is valid, and a subscriber bound. The case is like that of a corporation whose capital, by charter provisions, is limited by a maximum named therein. In such a case an increase is valid, provided it does not exceed the charter limit. *Brice, Ultra Vires*, 3d Eng. ed. 280; *Gray v. Portland Bank*, 3 Mass. 364, 8 Am. Dec. 156; *Somerset & K. R. Co. v. Ushing*, 45 Me. 524-532; *Cook, Stock & Stockholders*, § 281. This question has not been decided by the supreme court of Tennessee. The question was mooted in *Cartwright v. Dickinson*, 88 Tenn. 476-487, 7 L. R. A. 706, but expressly reserved.

The case of *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325, has been much relied upon by appellee. It is not in point. The Alabama law required that the constating instrument should state the amount of capital proposed to be employed. This became a definite sum stated in the charter. The fact that the application also stated that the sum named was subject to increase was a nullity. It was an unauthorized power injected into the application. The Tennessee statute contains, as we have already stated, no requirement that the application shall fix the amount of the capital.

This brings us to the Tennessee act of March 27 1838, being chapter 163 of the Acts of 1838.

That act is as follows: "That any persons organized as a corporation under a charter granted by a chancery court of this state, or under the Acts of 1875, chapter 142, approved March 23, 1875, who may desire to, to change the name of such corporation, increase its capital stock, or obtain any power granted by the act entitled 'An Act to Provide for the Organization of Corporations,' approved March 23, 1875, shall have the right to do so under and in the manner provided by § 19 of said act, which provides for the amendment of charters granted by the legislature, and with the like effect as therein provided; provided, that this act shall in no way apply to or affect corporations where suits have already been brought to declare their charters void, and shall have no effect on any kind of litigation or suits now pending against such corporation, for any purpose."

This it is urged is a repeal by implication of the provision in the act of 1875 which we construe as permitting an increase of stock through corporate action of stockholders. This act deals with two distinct classes of corporations,—those organized under the act of January 30, 1871, authorizing chancery courts to organize corporations with the powers conferred by the act, and those organized under the act of 1875. The language of the act is general, but it is manifest that some of the subjects with which it deals relate to but one of the two classes of corporations, while others are common to both. Thus, it is provided that persons organized under either of the two general laws referred to, "who may desire to," may have three distinct privileges. First, they may change the name of the corporation. Second, they may increase the capital stock of the corporation, or obtain the power to increase the capital stock, as these words may be construed. Third, they may obtain the powers granted by the act of 1875. The words of the act in furtherance of the intention must be taken distributively, *reddendo singula singulis*. They should be applied to the subject-matter to which they relate, as indicated by the context. Sutherland, Stat. Const. § 282. "Persons organized as a corporation under" the act of 1875 cannot possibly wish to obtain the powers with which they are already vested. This provision must therefore be referred to corporations not organized under the act of 1875. This principle of construction, being clearly applicable to this act, may be properly applied to so much of the act as refers to the subject of an increase of capital stock. If this act be construed as one by which the power to increase capital stock is to be obtained by such an amendment, to be exercised by the members of the corporation, then the power already existed, and these words should be referred to the other class of corporations where the power did not exist. The power to change the corporate name did not exist under either class of articles of association. This part of the act may therefore be regarded as applicable to both classes of corporations.

The act of 1883 contains no repealing clause, and the argument for repeal of the power of increase by by-law, which we find in § 5 of the act of 1875, has no basis, if the rule of construction we have applied be sound. 88 L. R. A.

But if the maxim, *Reddendo singula singulis*, has no proper application, and all the provisions of the act be held as intended to apply to corporations organized under the act of 1875, then there is no room for an implied repeal of that power, if the act of 1883 be construed as conferring on the directors the power to increase the capital by simply making the application prescribed. Such a power of increase by action of the directors would not be necessarily inconsistent with the power of increasing by action of the shareholders through by-law. The whole subject would not be covered by the new act. Repeals by implication are not favored, and will not be presumed if the two acts can stand together. Repugnancy in principle merely is not enough to work a repeal, unless it is clear that the new legislation is intended to cover the whole field. Sutherland, Stat. Const. § 137; *Cate v. State*, 3 Sneed, 120; *Durham v. State*, 89 Tenn. 728 *et seq.* On the other hand, if the act be construed as a method by which corporations not having the power of increasing capital may obtain the power, then the inclusion of corporations organized under the act of 1875, among those intended as beneficiaries, would not repeal a power already existing, there being no difference in limitation or method between the existing power and that to be obtained by applying for the amendment. So far as that act may be regarded as a legislative opinion that the power did not exist under the act of 1875, such opinion, though entitled to some consideration, would not be of any considerable weight, and is offset by a contrary opinion evidenced by the repeal of the act by the act of April 7, 1893 (Tenn. Acts 1893, p. 299, chap. 146), and the substitution of no other mode of increasing capital. This express repeal would leave no mode by which such companies might lawfully increase their capital stock, unless the power existed under the act of 1875,—a condition of things which we cannot assume the legislature to deliberately intend in view of the legislative history of this subject.

Another objection to a decree against the appellee remains to be considered. The 8th section of the revenue act of September 18, 1891, provided, among other things, that every corporation increasing its capital should pay a certain privilege tax upon the increase; "and no such corporation, joint stock company, or association shall have or exercise any corporate powers until the said tax shall have been paid. And the secretary of state shall not file or record any charter, certificate of incorporation, or articles of association, or certify or give any certificate to any corporation, joint-stock company, or association until the foregoing tax has been paid; and no such company, incorporated by any special act of the legislature, shall go into operation, or exercise any corporate powers or privileges, until said tax has been paid." There are several answers to this:

First. It does not appear that this tax has not been paid. The court will not presume that this tax law has been violated, but will, on the contrary, presume that the law has been complied with. *Young v. South Tredegar Iron Co.* 85 Tenn. 189.

Second. This defense is not open to the appellee. If the corporation had the power to in-

crease its stock, the failure to pay this tax is a mere irregularity, against which the appellee, by his acceptance of the stock and his taking the office of president by virtue alone of his stock, has estopped himself. The case in this aspect falls under the cases of *Handley v. Stutz*, 139 U. S. 417, 85 L. ed. 237, and *Veeder v. Mudgett*, 95 N. Y. 295. That this increase was made by a resolution of the stockholders clearly appears. A by-law is nothing more nor less than a resolution of the members of the incorporation. This resolution was unanimously passed. Elliott claimed a credit for \$3,012.50, for a patent right assigned to the company in part payment on his stock. This arrangement was made as a means of letting Elliott have the stock at less than par, its capital having been impaired by losses, so that its actual value was less than 75 per cent of its par value. The difficulty to be met was not that increase stock might not in good faith be sold at less than par, but in the fact that the by-law authorizing the increase required the new stock to be sold at par. Elliott made the transfer of this patent right on July 6, 1892, and on January 31, 1893, the directors passed a resolution in the following words: "Resolved, that for and in consideration of the sum of \$1.00, the right transferred to this company by J. M. Elliott, Jr., for the manufacture of his vertical hook coupler, be, and is hereby, transferred back to him. All rights by this transfer are released and conveyed back to him, the same as though

said transfer made on the 6th day of July, 1892, had not been made."

The arrangement by which this patent right was to be taken at the price fixed was for the purpose of evading the condition prescribed by the shareholders, namely, that the increase stock should be sold at par. This seems to have been known to Elliot. The resolution by which he reacquired the patent, at the nominal sum of \$1, must be construed either as a rescission of the agreement for the purchase of his patent, or as but a part of the original illegal scheme by which the limitation upon the power of the directors to sell the new stock at less than par was to be evaded. In either event, the appellee is not entitled to the credit, it not appearing that the patent was of any value to the corporation while it held the title. The subsequent agreement of the receivers to allow this credit was a mere proposed compromise settlement, and never carried out, the appellee refusing to pay the balance due upon obtaining such credit or to give his notes therefor.

The decrees must be reversed and remanded, with direction to enter a decree against appellee for \$6,997.32, with interest from the filing of the petition of the receivers. The appellee will pay the costs of this court and cost under the petition in the court below.

Rehearing denied.

ILLINOIS SUPREME COURT.

CONSOLIDATED COAL COMPANY of
St. Louis, *Appt.*,

v.
Joshua S. PEERS *et al.*

(106 Ill. 361.)

1. It is not proper to strike a plea from the files because it is insufficient in substance or form, but the remedy in such case is by demurrer.
2. A presumption against the pleader as to the contents of an instrument will arise when he bases a claim upon it without setting it forth *in hæc verba* or making averments which definitely show its contents.
3. A privity of estate between a lessor and an assignee of the term renders the assignee liable for breaches of any express covenants of the lease running with the land or term if they occur while such privity continues to exist.
4. A question of res judicata cannot be raised on appeal when it is not presented by the record.
5. A provision that an assignee of a lease takes it "subject to the agreements in the lease" does not impose a personal contractual obligation on the assignee.

6. The exclusion of "the agreements of the lessee" from a covenant against encumbrances in an assignment of a lease does not impose a personal liability upon the assignee to perform such agreements, but leaves them *in statu quo*.

(*Phillips, J., dissents.*)

(November 11, 1890.)

A PPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Madison County in favor of plaintiffs in an action brought to recover the rent due under a mining lease. *Reversed.*

Statement by Baker, J.:

This suit originated in the Madison circuit court. The declaration is in assumpsit, and charges, in substance, that on December 17, 1870, Joshua S. Peers *et al.*, the plaintiffs (appellees here), were the owners of coal underlying certain described lands, and by a lease in writing and under seal leased to the Abbey Coal & Mining Company, for the term of twenty-five years, the sole and exclusive right of mining and operating in coal on said lands, in consideration whereof the lessee, said Abbey Coal & Mining Company, agreed, among other stated things, to pay appellees a minimum rent of \$1,200 a year; that said Abbey Company sunk a shaft, and operated a mine until Au-

NOTE.—As to the liability of an assignee of a leasehold for rent, see *Bonetti v. Treat* (Cal.), 14 L. R. A. 151, and *nota*.
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gust 11, 1886, when, by its deed of that date, it granted, bargained, sold, assigned, transferred, and set over to the Consolidated Coal Company of St. Louis, defendant, the coal underlying said tracts of land, together with all the rights, privileges, and appurtenances thereunto appertaining or belonging, as the same were assured by said lease, and subject to the agreements therein mentioned to be performed by said lessee, and thereby covenanted and agreed to and with the defendant that it was seized of a perfect title to the property thereby conveyed, and that the same was free from all other and prior encumbrances, except those above specifically mentioned, and that it would warrant and defend the same to the defendant and to its successors; that the defendant took possession of the property by said deed conveyed to it, and from thence until the commencement of this suit has had the use, control, and enjoyment thereof, without molestation, interference, or hindrance on the part of the plaintiff, and during that time, to wit, from the 20th day of September, 1891, until the 20th day of September, 1894, there accrued to them, under and by virtue of the provisions of said lease, for and on account of royalty guaranteed, the sum of \$3,600, which has not been paid. The declaration then avers, in substance: By means whereof the defendant has become liable to pay to the plaintiffs the said sum of \$3,600, according to the terms and effect of the provisions of said lease and of said deed; and, being so liable, etc., undertook and promised, etc. To this declaration the following plea was filed: "And now comes the said defendant, by Charles W. Thomas, its attorney, and for a plea in this behalf says *actio non*, because it says that on the 28th day of November, A. D. 1887, it, the said defendant, by its instrument in writing of that date under its corporate seal, did assign and set over to one Jacob Lasurs, of said county, the lease in the declaration mentioned as having been made and executed by plaintiffs, and all the leasehold interest and estate thereby conveyed, and did put the said Lasurs into possession of the mine and premises in said lease described, by virtue whereof said Lasurs became, and since said time hath been, the sole lessee of said mine and premises under said lease, without this: That the defendant has had the use, control, and enjoyment of the said mine and premises from, to wit, the 20th day of September, A. D. 1891, to the 20th day of September, A. D. 1894, as is by the said declaration supposed, and this the defendant is ready to verify; wherefore," etc. Thereupon the plaintiffs moved the court to strike said plea from the files "for the following reasons, to wit: Because said plea does not answer the declaration, and presents an immaterial issue." The court allowed said motion, and ordered that the plea be stricken from the files, and rendered judgment by *nil dicit* for want of a plea, and had the plaintiffs' damages assessed by a jury, and rendered final judgment for the \$3,600 damages so assessed. To these several actions and proceedings of the court and to the rendition of judgment the defendant excepted. Upon an appeal to the appellate court the judgment was affirmed. This further appeal was then taken.

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Mr. Charles W. Thomas, for appellant:

An assignee of a lessee may destroy all privacy of estate between himself and the lessor by assigning over.

Taylor, Land. & T. § 452; *Washington Natural Gas Co. v. Johnson*, 123 Pa. 576, 10 Am. St. Rep. 558, and note; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Johnson v. Bates*, 16 Jones & S. 180; *Tate v. McCormick*, 23 Hun, 218; *Childs v. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 164; *Taylor v. Shum*, 1 Bos. & P. 23; *Babcock v. Scoville*, 56 Ill. 461.

The words "to be performed by said lessee" are merely descriptive of the agreements, and the phrase means simply, "subject to the agreements of the lessee therein mentioned."

Where the lessee assigned his interest in demised premises, by an indenture executed by both parties, "subject to the payment of rent, and the performance of the covenants and agreements reserved and contained in the original lease," it was held that the lessee could not maintain an action of covenant against the assignee in respect to such breach, the words "subject to the payment of rent," etc., being words of qualification, and not of contract.

2 Taylor, Land. & T. § 454; *Walker v. Phylsick*, 5 Pa. 193; *Wolveridge v. Steward*, 8 Moore & S. 561; *Serton v. Chicago Storage Co.*, 129 Ill. 318; *Comstock v. Hill*, 37 Ill. 542; *Hammer v. Johnson*, 44 Ill. 193; *Fowler v. Fay*, 62 Ill. 375; *Barker v. International Bank*, 80 Ill. 96; *Devlin, Deeds*, § 1067; *Stebbins v. Hall*, 29 Barb. 524.

The want of a warranty in such cases is equivalent to an agreement between the parties that the land conveyed shall remain subject to the encumbrance, and that if the grantee chooses to pay the encumbrance he may, otherwise not.

Comstock v. Hill, 37 Ill. 542; *Fowler v. Fay*, 62 Ill. 375.

Messrs. John G. Irwin and W. H. Knome for appellees.

Baker, J., delivered the opinion of the court:

There are some circumstances under which the court may properly strike a plea from the files, and this even when it presents a good defense to the action; and therefore, when the record does not show upon what ground the action of the court was based, it will be presumed in favor of the ruling of the court, that sufficient cause to justify its action was made to appear. *Fanning v. Russell*, 81 Ill. 398. Here, however, the motion and the proceedings had thereon are preserved in a bill of exceptions, and it is thereby shown that the plea was stricken from the files, and judgment by *nil dicit* rendered, because, in the opinion of the circuit court, said plea does not answer the declaration, and presents an immaterial issue. It has been held by this court in several cases that if a plea is insufficient in substance or form, the only mode of taking advantage of the defect is by demurrer, and that it is improper to strike the plea from the files. *Orne v. Cook*, 81 Ill. 288; *Johnson v. Freeport & M. River R. Co.*, 111 Ill. 418. To substitute a motion to strike a pleading from the files in place of a demurrer to such pleading is to abrogate the rules of common law per-

taining to pleading and practice, and to introduce a new and dangerous rule of procedure, and one that would tend to deprive parties litigant of the statutory right of amendment. *Hitchcock v. Haight*, 7 Ill. 604; *McClure v. Williams*, 65 Ill. 390; and *Burlingame v. Turner*, 2 Ill. 588, cited by appellees, have reference only to cases where immaterial issues have in fact been formed, not to a case where issue of fact has not been joined upon the pleading which is supposed to be immaterial. In a case such as that last mentioned, a demurrer is the proper tool to work with, whereas, after immaterial issues have been formed, there is no place for a demurrer, and such issues may be stricken from the files and a replender awarded, or judgment *nil dicit* rendered, or if after verdict, and in a very clear case, judgment *non obstante veredicto* given. The matter of the appeal herein has been discussed before us just as if a demurrer had been interposed to the plea, and sustained. Since this is so, and since the court below decided the case upon that theory, we deem it advisable to overlook the mere error of practice indicated, and dispose of the appeal upon the footing upon which counsel have submitted it. The declaration alleges the leasing of the premises to the Abbey Coal & Mining Company for the term of twenty-five years, and the covenant of that company to pay an annual royalty of at least \$1,200; the entry of that company on the demised premises, the opening of the mine thereon, and the operation of the same by it until August 11, 1886; the assignment by it, at that date, by deed, of the lease and demised property to appellant; and that the appellant "thereupon took possession of the property by said deed conveyed to it, and from thence until the commencement of this suit has had the use, control, and enjoyment thereof," etc.; and that during that time there accrued to appellees, under and by virtue of the provisions of the lease, guaranteed royalties from September 20, 1891, until September 20, 1894, amounting to \$3,600, which have not been paid. Where there are express covenants in a lease which runs with the land, such as to pay rent, the lessee is bound to their performance by reason of his being both in privity of contract and privity of estate with the lessor; and the privity of contract continues to the end of the term, but by an assignment of the term he terminates the privity of estate. Between the lessor and the assignee of the term there is privity of estate, and by reason of such privity the assignee is liable for breaches of any express covenant of the lease which runs with the land or term, and which occurs while such privity continues to exist. Tested by these well-settled rules, the declaration states a good cause of action against appellant for the rents or royalties for which suit is brought.

If we assume that the only valid cause of action against appellant that is set up in the declaration is that which we have mentioned and which has for its basis privity of estate, then it necessarily follows that the plea that was interposed by appellant is not justly subject to the charges brought against it of not answering the declaration, and of presenting an immaterial issue, but that, on the contrary, it presents a complete legal defense to the suit. The plea impliedly admits the making of the

lease wherein appellees were lessors and the Abbey Coal & Mining Company the lessee; the covenant of said lessee to pay the stated rents or royalties; the assignment by said lessee, by its deed of August 11, 1886, of the lease and demised premises to it, the defendant, and that it thereupon took possession of the mine and property; and pleads by way of defense to the action that it, the defendant, on November 28, 1887, by its instrument in writing of that date, under its corporate seal, did assign and set over to one Jacob Lasurs the lease and all the leasehold interest and estate, and did put said Lasurs into possession of the mine and premises described in the lease; and concludes by traversing the fact alleging in the declaration that it, the defendant, had the use, control, and enjoyment of the premises from September 20, 1891, to September 20, 1894. The rule is that, as the liability of the assignee grows out of privity of estate, and that only, it ceases when that privity ceases to exist; and each successive assignee is liable for only such breaches of covenant as occur while there is privity of estate between him and the lessor. *Sexton v. Chicago Storage Co.* 129 Ill. 318; *Washington Natural Gas Co. v. Johnson*, 128 Pa. 576; 2 Taylor, Land. & T. § 452; Wood, Land. & T. §§ 307, 339, 340, 349.

It is claimed by appellees, in their brief, that the question at issue in this cause was adjudicated in some former litigation between the parties to this suit, and that the matter here at issue is *res judicata*. There are no allegations in the declarations showing a former adjudication in respect to the questions or matters submitted in this suit for the decision of the court, nor is there any replication of *res judicata*; and so the necessary conclusion must be that no question of *res judicata* is raised by the record. The principal reliance, however, of appellees, is the claim that the provisions in the deed made on August 11, 1886, by the Abbey Company, lessee, to the defendant, assigning the lease and leasehold property to appellant, amount to a covenant on the part of appellant to pay the accruing rents or royalties for the residue of the term to the lessor in the assigned lease; in other words, that such provision show a privity of contract between appellees and appellant. If this contention is well grounded, then, of course, appellant did not shake off this contractual liability by making an assignment to Lasurs. Such latter assignment, while it would destroy the privity of estate, could not have the effect of obliterating the privity of contract as between appellees and appellant. The material question, then, is, Does the declaration show an express contract on the part of appellant to pay rent for the entire unexpired portion of the term created by the lease? The declaration states that "the said Abbey Coal & Mining Company granted, bargained, sold, assigned, transferred, and set over to the defendant the coal underlying said tracks of land, together with all the rights, privileges, and appurtenances thereunto appertaining or belonging, as the same were conveyed by said lease, and subject to the agreements therein mentioned to be performed by said lessee." The words principally relied on as showing a covenant on the part of appellant are these: "Subject to the agreements therein

mentioned to be performed by said lessee." The expression, "to be performed by said lessee," does not refer to the appellant. The Abbey Coal & Mining Company is the only "lessee" mentioned in the declaration or in the deed set forth therein. Said company is manifestly the "lessee" designated. The words, "to be performed by said lessee," then are merely descriptive of the agreements intended to be pointed out by the deed, and the whole clause relied on simply means, "subject to the agreements of the lessee mentioned in the lease."

Do the words, "subject to the agreements in the lease," impose a personal contractual obligation on the assignee? How stand the authorities upon that question? *Wolveridge v. Steward*, 3 Moore & S. 561, was an action of covenant by the lessee and assignor for non-performance of the covenants in the original lease on the part of the lessee and his assigns to be performed, and which it was contended on the part of the plaintiff that the defendant, according to the legal effect of the assignment from the plaintiff to him, covenanted to perform. The assignment was by an indenture executed by both parties, and was made "subject to the payment of rent and performance of the covenants and agreements reserved and contained in the original lease." The defendant took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. After the second assignment, the lessee was compelled to pay to the lessor rent which the second assignee had suffered to be in arrear. And the said action of covenant prosecuted by the lessee against his immediate assignee, it was held in the exchequer chamber, on error, Lord Chief Justice Denman delivering the opinion, that the immediate assignee was not liable in covenant to the lessee for rent which the latter had been called upon to pay in consequence of the default of the second assignee, and that the words, "subject to the payment of rent," etc., are words of qualification, and not words of contract. In *Walker v. Phynick*, 5 Pa. 193, it was held, in an opinion delivered by Chief Justice Gibson, that the assignment of land on which a perpetual rent has been reserved, declared in habendum to be "under and subject to the payment of the said rent as the same shall accrue forever," does not create any liability by the assignee to indemnify his assignor for payments of rent accruing after the assignee has assigned over, which were compelled under the personal covenant in the original ground-rent deed; and this whether the assignment be by deed poll or indenture. The particular question now under consideration seems never to have been passed upon directly by this court, but the decisions in cases more or less analogous have been in consonance with the law as held in the cases we have cited. In *Comstock v. Hitt*, 37 Ill. 542, it was held that taking a deed for premises "subject to" the terms of a title bond, and without any express promise to pay the notes for purchase money mentioned therein, did not subject the grantee to the payment of such notes. It was there said: "Taking a deed 'subject to an outstanding mortgage' creates no personal liability on the grantee to pay off the encumbrance, unless he has specifically agreed so to do, or the amount of the

mortgage has been deducted from the purchase price." *Hammer v. Johnson*, 44 Ill. 192, is to like effect; and so, also, is *Fowler v. Fay*, 62 Ill. 375. And the later case of *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467, recognizes the same rule of law, but in the deed there in question was this provision: "Which said two trust deeds, and the indebtedness thereby secured, are hereby assumed to be paid by the said party of the second part;" and this, of course, was held to be an express promise by the grantee to pay the indebtedness, he having accepted the deed with a knowledge of its contents.

Several cases are cited and relied upon by appellees. To the more important of these we will make brief reference. In *Wilson v. Marlow*, 66 Ill. 385, there was a contract under seal and an assignment of a patent right, and the plaintiff was to receive 5 per cent on the net profits of the business of manufacturing, etc.; and it was held that this amounted to an implied covenant that the business should be carried on if it could be made sufficiently profitable to justify its prosecution. We are unable to see that this decision is applicable to the case at bar. We find nothing in the averments of the declaration that shows that it was the intention of the Abbey Company and of appellant that the latter should not have the power to make a second assignment of the lease, and that appellant, and appellant alone, was to operate the mine for the residue of the term. In *Steward v. Wolveridge*, 9 Bing. 60, 2 Moore & S. 83, it was held by the court of common pleas that an assignee who takes from a lessee leasehold premises by indenture, "subject to the rent reserved in the lease," is liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. But it largely detracts from the authority of that decision that it was afterwards unanimously reversed in the exchequer chamber, on the ground that the words "subject to," etc., were merely words of qualification, and not of contract. *Wolveridge v. Steward*, 3 Moore & S. 561. And it also detracts from its weight that the decision is largely based on *Burnett v. Lynch*, 5 Barn. & C. 589, in which the breaches occurred during the time that the defendant was assignee of the term. *Port v. Jackson*, 17 Johns. 239, is not an authority in point, for there was in that case a positive and express covenant on the part of the assignee to pay the rent, as it became due, to the lessor. In *Campbell v. Shrum*, 8 Watts, 60, it was held that the purchase of a tract of land by agreement under seal, "subject to the payment of the purchase money and interest," due to a third person, is a covenant by the vendee to pay such purchase money and interest, upon which an action may be maintained in the name of the vendor for the use of him to whom it is due. The case seems to be in conflict with the rule as announced by this court in *Comstock v. Hitt*, 37 Ill. 542; *Hammer v. Johnson*, 44 Ill. 192; *Fowler v. Fay*, 62 Ill. 375; and *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467. Besides this, the decision that the words used created a covenant, according to the statement of the same court in *Walker v. Phynick*, 5 Pa. 193, turned upon the fact that the instrument in which they were employed was an

indenture, whereas, both from the statement in the declaration in the case at bar that the words "subject to the agreement," etc., were in "its deed," i. e., the deed of the lessee,—as well as from the rule that the declaration must be taken most strongly against the party whose pleading it is, it appears that the deed of August 11, 1886, here pleaded, was a deed poll.

There are several considerations that lead us to the conclusion that the words "subject to the agreement," etc., used in the deed of August 11, 1886, do not import a covenant on the part of the assignee to personally pay all rents or royalties that may accrue during the term: First. The weight of authority is otherwise. Second. The rule deducible from the decisions of this court in analogous cases is otherwise. Third. As has been suggested in some of the cases, it is the duty of a party who intends by a deed to bind another by a covenant in a former formal instrument to insert such covenant in the deed in such distinct and intelligible terms as that the party to be bound cannot be deceived, and not call upon the courts to infer such a covenant from equivocal words, which were probably understood by one party in a sense different from that sought to be ascribed to them by the other. Fourth. The assignee always takes the estate *cum onere*,—that is, he takes and holds it subject to the agreements agreed to be performed by the lessee,—and it is difficult to perceive why, upon sound legal principle, the mere expression of this legal implication should create a personal contractual obligation which the legal implication itself would not create. Fifth. It is the public policy of this state that the transmissibility of property should be free and unfettered; and to hold from mere inference, and in the absence of an express and plain covenant, that the assignee of a lease and his heirs will be personally liable for the payment of reserved rents which may accrue perhaps hundreds of years after such assignee has sold and signed the lease to a third person, would tend to make leasehold estates unsalable, and tend to prevent the transfer of them to others.

A further contention of appellees is based upon the averment in the declaration that the grantor in the deed of August 11, 1886, covenanted that the property "was free from all other and prior encumbrances except these above specifically mentioned." The claim is that this exception can be held to refer only to the "agreements in the lease to be performed by the lessee." It is a sufficient answer to this claim that the entire deed is not set out *in hac verba* in the declaration, and that there is

no averment therein that no encumbrances other than "the agreements of the lessee" are specifically mentioned in the deed. The presumptions in this regard must be against the pleader. Besides this, as between the lessee and his assignee, the covenants in the lease constitute no encumbrance whatever. The agreement in the lease to pay rent is an incident of the leasehold estate that was assigned,—one of the elements of the estate itself. The doctrine is that nothing which constitutes a part of the estate, or which, as between the parties, is to be regarded as an incident to which the estate is subject, can be deemed an encumbrance. *Dunklee v. Wilton R. Co.* 24 N. H. 489; 2 Devlin, Deeds, § 906. But let us assume that "the agreements to be performed by the lessee" are the "encumbrances specifically mentioned." An assignment of a leasehold estate which warrants and defends the assignee against the performance of the agreements of the lease would, indeed, be a curiosity in the way of a legal instrument. The averments of this declaration, however, show that the Abbey Coal & Mining Company did not execute such an instrument, but that by its deed it simply warranted against "encumbrances" other than such "agreements." The absence of a warranty against such "agreements" in legal effect merely left the assigned property, in respect to said "agreements," in its normal condition, and subject, in the hands of the assignee, to the performance of such "agreements;" in other words, there was no change, in this regard, either in the rights of the parties to the deed or in the status of the property which is the subject of the deed. If the words "subject to the agreements therein mentioned to be performed by said lessee," do not impose a personal liability upon the assignee, then it is impossible that the words used in the deed that simply exclude "the agreements of the lessee" contained in the deed from the operation and effect of the covenants of the deed, and leave such "agreements" *in statu quo*, can work such result.

It follows, from the views we have expressed, that the judgments of the circuit and appellate courts are erroneous. They are reversed. The cause is remanded to the circuit court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Phillips, J., dissents.

Rehearing denied May 5, 1897.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John Oscar TEELE

v.

BISHOP OF DERRY *et al.*

(168 Mass. 341.)

1. A bequest in trust to purchase a lot and build a chapel to be used forever for public worship under the auspices of the Roman Catholic Church is for a public charitable use.
2. The failure of the purpose of the testatrix in a bequest for the building of a chapel in her native place, which results because the people there are diminishing in number and are too poor to support the chapel, will not justify a diversion of the fund by the *cy près* doctrine to the repair of a neighboring parish church or for a parish house or the enlargement of a parish graveyard or otherwise for the general benefit of the parish, but the bequest must be held to have failed.

(May 1, 1897.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of an action brought to obtain instructions as to the construction and validity of a certain clause in the will of Margaret Bralley, deceased.

The clause of the will as to which instructions were asked directed the trustees to set aside a sum not exceeding \$12,000 to be expended by them in the purchase of a lot and the building of a chapel thereon in Carndrine, county Tyrone, Ireland, the title thereof to be vested in the Bishop of that diocese, and his successors in office, and upon the trust that said chapel and lot shall forever be used for the purposes of public worship under the auspices of the Roman Catholic Church.

It proved not practicable to use the money for the purpose of building the chapel because there was not sufficient population in Carndrine to support it and the bishop desired to use the money for repairs on the parish church, which is at Augbayarron 2 or 3 miles distant from Carndrine, to enlarge the graveyard, and to assist in paying for a parish house there.

The residuary legatees under the will claimed that the bequest, if valid, had failed and fallen into the residue which belonged to them.

Further facts appear in the opinion.

Mr. John O. Teele in propria persona.

Messrs. Charles R. Darling and Winfield S. Slocum, for defendants:

The bequest in the will of Margaret Bralley for the purpose of building a chapel at Carndrine is a good charitable gift.

Saltonstall v. Sanders, 11 Allen, 446; *Re Bartlett*, *Petitioner*, 163 Mass. 509; *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158; 2 Perry, Tr. 3d ed. § 687; *Jackson v. Phillips*, 14 Allen, 589.

It is no objection that the title to the chapel is directed to be vested in the bishop and his successors in office.

NOTE.—As to the *cy près* doctrine, see generally the note to *Stratton v. Physio-Medical Institute (Mass.)* 5 L. R. A. 83; also *Crerar v. Williams (Ill.)* 21 L. R. A. 454.

88 L. R. A.

McAlister v. Burgess, 161 Mass. 269, 24 L. R. A. 158; *Tudor, Charitable Trusts*, 3d ed. pp. 67 *et seq.*, 96; *Darcy v. Kelley*, 153 Mass. 488.

A trust is created notwithstanding the use of the words "request" and "may."

1 Perry, Tr. § 112; *Warner v. Bates*, 98 Mass. 274; *Bacon v. Ransom*, 189 Mass. 117; *Worcester County v. Schlesinger*, 16 Gray, 166. See *Minot v. Baker*, 147 Mass. 848.

The case is a proper one for the application of the doctrine of *cy près*.

American Academy of Arts & Sciences v. Harvard College, 12 Gray, 582; *Jackson v. Phillips*, 14 Allen, 589; *Fellows v. Miner*, 119 Mass. 541; *Society for Promoting Theological Edu v. Atty. Gen.* 135 Mass. 285; *Atty. Gen. v. Briggs*, 164 Mass. 561; *Weeks v. Hobson*, 150 Mass. 377, 6 L. R. A. 147; *Church of Jesus Christ of L. D. S. v. United States*, 186 U. S. 1, 52, 53, 34 L. ed. 478, 494; *Re Villers-Wilkes*, 72 L. T. N. S. 323; 2 Perry, Tr. § 723 *et seq.*; *Biapham*, Eq. 5th ed. §§ 127 *et seq.*

The principle on which the doctrine rests appears to be, that the court treats charity in the abstract as the substance of the gift, and the particular disposition as the mode, so that in the eye of the court the gift, notwithstanding the particular disposition may not be capable of execution, subjects as a legacy which never fails and cannot lapse.

Lyons v. Advocate General of Bengal, L. R. 1 App. Cas. 91.

The use desired by us is a charitable use.

Tudor, Charitable Trusts, 3d ed. p. 6.

The fact that the charity is for the benefit of people in another county is not a valid objection to its maintenance or to the jurisdiction of this court, the testatrix having been domiciled and the will probated here. In case of a foreign charity the court may appoint a trustee here or abroad according to circumstances.

Fellows v. Miner, 119 Mass. 541; *Tyssen, Charitable Bequests*, chap. 23, *Foreign Charities*.

The rule is the same in case of private trusts, the residence of the testator and the probate of his will here conferring jurisdiction on our courts, although the beneficiaries and even the trustees are out of the jurisdiction.

Chase v. Chase, 2 Allen, 101; *Jenkins v. Lester*, 131 Mass. 355; *Bowditch v. Soltyk*, 99 Mass. 136; 1 Perry, Tr. 3d ed. §§ 70 *et seq.*

The only question specially affecting a foreign charity is whether it is a valid charity by the laws of the country where created, and also of the country where it is to be executed.

Tyssen, Charitable Bequests, chap. 23, p. 289; *Fellows v. Miner*, 119 Mass. 541.

As to how far the domestic courts will go in regard to administering a foreign charity, and to what extent they will leave the matter to the courts of the foreign country, see the following cases, *viz.*:

Lyons v. East India Co. 1 Moore, P. C. O. 175; *Atty. Gen. v. Lepine*, 2 Swanst. 181; *Collyer v. Burnett*, Tamlyn, 79; *Forbes v. Forbes*, 18 Beav. 552; *Atty. Gen. v. Sturge*, 19 Beav. 597.

Mr. William M. Noble, for residuary legatees:

The court will not order the trustee to purchase land and erect a chapel as directed in the will.

The court will not substitute its discretion for that of a trustee; far less will it substitute the discretion of the Bishop of Derry; yet the bishop has gone on with the repairs and improvements which he proposes to make this fund pay for, without even consulting the trustee under the will.

Proctor v. Heyer, 122 Mass. 525; *Penniman v. Sanderson*, 18 Allen, 193.

The court will not substitute another charity in the place of the one intended by the testatrix.

The doctrine of *cy près* means that where a will discloses a general charitable intent which cannot be literally carried out, it will be carried into effect as nearly as possible.

Where the thing which fails is the very consideration which led to the making of the gift, the gift itself fails and *cy près* has nothing to do with the case.

Clark v. Taylor, 1 Drew. 642; *Corbyn v. French*, 4 Ves. Jr. 418; *Russell v. Kellett*, 3 Smale & G. 264; *Fiske v. Atty. Gen.* L. R. 4 Eq. 521; *Re Ovey*, L. R. 29 Ch. Div. 560; *Re Randall*, L. R. 38 Ch. Div. 218; *Re White*, L. R. 33 Ch. Div. 449; *Re Rymer* [1895] 1 Ch. 19; *Carbery v. Cox*, 3 Ir. Ch. Rep. 231; *Sims v. Quinlan*, 16 Ir. Ch. Rep. 191, 17 Ir. Ch. Rep. 43; *Minot v. Baker*, 147 Mass. 348; *Jackson v. Phillips*, 14 Allen, 594; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Stratton v. Physio-Medical College*, 149 Mass. 505, 5 L. R. A. 33; *Bullard v. Shirley*, 158 Mass. 559, 12 L. R. A. 110.

Certainly the Bishop of Derry will not contend that this is a gift for the benefit of the Roman Catholic Church, and that it is therefore a gift to general public charity; that would be to argue himself out of court; for, by the rule in this commonwealth, such a gift would be a private charity, and the doctrine of *cy près* would have no application whatever.

Old South Soc. v. Crocker, 119 Mass. 1, 20 Am. Rep. 299; *Atty. Gen. v. Proprietors of Meeting House in Federal Street*, 8 Gray, 1; *Atty. Gen. v. Clark*, 167 Mass. 201.

If, then, in this case, the testatrix had a particular object or a particular charity in mind, rather than a general intention to devote some of her money to public charity, the gift has lapsed; and the question before the court in its last essence is one of construction.

Clark v. Taylor, 1 Drew. 642; *Corbyn v. French*, 4 Ves. Jr. 418; *Russell v. Kellett*, 3 Smale & G. 264; *Fiske v. Atty. Gen.* L. R. 4 Eq. 521; *Re Ovey*, L. R. 29 Ch. Div. 560; *Re Randall*, L. R. 38 Ch. Div. 218; *Re White*, L. R. 33 Ch. Div. 449; *Re Rymer* [1895] 1 Ch. 19; *Carbery v. Cox*, 3 Ir. Ch. Rep. 231; *Sims v. Quinlan*, 16 Ir. Ch. Rep. 191, 17 Ir. Ch. Rep. 43; *Minot v. Baker*, 147 Mass. 348; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Stratton v. Physio-Medical College*, 149 Mass. 505, 5 L. R. A. 33; *Bullard v. Shirley*, 158 Mass. 559, 12 L. R. A. 110; *Atty. Gen. v. Bishop Oxford*, cited in 1 Bro. Ch. 444; *Corbyn v. French*, 4 Ves. Jr. 418; *Cherry v. Mott*, 38 L. R. A.

1 Myl. & C. 128; *Jackson v. Phillips*, 14 Allen, 586.

The object of this testatrix, instead of being advanced and improved upon by the proposed administration, would be extinguished.

Stratton v. Physio Medical College, 149 Mass. 508, 5 L. R. A. 33; *Re Buck* [1896] 2 Ch. 727; *Re Stevin* [1891] 2 Ch. 236; *Easterbrooks v. Tillinghast*, 5 Gray, 17.

Equity is slow to enforce trusts of this nature to be administered in foreign countries when the trustee refuses or manifests an indisposition to carry out the intention of the testator.

New v. Bonaker, L. R. 4 Eq. 655; *Lyons v. Advocate General of Bengal*, L. R. 1 App. Cas. 91.

Morton, J., delivered the opinion of the court:

We think that the bequest to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, Ireland, "to forever be used for purposes of public worship under the auspices of the Roman Catholic Church," was a gift for a public charitable use. *Atty. Gen. v. Briggs*, 164 Mass. 561, 567; *Re Bartlett, Petitioner*, 163 Mass. 509, 514; *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158; *Sears v. Chapman*, 158 Mass. 400. The fact that the charity would be administered in a foreign country does not, of itself, render the gift void, and there is nothing to show that it would not be a good public charity by the law of Ireland. *Fel'ors v. Miner*, 119 Mass. 541, 546; *Washburn v. Sewall*, 9 Met. 280; *Burbank v. Whitney*, 24 Pick. 146, 154, 35 Am. Dec. 312; *Chamberlain v. Chamberlain*, 43 N. Y. 424, 432. Neither does the fact that the bequest is in the nature of a public charity require of itself that the court should frame a scheme to carry out as nearly as may be the purpose of the testatrix, if for any reason that has become impossible of performance in the manner which she has provided. "Assuming that the object is a charity, still there is no universal principle that the testator's particular intentions must be sacrificed by reason of that general object." *Bullard v. Shirley*, 158 Mass. 559, 560, 12 L. R. A. 110.

The difficulty in this case, and generally in cases like it, is one of construction,—to find out the intention of the testatrix. When that is arrived at, the rules of law which apply seem to be pretty well settled. If it appears from the will that the intention of the testatrix was that her property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then, if by a change of circumstances or in the law it becomes impracticable to administer the trust in the precise manner provided by the testatrix, the doctrine of *cy près* will be applied, in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated. There are numerous cases in which this rule has been applied. *Atty. Gen. v. Briggs*, 164 Mass. 561, 567; *Sears v. Chapman*, 158 Mass. 400; *Weeks v. Hobson*, 150 Mass. 377, 6 L. R. A. 147; *Society for Promoting Theological Education v. Atty. Gen.* 185 Mass. 285; *Jackson v.*

Phillips, 14 Allen, 539; *American Academy of Arts & Sciences v. Harvard College*, 12 Gray, 582; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 84 L. ed. 478; *Lyons v. Advocate General of Bengal*, L. R. 1 App. Cas. 91; *Re Maguire*, L. R. 9 Eq. 632; *Re Prison Charities*, L. R. 16 Eq. 140, note; *Biscoe v. Jackson*, L. R. 35 Ch. Div. 460; *Re Campden Charities*, L. R. 18 Ch. Div. 810; *Re Slevin* [1891] 2 Ch. 236. But, if the charitable purpose is limited to a particular object, or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy près* does not apply, and in the absence of any limitation over or other provision, the legacy lapses. There are many cases which, it has been held, fall within this rule.

Bulard v. Shirley, 153 Mass. 559, 12 L. R. A. 110; *Stratton v. Physio-Medical College*, 149 Mass. 505, 5 L. R. A. 83; *Easterbrooks v. Tillington*, 5 Gray, 17; *Clark v. Taylor*, 1 Drew. 642; *Corbyn v. French*, 4 Ves. Jr. 418; *Russell v. Kellett*, 3 Smale & G. 264; *Fisk v. Atty. Gen.* L. R. 4 Eq. 521; *Re Orey*, L. R. 29 Ch. Div. 560; *Re White*, L. R. 33 Ch. Div. 449; *Re Rymer* [1895] 1 Ch. 19; *Carbery v. Cox*, 3 Ir. Ch. Rep. 231; *Atty. Gen. v. Bishop Chester*, 1 Bro. Ch. 444; *Cherry v. Mott*, 4 Myl. & C. 123. The latest case in this commonwealth in which the doctrine of *cy près* has been applied is *Atty. Gen. v. Briggs*, 164 Mass. 561, 567, in which it was held that there was manifest on the part of the testator a general intent to promote education in the neighborhood, and a purpose that the whole town should have the benefit of his bounty, if it could not otherwise be made available to the district which he had designated. In the present case the bequest is not for general religious purposes, nor is there anything to indicate that the object of the testatrix was to benefit the parish as a whole. Her object evidently was to provide a place in the village of Carndrine where the inhabitants could attend religious services, and have the rights of their church administered, without being obliged to go several miles to the parish church at Aughayarron, or to Castlederg, in the neighboring parish. Her purpose was that a lot should be purchased and a chapel built at Carndrine for the benefit of the inhabitants there, not that the bequest should be devoted to repairing the church at Aughayarron or otherwise for the general benefit of the parish. The particularity of the language used forbids, we think, any other construction. Thus she requests her trustees to set aside a sum "to be expended by them in the purchase of a lot and the building of a chapel thereon in my native place, Carndrine; . . . the title thereof to be vested in the bishop, . . . upon the trust that said chapel and lot shall forever be used," etc. Again, she says: "I do not intend to charge my trustees with the responsibility of attending in person to the purchase of the lot and the building of the chapel, but they may make the selection of the lot and contract for the erection of the chapel," etc. Still further she provides that "the amount of money to be expended for such lot and chapel, and the time and manner of its payment, shall be left," etc.

38 L. R. A.

From this it appears, we think, as already observed, that the leading purpose in the mind of the testatrix was the purchase of a lot and the building of a chapel at Carndrine for the benefit of those living there, and that to divert the bequest to repairing the parish church, or for a parish house, or to enlarging the parish graveyard at Aughayarron,—which are the schemes suggested,—would be devoting it to purposes inconsistent and at variance with those designated by the testatrix, and not in furtherance of any general charitable intent on her part. We think that a general intent to advance religion in the parish hardly can be inferred from the purpose thus particularly expressed to build a chapel in Carndrine. It is found that it will be impracticable to carry out the scheme which the testatrix had in mind, and that it will be a wasteful expenditure of the trust fund to purchase a lot and build a chapel at Carndrine. The population is small 'not over one hundred, of whom about four fifths are Roman Catholics, and is diminishing. The people are too poor to support a chapel, and the bishop refuses to assist in maintaining a chapel or supporting a priest, and without his help the people could do neither. The purpose which the testatrix had in view has failed, therefore, and, the case not being one in which the doctrine of *cy près* properly can be invoked, it follows that the bequest must be held to have failed, and to pass under the residuary clause. See *New v. Bonaker*, L. R. 4 Eq. 655.

Decree accordingly.

Edward P. KELLEY

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(168 Mass. 306.)

The common-law right of a husband to a right of action for the loss of consortium through an injury to his wife caused by negligence is not taken away by the Massachusetts statutes giving married women the control of their time and actions.

(May 19, 1897.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action to recover damages for loss of society of plaintiff's wife, and expenses incurred for medical attendance upon her by reason of an injury caused by defendant's negligence, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. Benton & Choate, for defendant: By virtue of the legislation in this state a married woman is, "in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account." Her right to

NOTE.—For husband's right of action for injuries to his wife, see also *Skoglund v. Minneapolis Street R. Co.* (Minn.) 11 L. R. A. 222, and note; also *Holleman v. Harward* (N. C.) 84 L. R. A. 803.

employ her time for the earning of money on her own account is as complete as his.

Harmon v. Old Colony R. Co. 165 Mass. 100, 80 L. R. A. 658.

To say that the husband still has the right to the society and companionship of his wife is to say that he has the right to the control of her time.

To say that his right to enjoy her society is subordinate to her right to employ her time for such labor or business as she sees fit, which right is absolute, exclusive, and as complete as his, is saying nothing less than that his right is no right at all.

The right to recover damages for a loss of "consortium" was given by the common law in three instances, viz.: (1) Where the defendant had enticed the wife away; (2) where the defendant had alienated her affections, or had had criminal conversation with her; (3) where the wife had been injured by the negligence of the defendant.

8 Bl. Com. 189, 140.

Consortium implies an exclusive right against an invader to the wife's affection, companionship, and aid.

Bigelow, Torts, 171; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 558.

The "aid" of Bigelow's definition has been stricken out of the husband's list of assets.

The rights left him are, in substance, to the exclusive possession of her fidelity, affections, and companionship against any invader.

Bigauvette v. Paulet, 184 Mass. 128.

But these rights are not enjoyed by the husband alone. They are mutual. The wife has exactly the same rights to the exclusive possession of her husband's affections and companionship, and to have them undeviled by an "invader," as he has to hers.

Lynch v. Knight, 9 H. L. Cas. 589; *Foot v. Card*, 58 Conn. 1, 6 L. R. A. 829; *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 558; *Seaver v. Adams*, 66 N. H. 142; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 18; *Jaynes v. Jaynes*, 39 Hun, 40; Bigelow, Torts, 171, note 3; Cooley, Torts, 2d ed. 267, note 2.

Mere negligence cannot reach or affect those mutual rights which spring from the marriage contract. It does not rob the husband of his wife's affections. It does not interfere with the exclusiveness of his right to conjugal intercourse with her. It does not entice her from her home, or deprive him of the right to exclude everyone else from the enjoyment of her society as a wife. All these things she can deprive him of in the exercise of her own recently acquired liberty.

Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

It was always held that the gist of the action which the husband had was *per quod consortium amisit*, and the writ when first granted was so framed.

Guy v. Liressey, Cro. Jac. 501; *Hyde v. Scysson*, Cro. Jac. 538.

Expense incurred in curing the wife was held to be incidental to and aggravation of the real injury. But without the existence of that for which, if injured, an action was given, expenses alone gave no ground for suit.

Hall v. Hollander 4 Barn. & C. 660.

88 L. R. A.

Mr. J. E. Cotter, for plaintiff:

The married women's acts have not extinguished the common-law *per quod* remedy of a husband.

It would be illogical to hold that a husband remains responsible for expenses occasioned by an injury to his wife, and that he may have exclusive enjoyment of her time and society through her voluntary choice, but that he is remediless if subjected to the one and deprived of the other by the act of a tortfeasor.

The testimony as to the nature of the consequences of the injury to the wife, taken in connection with the nature of her prior health and employment, was ample to warrant a finding that the husband had been substantially, if not entirely, deprived of his wife's society and services.

Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

Allen, J., delivered the opinion of the court:

In *Bigauvette v. Paulet*, 184 Mass. 123, 45 Am. Rep. 307, a husband's action for loss of consortium with his wife was held to be maintainable, although there was no loss of service or payment of expenses in consequence thereof. And in *Bennett v. Bennett*, 116 N. Y. 584, 6 L. R. A. 558, it is said that the basis of the husband's action for loss of consortium is his right to the conjugal society of his wife, and that it is not necessary that there should be proof of any pecuniary loss, or loss of service. The present case was tried with an action brought by the plaintiff's wife, and the same jury fixed the damages in both cases. The defendant took exceptions in this case, but none in the action brought by her. The jury were instructed that the division of the rights to recover which by law is made between the husband and the wife does not, in any sense, increase the aggregate right of recovery, and that the damages which are to be divided between the husband and the wife should not, in the aggregate, exceed the damages which the wife, if unmarried, would be entitled to recover; with the qualification, however, that one additional element should be considered, namely, the loss of consortium by the husband. The defendant contends that now an action will not lie for loss of consortium, or, at least, that it will not in case of an injury to her through negligence, and that the incurring of expenses will not alone give a ground of action. It might be sufficient, to dispose of this case, to say that the plaintiff was bound to support his wife, and that the expenses incurred by him appear to have exceeded the amount of the verdict, and that, therefore, the defendant's exceptions should be overruled; but, in view of the ruling at the trial allowing the jury to take into account the plaintiff's loss of consortium, and of the defendant's request that the correctness of this ruling should be determined, we proceed to consider it. By the common law it is quite clear that a husband might maintain an action in his own name alone for an injury to his wife which resulted in his loss of consortium with her; as, for example, for an injury caused by an assault and battery upon her by medical or sur-

gical malpractice, or by other negligence. *Lyde v. Seyssor*, Cro. Jac. 538; *Guy v. Lusy*, 2 Rolle, 51; *Russell v. Corne*, 3 Ld. Raym. 1081; *Dix v. Brookes*, 1 Strange, 61; *Smith v. Hizon*, 2 Strange, 977; 2 Rolle. Abr. 556; Hale, Analysis of the Law, 40; 8 Bl. Com. 140; 1 Chitty, Pl. 83; [*Higgins v. Butcher*], Yelv. (Met. ed.) 89; *Baker v. Bolton*, 1 Campb. 498; *Carey v. Berkshire R. Co.* 1 Cush. 475, 478, 48 Am. Dec. 616; *Barnes v. Hurd*, 11 Mass. 69; *Laughlin v. Eaton*, 54 Me. 156; *Hopkins v. Atlantic & St. L. R. Co.* 86 N. H. 9, 14, 73 Am. Dec. 287; *Lewis v. Babcock*, 18 Johns. 443; *Matteson v. New York C. R. Co.* 85 N. Y. 487, 91 Am. Dec. 67; *Jones v. Utica & B. R. Co.* 40 Hun, 349 (a case much like the present); *Berger v. Jacobs*, 21 Mich. 215; *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Nixon v. Ludlam*, 50 Ill. App. 273; *Menchirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618; *Mowry v. Chaney*, 48 Iowa, 609; *Smith v. St. Joseph*, 55 Mo. 456, 17 Am. Rep. 660. The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost this right of consortium by reason of the legislation of this commonwealth increasing the rights of married women. *Harmon v. Old Colony R. Co.* 165 Mass. 100, 80 L. R. A. 638. But there has been no substantial change in the statutes upon this subject, since the decision in *Bigaouette v. Paulet*. Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired. *Butler*

v. Ives, 139 Mass. 202. They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligations towards each other, in sickness and health, which it cannot be supposed that the legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole and separate account, as her husband may; nevertheless each owes certain duties to the other which are not annulled by the statutes. *Menchirter v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618. These duties are included in the word "consortium;" but the extent of these duties, or of the right of consortium, need not now be determined. The only question presented to us is whether the presiding justice was right in allowing the jury to consider at all the loss of consortium. It is argued by the defendant that, if a husband has a right to recover for the loss of consortium through an injury caused by negligence, a wife also would have the same right, by virtue of the existing statutes, in case of such an injury to her husband; and that this has never been held, or even contended for. She has no such right at common law, but whether she has by statute we do not now consider. The question has been considered elsewhere, but the decisions are not in harmony.

Exceptions overruled.

MISSOURI SUPREME COURT.

Peter GRANEY and Wife, *Repts.*,
v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, *Appt.*

(.....Mo.....)

1. An action for negligence in running a train at a rate of speed prohibited by ordinance over a crossing at which there do not appear to have been any gates or watchmen is not defeated by the subsequent substitution of an ordinance which makes the same limitation except when gates and a watchman are provided.
2. Negligence may be the proximate cause of an injury which directly results therefrom, although the particular consequences were unusual and could not ordinarily have been foreseen.
3. The negligence of a boy twelve years old in standing so near a passing train that he is drawn under it by a current of air is a question for the jury, and cannot be declared as a matter of law.

4. Standing so near a passing train that there is danger of being drawn under it by a current of air is negligence although the person does not stand near enough to be struck by the train.

5. Evidence of the effect of air upon mail sacks thrown from running trains is inadmissible on the question of the effect upon a boy weighing 65 pounds standing near a passing train.

(*Sherwood, Burgess, and Robinson, JJ., dissent.*)

(June 8, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiffs in an action brought to recover damages for the alleged negligent killing of plaintiffs' minor son. *Reversed.*

The facts are stated in the opinion.
Messrs. Martin L. Clardy and Henry G. Herbel for appellant.
Mr. W. B. Thompson for respondent.

NOTE.—As to contributory negligence of infants, see also *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 123, and note; *Winter v. Kansas City Cable R. Co.* (Mo.) 6 L. R. A. 538, and note; *Newman v. Phil.* 88 L. R. A.

Hipsburg Horse Car R. Co. (N. J.) 8 L. R. A. 842, and note; *Rodgers v. Lees* (Pa.) 12 L. R. A. 216, and note; and *Lake Erie & W. R. Co. v. Mackey* (Ohio) 29 L. R. A. 757.

Macfarlane, J., delivered the opinion of the court:

This is an action by plaintiffs, who are husband and wife, to recover the statutory damages of \$5,000, for the death of their minor son, James Graney, caused, as alleged, by the negligence of the employees of defendant in running one of its freight trains in the city of St. Louis. The petition charges in substance that on the 18th day of January, 1891, there were in force three valid ordinances in the city of St. Louis,—one prohibiting any car or cars or locomotive propelled by steam power to be run at a rate of speed exceeding 6 miles per hour; another requiring such locomotive to ring a bell constantly while running within the city limits; and the third imposing a penalty for violation of either of the other two. The petition then charges the circumstances under which the son of plaintiffs was killed, substantially as follows: The said James, the infant son of plaintiffs, was on the 18th day of January, 1891, standing upon the crossing of Dorcas street, in the city of St. Louis, alongside the track of defendant's railway, and at a sufficient and proper distance away from said track, and away from the locomotive and cars operated by defendant, when the servants of defendant, without warning, recklessly, negligently, and at a speed prohibited by an ordinance of said city, ran a train of freight cars over said track, by reason of which their son fell and was sucked under the wheels of the cars, and was thereby killed. The only negligence charged is the violation of these ordinances. Defendant answered by a general denial and a plea of contributory negligence. It also averred that said ordinances regulating the speed of trains had been repealed, since the death of James Graney, by an ordinance limiting the rate of speed to 20 miles per hour. On the trial the ordinances pleaded were read in evidence. It was admitted that James Graney was killed on the 18th of January, 1891, by being run over by a train of freight cars operated by defendant, and that he was the minor son of plaintiffs. It was shown that, on the date mentioned, defendant controlled and operated a railroad, a portion of which was located in the city of St. Louis. It has two tracks, running north and south, which cross Dorcas street at right angles. This street runs east and west through the city. On Sunday afternoon, January 18, 1891, James Graney, then eleven years and nine months old, and four other boys, who were from one to two years older, came down Dorcas street from the west, intending to cross the railroad of defendant. When close to the track, a train of twenty-three freight cars, drawn by an engine, came onto the crossing from the south in front of them. The engine bell was not ringing, and the train was running 20 or 25 miles per hour. The boys stopped at various distances from the track, to await the passage of the train. James Graney stood between the two tracks, 2 or 3 feet from the west rail of the east track, upon which the train was passing. When about half or two thirds of the train had passed, he was seen to whirl around, and fall upon the ground, and roll over. In rolling, his legs got upon the rail, and the cars passed

over them. From this injury he died, on the next day.

These are substantially the facts proved on the trial. There was no material conflict except as to the speed of the train and giving the signals. No witness gives the speed of the train at less than 6 miles per hour. The other boys who were with deceased testified to a speed of over 20 miles per hour. At the close of all the evidence, defendant's counsel asked the court to give an instruction in the nature of a demurrer to the evidence, which was refused. The court gave each party a number of instructions, and refused some asked by defendant. No. 7, given at request of plaintiff, is as follows: "The court instructs the jury that plaintiffs' minor son, James Graney, was entitled on the 18th day of January, 1891, to pass over and upon Dorcas street, where the tracks of defendant cross the said street, if the jury find from the evidence that said Dorcas street was a public traveled street of the city of St. Louis, and to stop at any place upon said street away from the track of said defendant on which it was operating its train; and if the jury find from the evidence that said James Graney was away from the said track of said defendant a reasonably sufficient distance, so that he was not struck by the locomotive or train, or by any motion or other agency caused by the approach of said train, and the jury further find that the said James Graney, without any fault or negligence on his part, was drawn in by the air caused by the velocity of said train being operated in excess of 6 miles an hour, and by that cause alone was injured, by having his feet drawn in and under the said train, and that such injury was the cause of his death, on the 19th day of January, 1891, then the jury will find for the plaintiffs." There were a verdict and a judgment for plaintiffs, and defendant appealed.

1. Counsel for appellant insist, in the first place, that the repeal of the ordinance in force at the date of the accident defeats the right of action grounded upon negligence in running the train at a rate of speed prohibited by the ordinance. The argument is based upon the well-recognized principle of law that "a right to have one's controversies determined by existing rules of evidence is not a vested right," and, "like other rules affecting the remedy, they must therefore, at all times, be subject to modification and control by the legislature." *Cooley, Const. Lim. 450; Coe v. Ritter, 86 Mo. 282.* What the effect of a repeal of the existing ordinance of the city would be in making proof of negligence which rests entirely upon its violation might be an interesting question. But an examination of this record does not show that the ordinance in question was repealed in respect to the limitation on the rate of speed of trains by the subsequent ordinance passed by the city. The ordinance in force at the date of the accident is known as § 28 of article 4 of chapter 31 of the Revised Ordinances of the city of St. Louis, and reads: "It shall not be lawful within the limits of the city of St. Louis for any car, cars, or locomotives propelled by steam power, to run at a speed exceeding 6 miles per hour." Exceptions are made, which have no application to the train

by which the death of the boy was occasioned. The subsequent ordinance amends the Revised Ordinances of the city by striking out §§ 1234, 1235, 1236, 1237, and 1238 of article 5 of chapter 31, and inserting five new sections in lieu thereof. The first of these requires railroad corporations to maintain gates at street crossings, and keep a watchman to operate the same. The next three sections provide for enforcing compliance with the first. The fifth, upon which defendant relies, is as follows: "It shall not be lawful within the limits of the city of St. Louis for any person, association, or corporation to run any engine, car, or train of cars propelled by steam power at a rate of speed exceeding 6 miles per hour over, along, or across any cross or intersecting street, avenue, or road, which is now or may hereafter be used for wagon travel, if such person, association, or corporation shall have failed to comply with a notice from the street commissioner, specified in § 1234. But after compliance therewith, it shall be lawful for any person, association, or corporation to run its engines, car, or train of cars at a rate of speed not exceeding 20 miles per hour." Now, it is evident that the prohibition in respect to the speed of trains contained in the original ordinance was continued in force until the railroad corporation complied with the requirements of § 1234 of the substituted ordinance. There was no proof that defendant maintained a gate or kept a watchman at the crossing of Dorcas street. Indeed, the inference may be readily drawn from the evidence that the requirements of the substituted ordinance had not been complied with, and defendant was therefore limited to a speed of 6 miles per hour. From what is said, we do not wish to be understood as expressing or intimating an opinion as to what effect an absolute repeal of the original ordinance would have had upon its admissibility as evidence in proof of negligence. According to defendant's contention, the substituted ordinance furnished the evidence.

2. Was the demurrer to the evidence properly denied? First, was defendant's negligence the proximate cause of the injury? Under the ordinance in force in the city of St. Louis, defendant was negligent in running the train at a rate of speed in excess of 6 miles per hour. The negligence being established, defendant is liable for all the consequences directly resulting therefrom, though the particular injury might not have been anticipated. In case the negligence is admitted or otherwise proved, and the injurious consequences are immediate, and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual, and could not ordinarily have been foreseen. Proof of negligence and of injury directly resulting therefrom makes, *prima facie*, a case for damages. 16 Am. & Eng. Enc. Law, p. 423. It is well known from common observation and experience that a moving train or other body creates a movement of the air near it in the same direction. The force of the current of the air is increased with the increased velocity of the moving object. A rapidly moving train carries the air along with it with such velocity and force as to tend to move or overthrow one standing

very near to the track. F. E. Nipher, professor of physics of Washington University, of St. Louis, Missouri, testified as a witness for plaintiff. He stated that he had occupied the position of professor of physics for twenty years; had frequently observed the motion of bodies through the air; had experimented on the effect upon the air of running railroad trains. A train of twenty cars, running at 6 miles per hour, has no appreciable effect upon the air, but the effect is very much greater when the speed is 20 miles per hour. The witness was asked what effect the air, struck by a running train, would have upon bodies standing close to it. He answered: "The body that is very close to the moving train as the train approaches—the front part of the train—the body would have a tendency to be pushed away from the front part of the locomotive by the parting of the air, but along towards the latter part of the train the air is carried along with the train, and a person standing near a car or train like that the air would have a tendency to draw along with it. It would have a tendency to produce its rotation on the party; that is to say, the side of the party towards the train would be whirled around, and carried with and towards the train. I have always felt this current of air while standing near a moving train in making such tests."

Q. Now, suppose a person, a small boy, weighing about 60 pounds, was standing near a train, running at 20 miles an hour; what would you say would be the effect of the velocity of the air created by that train on that boy?

A. The effect of that would be to upset him, perhaps, and in doing so, if he were to fall, it would produce a whirling of his body, which would roll him towards the train.

Q. Could that occur if the train was running at 6 miles an hour?

A. No, sir; there would be no effect of that kind produced on the boy.

The witness gave it as his opinion that the boy might have been thrown down and rolled under the wheel by force of the air, without "the boy striking the train, or the train striking the boy;" also, that the air would give to the body a rotary motion towards the cars. We have no right to disregard this evidence as being contrary to known laws. The evidence tends to prove that James Graney was standing within 2 or 3 feet of the track as the train passed him. When about half the train had passed, he was observed to turn and fall in the direction in which the train was moving, and to roll over on the ground, his legs thereby going upon the rail. An inference may be reasonably drawn from these facts that he was thrown down by the force of the current of air caused by the unlawful speed at which the train was run. We have, therefore, evidence tending to prove negligence in operating the train, and that the death of the boy was the immediate consequence thereof. These facts, if found by the jury, would authorize a recovery, unless negligence can be attributed to the boy in voluntarily standing so near the running train as to be thrown down by the wind created thereby.

3. Deceased saw the train, and standing, as he was, by the side of it, knew its rate of speed was unlawful, or at least he was not entitled

to rebut the presumption that it was running less than 6 miles per hour. If an injury had been suffered by a person *sui juris* in the same circumstances, and for the same cause, we could not hesitate to declare his conduct in standing so near the track such negligence as would preclude a recovery. But a boy of twelve years is only required to exercise the degree of care commensurate with his intelligence, experience, and knowledge, and is only chargeable with contributory negligence according to the same rule. Whether, in a particular case, his concurring negligence will defeat a recovery, is generally, but not always, a question of fact, to be determined by the jury. Where it appears conclusively that a boy of such age has knowledge of the danger of doing an act and sufficient intelligence to avoid it, and nevertheless voluntarily does it, and is injured thereby, he will be chargeable with contributory negligence, as a matter of law. The fact that he was reckless in the face of the danger should no more excuse him than the same characteristic would excuse an adult person. *Payne v. Chicago & A. R. Co.* 186 Mo. 562; *Spillane v. Missouri P. R. Co.* 135 Mo. 414; *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270, and 288. James Graney was eleven years, nine months old at the date of his death, and was small for his age, weighing only about 65 pounds. The record gives us no information in respect to his intelligence, knowledge of running trains, or physical activity. That he was indiscreet can be readily inferred from his conduct on the occasion of his death. The question then is, whether, in the circumstances under which the boy met his death, we can declare, as a matter of law, that he was guilty of contributory negligence. In order to declare this, as a conclusion of law, we must presume from his age alone that he was capable of understanding the danger to which he exposed himself. It has been held that a boy between eleven and twelve years of age will be presumed to know the danger he incurs in going upon a railroad track immediately in front of a running train. *Masser v. Chicago, R. I. & P. R. Co.* 63 Iowa, 602; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308.

But the capacity to know and the ability to avoid danger are generally to be determined by the character of the danger, and the precaution necessary to be taken in order to avoid it. While a boy twelve years of age may well be presumed to know the obvious danger of going upon a railroad track before a running train, he might not have knowledge of the danger of standing so near the track while a train is passing. We do not think it conclusively appears from the mere evidence of the age of deceased that his knowledge was sufficient to justify the court in declaring, as a matter of law, that he knew of the danger of his negligent act, and the jury was properly left to determine whether, in the circumstances, contributory negligence should be imputed to him. We are of the opinion that the trial

court did not commit error in refusing the demurrer to the evidence.

4. We are of the opinion that the seventh instruction given at the request of plaintiff is misleading, and improperly declares the measure of care required of one standing beside a railroad track while a train is running over it. As will be seen, the instruction in effect tells the jury, as a matter of law, that deceased was not negligent if he stood a sufficient distance from the track to avoid being struck by the locomotive and train passing upon it. Thus, the instruction ignores the very cause which produced the injury, namely, the disturbance of the air. A prudent person would stand far enough from the track to avoid the dangerous effect of the wind produced by the train. Whether a boy could stand nearer a train than common prudence would dictate in the case of an adult person, and avoid the effect of his conduct if injured, would depend upon whether contributory negligence could be imputed to him. The degree of care required of a boy is not different from that required of a man if the former is chargeable with contributory negligence at all. The act of deceased in voluntarily taking a position so near the train as to be thrown down by the disturbance of the air was a negligent act, and the jury might properly have been so instructed. He had no right to presume that the train was running at less speed than 6 miles per hour when he could see that it was moving much faster. His companions knew that it was running over 20 miles per hour, for they all testified to the excessive rate of speed. The question then, was, whether deceased had knowledge and understanding of the danger he incurred in taking a position within 2 or 3 feet of this train, and trying to stand there while it passed him.

5. Two witnesses, Lavin and Culvert were called as experts, and were permitted to give their opinion as to the effect the current of air produced by a freight train running at the rate of 20 miles per hour would have upon a boy weighing 65 pounds, standing within 2 or 3 feet of it. These witnesses were allowed to detail in chief to the jury their observations of the effect of the air upon mail sacks thrown from running trains. This evidence was entirely irrelevant to any issue on trial. It did not even correctly illustrate the question in issue. An object thrown from a train while in motion is carried forward by the momentum of the train, as well as by the current of the air, and the effect of the current on them might not be the same as that produced upon a stationary object. The court should not have permitted these witnesses, on examination in chief, to detail to the jury the result of these experiments.

Judgment reversed, and cause remanded.

Barclay, Ch. J., and Gantt and Brace, JJ., concur.

Sherwood, Burgess, and Robinson, JJ., dissent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

TRENTON PASSENGER RAILWAY
COMPANY, *Pf. in Err.*,v.
Charles S. COOPER.SAME, *Pf. in Err.*,v.
Samuel M. BENNETT.

(.....N. J.....)

***1. Escape of electricity from a street railway** to the injury of a horse being driven on a public street is presumptive proof of negligence in the operation of the railway. *Res ipsa loquitur*.

2. Words spoken by a driver in the effort to control a runaway horse are admissible in evidence as a part of the *res gestæ* on the trial of an action for damages for injuries resulting from the frightening of a horse. Evidence of previous experience of the driver in case of electric shock to a horse was competent, not to prove the fact of a shock in the case at hand, but to account for the driver's words and conduct.

3. Evidence legal for some purpose cannot be excluded because a jury may erroneously use it for another purpose. The defendant's protection against this is to ask for cautionary instruction.

4. The admission of a leading question cannot be reviewed on error.

(Garrison, J., dissents.)

(June 28, 1897.)

WRITS of error to the Circuit Court for Mercer County to review judgments in favor of plaintiffs in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Mr. James Buchanan for plaintiff in error.

Messrs. John H. Backes and G. D. W. Vroom, for defendants in error:

Parties dealing with this dangerous article are held to the highest degree of care. Whether or not this was done by the defendant was for the jury.

Thompson, Electricity, 64.

The exclamation made by the plaintiff, Cooper, to Bennett, when the horse lunged and kicked, "He has got a shock, Sam; catch hold," was a part of the *res gestæ*, and as such was admissible in evidence.

1 Whart. Ev. § 258; *Hunter v. State*, 41 N. J. L. 536; 1 Greenl. Ev. § 108.

The evidence of Bennett, that the plaintiff, Cooper, made such remark to him, was admissible as part of the *res gestæ*.

Castner v. Sliker, 33 N. J. L. 95.

*Headnotes by COLLINS, J.

NOTE.—As to liability for injuries by electric wires in highways generally, see note to *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 566.

38 L. R. A.

Collins, J., delivered the opinion of the court:

These two causes were argued together upon identical bills of exception and assignments of error, the original actions having been tried together in the Mercer circuit. The actions were based upon alleged negligence in the lawful operation by means of electricity of a street railway in the city of Trenton. In such operation an electric current was conducted through rails laid on the street, the ends of the rails being fastened together with metallic ties by a process called in the declaration and testimony "bonding." The negligence averred was insufficient or defective bonding, permitting the escape of electricity. In one of the actions the result averred was injury to a valuable horse owned and being driven by the plaintiff Cooper, and in the other personal injury to the plaintiff Bennett, who was Cooper's hostler and was riding with him. The horse ran away, and both men were thrown from the carriage. The plaintiffs recovered damages, and the judgments have been removed by writs of error to this court.

Error is first assigned upon refusal to nonsuit. The contention is that, as the averments of negligence were limited to the bonding of the rails, the plaintiffs were obliged to point out and establish some particular defect or insufficiency in such bonding. I do not assent to this view. It would have been sufficient to aver that electricity was, through negligence, permitted to escape from the rails; but, as it appeared in the case that such escape was only possible at the ends of the rails, it was a necessary conclusion that, if it occurred, it must have been due to insufficient or defective bonding. It must be assumed that with proper and sufficient bonds the rails would have carried a current of electricity with safety to horses stepping upon them. Otherwise the operation of a railway in a public street by means of such a current passing through its rails was *ipso facto* a nuisance. No legislation has authorized such an infringement on the rights of the public in a highway. If, therefore, electricity did escape from the rails, that fact was presumptive proof of negligence. The case comes clearly within the bounds set by this court for the right of a plaintiff to say, "*Res ipsa loquitur*." *Bahr v. Lombard*, 53 N. J. L. 233. Of course, proof of a latent defect or of a break in a bond, of which the managers of the railway could not with due diligence have learned, might rebut the presumption of negligence, but no such proof appeared in the plaintiff's case. Assuming that there was proof tending to show that electricity did escape from the company's rails and affect the horse, it was the duty of the trial judge to require a defense. There was proof sufficient to go to the jury of such escape and shock. The horse, previously docile, and accustomed to the city streets, was being driven across the railway track. Immediately after stepping on a rail, he stopped, shook, quivered, and then plunged forward, and ran so violently as to overcome all efforts to restrain him. A subsequent examination by a veteri-

state. Its organization, corporate functions, who shall become members, what are their rights as members, are all questions for New Jersey courts, because questions of local law. Therefore they require local administration. The contract with the Edison Company, the bill assumes, granted the exclusive use of the conduits to that company, which was not within the corporate power of the Penn Company to grant. Assuming that the grant was exclusive, what was the scope of the corporate powers conferred by the state of New Jersey? We must at once turn to the local law of New Jersey for answer. Next it is asked that a decree be made that bids be invited for the extension and use of its conduits; next, that the management shall be declared collusive and fraudulent, and be placed in the control of a master to be appointed by the court. This involves the corporate management of a foreign corporation by a Pennsylvania court. It seems to us it would be without warrant in either reason or authority. While visitatorial and remedial powers are conferred upon our courts over corporations of this state, and they can, under certain circumstances, properly exercise these powers, as to foreign corporations it has been directly decided otherwise. In *Morris v. Sterens*, 6 Phila. 488, Justice Sharswood, sitting at nisi prius, held that a stockholders' bill could not be maintained against a foreign corporation mainly on the ground that to do so would lead to a conflict of jurisdiction. He refers to Judge King's decision in *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534, where it was held that even a creditors' bill to compel payment of subscription to stock was not sustained; much less would a stockholders' bill lie, for the Pennsylvania resident has no right to call upon the courts of his own state to protect him from the consequences of a voluntary membership in a foreign corporation. By the very act of membership, he intrusted his money to the control of an organization owing its existence to, and governed by, the laws of another state.

It is argued by appellants that the visible, tangible property of a foreign corporation situate within this state confers local jurisdiction, and therefore, as the conduits are in Philadelphia, our courts have jurisdiction. Without doubt, courts of equity in Pennsylvania have, under our act of assembly of April 6, 1859, jurisdiction to enjoin unlawful acts by such corporations; to enforce performance of contracts in this state with third parties; in short, have general jurisdiction in equity; but they have no jurisdiction as to their internal management. What constitutes internal management is well defined by Stone, J., in *North State Copper & Gold Min. Co. v. Field*, 64 Md. 154: "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our courts will not take jurisdiction." Here the plaintiffs (stockholders) accuse the corporate management of disregard of the rights of the whole body of stockholders, for whom the corporation is trustee, in making unwise and reckless contracts which depreciate and render valueless their stock. The wrong complained of is not from the violation of a contract with them, but want of fidelity to duty in their fiduciary relation springing from the nature of the organization. In substance, the averment is that, at the office of the company in the state of New Jersey, the management, in violation of their official duty, entered into a contract to be performed in Pennsylvania, whereby the stockholders suffer. This, plainly, strikes at the internal management of the company. The existence of the wrong must be ascertained, and the remedy applied, according to the laws of the domicile.

The decree is affirmed.

CALIFORNIA SUPREME COURT.

Ex parte James LACEY.

(108 Cal. 326.)

1. Power to make and enforce police, sanitary, and other regulations will in-

NOTE.—Municipal power over nuisances relating to trade or business

- I. In general.
- II. Slaughterhouses.
- III. Laundries.
- IV. Fertilizers.
- V. Livery stables.
- VI. Brick and lime kilns.
- VII. Stockyards.
- VIII. Tanneries, fat, hides, etc.
- IX. Dairies.
- X. Pawn brokers, junk, and second-hand clothes dealers.
- XI. Miscellaneous trades.

The general principles of the law relating to the power of municipal corporations to define, prevent, 88 L. R. A.

clude power to prohibit the conducting of a steam shoddy machine or steam carpet-heating machine near a church, schoolhouse, residence, or dwelling house.

2. An ordinance prohibiting the establishment of a steam shoddy machine or

and abate nuisances are treated of in a note to *Grossman v. Oakland* (Or.) 26 L. R. A. 593.

The question of the power of municipalities over nuisances affecting buildings and other obstructions will be found in note to *Evansville v. Miller* (Ind.) ante, 161.

A note to the cases of *Cape May v. Cape May*, D. R. & S. P. R. Co. (N. J.) post, —; *Hagerstown v. Whitmer* (Md.) post, —, and *State v. Clarke* (Conn.) post, —, shows the power of such authorities over nuisances on highways and waters.

Cases of nuisances relating to the use and sale of intoxicating liquors, and other nuisances affecting public morals, decency, peace, or good order, and the power of municipalities over the same, will form the subject of another note, as will also the

steam carpet-beating machine within 100 feet of any church, schoolhouse, residence, or dwelling house does not deprive the owner of any fundamental right, and is not unreasonable, arbitrary, or discriminating.

(August 1, 1895.)

question of prescription in cases of nuisances, and that of the power of a court of equity to interfere on behalf of the municipal authorities to restrain a nuisance.

Nuisances affecting public safety, health, and personal comfort and the municipal power thereover, form the subject of *note* to *Harrington v. Providence (R. I.) ante*, 305, which also treats of the keeping of explosives and the use of electricity and steam.

As bearing upon the power to license a particular business, see *State v. Conlon (Conn.)* 31 L. R. A. 55.

The subject of this note is confined exclusively to the question of municipal control over, and the regulation or abatement of, nuisances arising from any particular trade or business, and does not treat of the subject of private remedies for such nuisances.

I. In general.

The right to use property in the prosecution of any business which is not dangerous to others, nor injurious nor offensive to persons within its vicinity, is one of the legal attributes of the ownership of property of which the owner cannot be deprived by the arbitrary declaration of any law of the state or municipal ordinance, nor can the right of any person to engage in any useful occupation not a nuisance *per se* at such place as he may choose for that purpose be denied by any law or ordinance. *Re Hong Wah*, 82 Fed. Rep. 623, 626.

Upon this question it has been said that, as a city cannot declare that to be a nuisance which is not one it must confine its prohibitory action to fixing the locality of any business to future erections or establishments, and when anything creates an actual nuisance it may be reached and punished without reference to its duration, and its continuance as a nuisance may be adequately prevented. *Wreford v. People*, 14 Mich. 41.

A city cannot declare a particular business a nuisance in a summary way and at its pleasure. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 505, 19 L. ed. 986.

An existing business cannot be put an end to so long as it is not a nuisance in fact. *Wreford v. People*, 14 Mich. 41.

In *Ruff v. Phillips*, 50 Ga. 131, 183, it is said, to make the thing a nuisance it ought to be of such a character as will hurt or annoy, in the legal sense of those words, ordinary people, not nice, susceptible sickly people. In this case it was sought to abate the defendant's warehouse as a place of storage for commercial fertilizers, but the case was of a private nature.

The legislature under the police power may regulate, or even prohibit, the carrying on of any business in such a manner and in such a place as to become dangerous or detrimental to the health, morals, or good order of the community. *People v. Rosenberg*, 138 N. Y. 410, 415.

In order to constitute a public nuisance in conducting a business in a populous city it is not sufficient to show that its exercise is merely disagreeable, but there must be an annoyance calculated to interrupt the public in the reasonable enjoyment of their property. *Proust's Case*, 4 City Hall Rec. 87.

It is not necessary that a trade should be so injurious to health as to constitute a public nuisance in order to have it restrained; the mere offensiveness to the senses making the enjoyment of life uncomfortable may destroy a vast amount of property in the neighborhood. *Howard v. Lee*, 3 Sandf. 88 L. R. A.

PETITION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for alleged violation of a city ordinance restricting the limits within which certain kinds of machinery could be erected. *Denied*.

The facts are stated in the opinion.

231, 233. This was a case of a private person seeking to restrain a soap-boiling establishment.

In *Kinney v. Koopman (Ala.)* 37 L. R. A. 497, it is said if an occupation be lawful, and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not *per se* a nuisance; and if an occupation or business becomes a nuisance it is because of a want of proper care or precaution. In this case the defendant was held liable for keeping gunpowder contrary to § 4093 of the Alabama Criminal Code of 1893.

The pursuit of a noxious trade is lawful so long as it does not interfere with the rights of the public, but when it does so interfere with their superior rights it becomes illegal, and no length of time can sanctify it, as its exercise is a daily renewal of the offense. *Ashbrook v. Com.* 1 Bush, 139, 89 Am. Dec. 616.

Manufactures, lawful in themselves, may become nuisances if erected in parts of towns where they cannot but greatly incommode the inhabitants and destroy their health. *Meeker v. Van Rensselaer*, 15 Wend. 397.

Even works that are nuisances *per se* may be lawfully carried on in a convenient place, as in a place remote from habitation and public localities; and when such a business is thus established in a convenient place remote from dwellings and public works, even though it may have been carried on for many years, yet when the place becomes inconvenient by reason of public roads being laid so near that it becomes materially offensive upon them, or when other business is established in the vicinity which is not a nuisance and is injuriously affected thereby, being offensive to those who work there or come there to trade, or when numerous dwellings are erected in its vicinity to which it is a serious annoyance,—it in law becomes a public nuisance, and must yield to the public necessity and to the demands of the public interest, notwithstanding that it has been carried on there for more than a century, for no length of time works a prescription for a public nuisance or other public offense. *Com. v. Miller*, 139 Pa. 77, 83.

In *Woodyear v. Schaefer*, 57 Md. 1, 10, 40 Am. Rep. 419, it is said that the right to pure air is held to be a natural right and as incident to the enjoyment of land, and its sensible pollution by the exercise of a noxious trade whereby the comfortable enjoyment of property is diminished is a nuisance.

The right to pure air is in one sense an absolute one for all persons having the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but in another sense it is relative and depends upon one's surroundings, and therefore people living in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts by reason of noise, dust, smoke, and odors more or less disagreeable produced by and resulting from the business that supports the city, and they can only be relieved from them by going into the open country. *Com. v. Miller*, 139 Pa. 77, 83, 84.

If the owner of real estate suffers a nuisance to be created or continued by another on or adjacent to his premises in the prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons; and therefore such a party would be liable to reimburse the municipal-

Messrs. D. P. Hatch and R. B. Treat for petitioner.

Mr. C. McFarland for respondent.

Garoutte, J., delivered the opinion of the court:

The petitioner has been convicted and im-

prisoned for violating a city ordinance of the city of Los Angeles which provides: "No person or persons shall establish or conduct any steam shoddy machine or steam carpet-beating machine within 100 feet of any church, schoolhouse, residence, or dwelling house." He now alleges the judgment void, upon the

ity the damages and expenses they have occasioned through the wrongful act of the defendant in so permitting the nuisance to exist. *Chicago v. Robbins*, 87 U. S. 2 Black, 418, 424, 17 L. ed. 298, 302.

There are many noxious useful things which a municipality cannot, lawfully, under a general grant of power, declare nuisances, such as the exercise of certain trades and callings, as that of a physician, druggist, and the like; and in all such cases the courts, acting upon their own experience and knowledge of human affairs, would say, as a matter of law, that the exercise of such trades or callings or things of like character is not a nuisance, and that any attempt to so declare it by the municipal authorities is an unwarranted abuse of their power. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 213, 44 Am. Rep. 788.

The public health, welfare, and safety of the community are matters of paramount importance to which all the pursuits, occupations, and employments of individuals inconsistent with their preservation must yield, and it is immaterial, so far as the government is concerned in the administration of the law for the general welfare, how long a noxious practice may have prevailed or illegal acts been persisted in. *Com. v. Upton*, 6 Gray, 473, 476.

Any occupation comes within the range of the police power which is such as to be naturally liable to create a nuisance unless subjected to special regulations, whether it be so conducted as in fact to create a nuisance or not. *State v. Orr*, 68 Conn. 101, 34 L. R. A. 279.

A nuisance may consist in the carrying out of any trade or business in such a manner as to emit offensive odors and stenches either injurious to the health of the public or making the occupation of neighboring houses uncomfortable and disagreeable. *Com. v. Kidder*, 107 Mass. 188, 192.

So, a nuisance may be produced by offensive sounds in the prosecution of a business lawful per se. *Whitney v. Bartholomew*, 21 Conn. 213; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Bishop v. Banks*, 83 Conn. 118, 121, 87 Am. Dec. 197.

And a nuisance at common law may consist in the keeping of or manufacturing of gunpowder, naphtha, or other explosives or inflammable substances in such quantities and places, or in such a manner, as to be dangerous to the persons or property of the inhabitants of the neighborhood. *Com. v. Kidder*, 107 Mass. 188, 192.

As to negligence in respect to explosives, see *note to Judson v. Giant Powder Co. (Cal.)* 29 L. R. A. 718.

Where a trade or business is a nuisance in itself it cannot be carried on in a thickly populated district. *Com. v. Rush*, 11 Lanc. L. Rev. 97.

In *Prescott's Case*, 2 N. Y. City Hall Rec. 161, it is said that a lawful business carried on in a populous city ought to be so conducted that the least possible annoyance or inconvenience will arise therefrom to the injury of the citizens.

So, where a business is carried on which may or may not create a nuisance, the persons so conducting such business are bound to use the most improved methods in order to prevent such nuisance. *Com. v. Rush*, 11 Lanc. L. Rev. 97.

And if, from the manner in which the business of a stock-yard company is operated, such as the boiling and manufacturing the viscera and intestines and the extracting of the fat and the disposal of the products, and the condition in which the buildings and cattle pens are kept, the same is un-

questionably a nuisance, it will be abated. *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296.

A city has the right by reasonable and general provisions, by ordinance, to regulate and restrain all noxious and injurious callings within its limits. *Chicago v. Rumpf*, 45 Ill. 90, 93, 32 Am. Dec. 196.

It is a well-established rule that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply. *Richmond v. Dudley*, 129 Ind. 112, 114-116, 13 L. R. A. 587.

A business not unlawful in itself may be brought under control by safe and proper regulations touching the modes of conducting such business in order to avoid annoyance to the public. *Garrett v. State*, 49 N. J. L. 94, 103, 60 Am. Rep. 562.

And it makes no difference that such business may have been carried on under the authority of the city. *Davenport v. Richmond City*, 81 Va. 636, 59 Am. Rep. 694.

A trade or occupation of carriage making, or of a blacksmith, is a lawful and useful one, and a shop or building erected for its exercise is not a nuisance per se, yet, if erected in an improper place so as to result in public injury to others, it is a wrongful act which may be abated. *Whitney v. Bartholomew*, 21 Conn. 213, 217, 218.

Where businesses and callings are in their nature nuisances, and the law recognizes them as such, they may be interdicted by a city council, and as to them the declaration of such council is to be deemed conclusive. *Harrison v. Lewiston*, 46 Ill. App. 164, 165.

If the charter confers the power on the municipal authorities of a city to pass ordinances on the subject of nuisances, the city may make such ordinances as its charter authorizes, and a structure erected or a business conducted in violation of such ordinance may be dealt with in accordance with the ordinance. *Lake v. Aberdeen*, 57 Miss. 260, 263.

Although there can be no general restraint of trade, yet to a certain extent it may be regulated, and, by consequence, to some extent restrained in a particular place, if such restraint be for the good of the inhabitants, as when, for the prevention of nuisances, certain trades are confined to the suburbs of a city, or where it is for the advantage of the trade and improvement of the community. *Mobile v. Yuille*, 3 Ala. 137, 141, 36 Am. Dec. 441.

By-laws made to restrain trade in order to the better government of it are good when they are for the benefit of the place, and to avoid public inconvenience, nuisances, etc., or for the advantage of the trade and improvement of the community. *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441. To the same effect, *Mitchell v. Reynolds*, 1 P. Wms. 181; *Fazakerley v. Wiltshire*, 1 Strange, 463; *Rex v. Harrison*, 3 Burr. 1822; *Wannell v. London*, 1 Strange, 675; *Pierce v. Bartrum*, 1 Cowp. 269; *Gunmakers' Soc. v. Fell*, Willes, Rep. 384; *Dunham v. Rochester*, 5 Cow. 462; *Shelton v. Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Huntsville v. Phelps*, 27 Ala. 65.

It has been further stated that a city has the right, by reasonable and general provisions by or-

ground that the ordinance is void, and seeks his release by writ of habeas corpus. He claims the ordinance void upon the ground that it interferes with certain of his inalienable rights vouchsafed to him by the Constitution. Upon the part of the city, it is claimed that the passage and enforcement of the ordinance are

but the exercise of a police power granted to it in terms, by the Constitution of the state. The Constitution of the state of California (art. 11, § 11) provides: "Any county, city, town, or township may make and enforce, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with

dinance, to regulate and restrain all noxious and injurious callings within its limits, and may prevent slaughterhouses from being maintained or animals from being slaughtered in designated localities within the city, and, possibly, it may prohibit and wholly restrain such things within the city limits; and further, there is no doubt that a city has the power to designate the particular locality of a city within which the business may be conducted, and to prohibit it in others; and regulate and restrain it so as to prevent its becoming offensive or injurious. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 190, 208.

And this is so for the reason that it is the right of the legislative body of the city government, as the tribunal established by law, to determine the question of nuisance or no nuisance, to restrain any occupation which proves detrimental to public health. *State, Marshall, v. Cadwalader*, 26 N. J. L. 283, 284.

So, in *Ex parte Andrews*, 18 Cal. 678, it is stated that the legislature has not only the power to regulate, but also the power to suppress particular branches of business deemed by it immoral and prejudicial to the general good.

Many things, not nuisances *per se*, may become such when placed in locations forbidden by law, and where they essentially interfere with the enjoyment of life or property. *Baumgartner v. Haaty*, 100 Ind. 575, 576, 50 Am. Dec. 830.

A perversion of the police power is not shown by the fact that the business restrained is a necessary and lawful business which has not yet become a public nuisance in fact, or been declared to be such by statute; the law interfering for the protection of the public by preventing in advance a threatened probable injury, exposure to danger being itself an injury. *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

The power conferred by a city charter to declare, prevent, and abate nuisances on public or private property, and the causes thereof, although it may not extend so far as to authorize the municipal authorities to make, by an ordinance, that a nuisance which was not so before, as a matter of law, yet enables them to take precautions against eventual and contingent nuisances by confining, within certain limits, certain establishments, trades, or occupations which from their known character are likely to become such. *State, Russell, v. Beattie*, 16 Mo. App. 131.

So, with respect to the carrying on of a lawful trade which may become a nuisance, it has been stated that, as a police regulation, it is not essential that the provisions of the enactment should be applicable to all parts of the commonwealth, density of population itself being an element which may increase the danger to be provided against, and which in any locality may justify the interference of the legislature and relieve it from the objection that it is partial and unequal. *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694. To the same effect, *Com. v. Alger*, 7 Cush. 68; *Baker v. Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Austin v. Murray*, 16 Pick. 121; *Coates v. New York*, 7 Cow. 565, 604.

In cases involving the question of preventing, abating, or regulating certain businesses, much must depend upon the site where the erections are, or where the factories or trades are carried on, or where the cattle or pigs are kept or allowed to be

kept, whether they will prove to be a nuisance or not. *McKnight v. Toronto*, 3 Ont. Rep. 284.

The establishment of a rural cemetery and the interment of the dead therein would not necessarily nor probably be a business which was nauseous, offensive, or unwholesome, under a clause in the state statute giving the trustees power to regulate and restrain places where a nauseous, offensive, or unwholesome business may be carried on. *Lake View v. Letz*, 44 Ill. 81, 83.

Whether a particular business is a nuisance or not is a mixed question of law and of fact, and an indictment for maintaining such a nuisance must charge the facts necessary to bring it within the definition of a nuisance, or, at least, within the power conferred in the statute to suppress it, and the power given to municipal authorities to regulate does not embrace a power to prohibit or destroy a trade or occupation. *State v. Mott*, 61 Md. 294, 48 Am. Rep. 105, 107.

In *Reg. v. Lister*, 3 Jur. N. S. 570, 26 L. J. M. C. N. S. 106, Dears. & B. C. C. 300, it was held that it was a question of fact for the jury whether the keeping and depositing or the manufacturing of inflammable substances and dangerous, ignitable, and explosive fluids, such as wood naphtha, in a warehouse or building, was dangerous to life and property, and that the liability to ignition *ab extra* was properly taken into consideration by the jury.

Any trade or business carried on in a town or populous neighborhood, or near a public road or highway, which produces noxious or offensive smells to the annoyance of the neighborhood, or persons traveling along the public road, is a common nuisance and indictable, and it is not necessary that they are offensive to health, it is sufficient if they are offensive to the senses. *State v. Luce*, 9 Houst. (Del.) 396; *State v. Wetherall*, 5 Harr. (Del.) 487.

If the smells or odors produced by such trade are detrimental to the comfort of those dwelling near them and to passers-by, they will be declared a nuisance and abated as such. *Ashbrook v. Com.*, 1 Bush, 139, 89 Am. Dec. 616, 619.

Under the Massachusetts statute (Gen. Stat. chap. 26), which gives the board of health power to forbid the exercise within the city limits, or any particular locality thereof, of any trade or employment which is a nuisance, or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates, the city authorities have power to proceed in a summary way in order to accomplish the abatement of such nuisance; as to allow such trade to be carried on until it can be decided by a jury to be a nuisance will defeat the purposes of the statute, and private rights in such cases would be considered subordinate to the public welfare. In such a case the defendant's allegation that the trade he carries on is not a nuisance is no defense in proceedings taken against him under such statutes. *Taunton v. Taylor*, 116 Mass. 254, 261.

And under § 52 of such statute the order of a board of health prohibiting the trade or employment of the business of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and drying of bones, hoofs, heads, refuse, and partially decayed animal matter, and also as a part of such trade or employment the storing

general laws." It will thus be observed that Los Angeles city is vested with certain powers by direct grant from the Constitution, and that grant of power is not confined within

narrow limits, but is broad and far-reaching in its scope and effect. Under this grant of power the city had the right to pass this ordinance, unless it is in conflict with general

about the premises of putrid meats, bones, heads, legs, and various other materials from which offensive smells emanate, which are used in such trade or employment, is a valid exercise of the power conferred upon the board of health. *Taunton v. Taylor*, 116 Mass. 254, 261.

Yet a city cannot, by any ordinance regarding nuisances, whatever its provisions, recover a penalty of an individual for keeping within the city limits articles of property, which otherwise might be lawfully owned and kept, merely because they emit a disagreeable odor. *Sippman v. South Bend*, 84 Ind. 276, 279.

The case of an offensive trade causing effluvia is within § 114 of the English public health act of 1875, if the effluvia, though not injurious to persons in sound health, causes sick persons to become worse. *Malton Local Bd. of Health v. Malton Farmers' Manure & Trading Co.* L. R. 4 Exch. Div. 302, 49 L. J. M. C. N. S. 90, 44 J. P. 155.

If a board of health orders the suspension of a business which is a nuisance *per se*, it does not deprive a man of his property without due process of law, the legislature having power to give the board such authority. *Coe v. Schultz*, 47 Barb. 64, 2 Abb. Pr. N. S. 193.

Upon the question as to whether or not such ordinances are or are not an infringement of Constitutional rights, see *note* to *Grossman v. Oakland (Or.)* 36 L. R. A. 593.

Where the general statutes of a state empower the selectmen of the town, in their capacity as a board of health, to forbid the exercise of any trade or employment within the limits of the town "which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome or injurious odors, or is otherwise injurious to their instincts," the power thus vested is in its nature quasi judicial, and necessarily involves the determination of the question whether a particular trade falls within the category contemplated by the legislature, and requires the officers charged with the duty to use their discretion and judgment in adjudicating upon the matter. *Belcher v. Farrar*, 8 Allen, 325, 327.

The selectmen of a town may, under Mass. Gen. Stat. chap. 26, § 52, prohibit the exercising of offensive trades within the limits of the town, without giving notice to the person carrying on such trade; yet the prohibition contained in such section operates only as a temporary suspension of the use of the property, if the owner sees fit to appeal and submit the question whether the trade or employment which he exercises is a nuisance, or hurtful or injurious to the inhabitants or their estates. *Belcher v. Farrar*, 8 Allen, 325, 327.

Massachusetts Gen. Stat. chap. 26, § 52, etc., in reference to the places where, and the buildings in which, offensive trades and manufactures or other employments are to be carried on, have in no way superseded the common-law remedy by indictment in the carrying on of an offensive trade or manufacture. *Com. v. Rumford Chemical Works*, 16 Gray, 231.

The powers given to local boards of health under the New Jersey Statutes of 1874 (Pamph. Laws, p. 569), and Laws of 1884 (Pamph. Laws, p. 282), are granted solely for the repression, and not the creation or protection, of nuisances, and the power to license a trade or business is given as a means of exercising restraint and control over doubtful pursuits, as to those noxious in their nature or becoming so from carelessness, the sole power given or 88 L. R. A.

designed to be given being to abate and suppress. *Garrett v. State*, 49 N. J. L. 103, 60 Am. Rep. 562.

The board of health of the city of New York have no power, under the act of 1850 (2 Rev. Stat. 5th ed. p. 12), and the Laws of 1850, p. 597, § 2, p. 606, to declare a trade or business to be a nuisance unless notice and opportunity to be heard be given to the owner of such trade or business. *People, Savage, v. New York Bd. of Health*, 38 Barb. 344.

For the purpose of suppressing such establishments as city authorities may consider nuisances, as being peculiarly dangerous to the public peace, and to the tranquillity of the neighborhood in which they are located, and as destroyers of good morals, a city may, by ordinance, impose a tax upon persons pursuing particular occupations, such as the keeping of a coffee house with theatrical performances. *Goldsmith v. New Orleans*, 31 La. Ann. 646, 648.

Where the city charter gives the authorities power to regulate and prevent the carrying on of dangerous manufactures as causing or promoting fires, and to prevent and remove all nuisances, a city ordinance which provided that all steam gristmills, sawmills, and other machinery run by steam contained and operated in buildings or structures wholly or in part of wood, which establishments, by reason of the defect or delapidation of the buildings, the defective structure of the machinery, the worn-out condition of the boiler, or any other cause, are or shall thereafter become dangerous to persons or property in the vicinity, shall be deemed public nuisances and liable to be proceeded against as such, is a valid exercise of the police power and within the terms of the charter. *Green v. Lake*, 60 Miss. 451.

The mere fact that a certain machine was in operation at the place mentioned in the ordinance, before the passing thereof, is no defense in proceedings by the municipal authorities under such ordinance to abate such nuisance. *Kansas v. McAlleer*, 31 Mo. App. 433, 438. To the same effect, *Hayden v. Tucker*, 37 Mo. 214; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Weir's Appeal*, 74 Pa. 230; *Coates v. New York*, 7 Cow. 685.

And the erection of adjoining buildings near to a distillery which emits unwholesome smells is no defense in an action for maintaining a public nuisance by the emission of such odors from such business. *Richard's Case*, 6 N. Y. City Hall Rec. 61.

In *Ellis v. State*, 7 Blackf. 534, where the defendant was prosecuted for erecting a nuisance by means of a noxious trade in steaming the entrails and other offal of hogs, etc., which created noisome and unwholesome smells, it was held that evidence tending to prove that the defendant's business existed prior to the erection of buildings and dwelling houses in the vicinity ought to have been allowed as a defense against the charge of maintaining a nuisance, the court relying upon the case of *Rex v. Cross*, 2 Car. & P. 483.

Even though the tanks used by the defendant in the prosecution of his business wherein he caused and suffered the carcasses of dead animals and offal and filth and other noisome substances to be collected upon his premises were not in themselves nuisances, or the business of operating a nuisance, or liable to become so when operated with proper care, yet the fact that the defendant collected more carcasses than could be rendered before they became offensive to the neighborhood does not excuse him from liability as creating a nuisance; and the mere fact that the business was a public benefit

laws; and we know of no general laws which conflict with it, unless it can be said to be violative of those general principles of constitutional liberty which form the very foundation

of both the state and Federal Constitutions. We see nothing in the language of this ordinance contrary to these great principles of our government. We see nothing there de-

was no justification for his action, neither was the fact that the persons injured had contributed to such business. *Seacord v. People*, 121 Ill. 623, 632, 638.

In *Sawyer v. State Bd. of Health*, 125 Mass. 182, the court passed upon the authority of the board of health and public authorities to prohibit certain trades within certain localities, which trades were adjudged to be nuisances, but that case really turned upon the question of the right of the person aggrieved by the order of the board of health abating such nuisance, to appeal to a jury from the decision of such board.

The want of power in a municipal corporation to suppress a particular occupation as a nuisance, or as a means of preventing fire, should be shown in the proof; although such authorities have power to pass all laws which are necessary or proper to carry into effect any given power, and the degree of its necessity or propriety will not be minutely or critically scrutinized, yet the court ought to see that it may be the means of accomplishing the object of the grant. *Glenn v. Baltimore*, 5 Gill & J. 424, 429.

Yet municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade unless it is so conducted as to be injurious or dangerous to the public health. *Greensboro v. Ehrenreich*, 80 Ala. 579, 583, 60 Am. Rep. 130.

A statute giving power to departments of health or the commission or commissioners thereof in any incorporated city of the state to enforce an act to prevent fat rendering, bone boiling, or the manufacturing of fertilizers within the corporate limits of any incorporated city in the state, or within a distance of 3 miles from the corporate limits thereof, ought not to be construed in a manner that would attribute to the legislature a purpose to prohibit the carrying on of a fat rendering establishment irrespective of the manner in which it is conducted, or if its effect is injurious or otherwise upon the community, and it will be assumed that the legislature intended to act within its ordinary police power to suppress nuisances and to punish persons carrying on such business in such a manner as to become such; and if the statute itself does not use language of such explicit import as to preclude any other construction an intention will not be attributed to the lawmaking power to arbitrarily interdict such business recognized as a lawful business irrespective of such facts. *People v. Rosenberg*, 138 N. Y. 410, 415.

So, under a delegation of powers to preserve health, and to prevent and remove nuisances, and also to regulate the places for carrying on lawful but offensive trades, the city authorities are not vested with the exercise of any unlimited control over the trade and business occupations of the people. *State v. Mott*, 61 Md. 297, 304, 48 Am. Rep. 105.

And a business which is not in its nature a nuisance irrespective of its local surroundings, especially where there is no authority conferred upon the city authorities to declare it a nuisance, either to health, comfort, or property, cannot be so declared by such authorities, in the absence of an express authority. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, 107.

So, a city board of health has no authority to prevent any inhabitant from carrying on any lawful business, not necessarily a nuisance, in such a manner as not to be a public nuisance; and such a body, in the exercise of its police power, will be confined

to such interruptions as may be reasonably necessary to enable it to abate such nuisances. *Well v. Ricord*, 24 N. J. Eq. 169, 173.

If the business, by reason of its location, the character of the buildings in which it is conducted, or the manner in which it is carried on, may become a nuisance, the most that can be claimed by the city is the power to regulate or to abate such business, and where the effort is not to regulate the business by prescribing the method of conducting it, or the abatement of it as a nuisance, an ordinance which calls for a confiscation of the property, not on account of the business having become a nuisance, but because the owner has failed to secure a permit to conduct such business, is void. *Plymouth v. Schultheis*, 135 Ind. 339.

And corporate authorities cannot, by an arbitrary ordinance, destroy private property by force, or compel the owner of it to have it removed, unless it is a nuisance and so declared in the ordinance, and shown to be such by its location or by the sanitary condition of the city or town. *Pieri v. Sheldaboro*, 42 Miss. 493, 495. In this case the city ordinance ordered the removal of the defendant's lumber from his lumber yard on the banks of a bay, and caused the marshal of the city to remove or destroy the same by force, and the ordinance was held invalid.

Again, an ordinance making a particular business a nuisance is too broad, and will be held invalid, where neither the business or occupation nor the subject thereof is a nuisance *per se*,—especially when the ordinance has no regard for the fact whether the act is or is not a nuisance, or whether the subject-matter thereof has in general become such. *Arkadelphia v. Clark*, 52 Ark. 23.

And a city ordinance restraining the lawful use of property and nature of a business carried on therein, which does not declare the business or its location to be a nuisance, or provide any conditions under which it may be transacted either as to the location, character of the buildings, drainage, ventilation, or processes employed, its manifest intention being not to regulate or prohibit tanneries, but to confer upon the board of health and the common council the undefined power of determining by whom and where such businesses should be conducted, is void. *Plymouth v. Schultheis*, 135 Ind. 339.

So, a charter giving power, by ordinance, to regulate and prevent the carrying on of manufactures dangerous, causing or promoting fires, and to prevent and remove all nuisances, does not confer upon the authorities the right to declare a particular structure or business, such as that of a flouring mill not condemned by any law or ordinance, to be a nuisance, and to have the structure removed or the business stopped or interfered with. *Lake v. Aberdeen*, 57 Miss. 200, 213.

And although a business which is useful and necessary may become a nuisance by reason of the growth of a village or town around it, yet there is a manifest distinction between such a case and that of a person who seeks to establish an offensive business in a thickly populated neighborhood. *New Castle v. Raney*, 130 Pa. 548, 561, 6 L. R. A. 737.

So, where an establishment, trade, or occupation is lawful and not in itself a nuisance, but nevertheless may become such from the place where, or manner in which, it is erected or carried on, it is not competent for the legislative power, much less for the executive power of a municipal corporation, to make it a nuisance by merely declaring it to be such. *State, Russell, v. Beattie*, 16 Mo. App. 131.

prising petitioner of any fundamental right. In the exercise of its police and sanitary power the city has attempted to regulate the business of beating carpets by steam power. Under its

constitutional grant, it had the right to regulate this business. The use of steam power, of itself, within municipal territory, has always been recognized as a proper subject of regu-

The defendants charged with maintaining a public nuisance in a trade or business have a right to have the character of their business determined in the light of all the surrounding circumstances, including the character of the city as a manufacturing place and the manner and use of the river flowing through such city for manufacturing purposes, and if, looked at in this way, it constitutes a common nuisance, it should be removed; if not it may be conducted without subjecting the proprietors to the pecuniary loss which its removal would involve. *Com. v. Miller*, 139 Pa. 77, 83, 94.

And municipal authorities cannot declare in advance a certain business to be prohibited because it may become a nuisance, as in such a case there would not only be an exercise, by the legislative department of the city, of a judicial power, but it would be going further in the exercise of such power than the judicial courts have gone, the doctrine of the courts being that judicial powers will not be exerted to enjoin an eventual or contingent nuisance. *State, Russell, v. Beattie*, 16 Mo. App. 131.

As to judicial determination, see *note* to *Grossman v. Oakland* (Or.) 36 L. R. A. 593.

The mere fact or possibility that a business carried on within the limits of the city may in the future become a nuisance will not justify the city in prohibiting the business entirely in anticipation. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, 107.

In an English case it is said that where a man sets up a noxious business in a neighborhood where such business has long been carried on, he cannot be held for a nuisance, unless it is shown that the noxious vapor is much increased by his business. *Bex v. Neville, Peake*, N. P. 91.

Yet it would seem that in the United States the fact that a business, the conducting of which constitutes a nuisance, is established upon an open common, remote from habitation, will not defeat a prosecution of the proprietors for the maintenance of a nuisance, after the land in its vicinity has been built up and occupied, as such business must give way to the rights of the public, and when buildings and habitations approach the place of its location means must be devised to avoid the nuisance, or it must be removed or stopped. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722.

So, although a municipal corporation may have power to enforce fines for the violation of its ordinances respecting nuisances by reason of offensive trades, yet it cannot designate one individual or one establishment and subject its owners to punishment, such proceeding being contrary to common right. *First Municipality v. Blinneau*, 3 La. Ann. 688.

Where the city ordinance only relates to the future erection and location of slaughterhouses, the authorities have no power to put an end to an existing business of that kind so long as it is not a nuisance *per se*. *Wreford v. People*, 14 Mich. 41, 46.

An asylum for the treatment of mild forms of insanity is not properly classed as a business of such a noxious or offensive character as that the health, safety, or comfort of the surrounding community requires its exclusion from the particular locality, an asylum not being a nuisance *per se*. *Ex parte Whitwell*, 98 Cal. 73, 83, 19 L. R. A. 727.

So, theatrical performances, legalized by the payment of a tax imposed by the city corporation, are not within the provisions of an act giving the city authorities power to make, limit, and impose reasonable fines for all misdemeanors, disorders, 38 L. R. A.

neglects, and nuisances committed within the limits of the city for which the laws of the state have not provided an ample remedy. *Waters v. Leach*, 8 Ark. 110, 155.

A complaint charging the defendant with keeping a large quantity of hides, tallow, and other substances which emit a disagreeable odor, but not appraising him of the fact whether he is to answer a public or a private nuisance, the facts themselves not constituting a nuisance either public or private, will be held erroneous upon a motion in arrest of judgment, and the judgment will therefore be reversed and the case remanded. *Lippman v. South Bend*, 84 Ind. 276, 279.

An ordinance prohibiting a business entirely within the limits of a city, even though carried on in the remotest outskirts thereof, is invalid—especially where the evidence does not show that it is now, or ever may become, a nuisance, the public health not being affected thereby. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

So, under the power to abate nuisances as contained in a charter, a city council cannot prohibit every specified trade or business until such trade or business is shown to be so employed as to be inimical to the public health or safety, or until the provisions of the ordinance relating to the mode of carrying on the same are contravened so as to render them nuisances. *State, Marshall, v. Cadwalader*, 36 N. J. L. 233, 234.

And a board of health cannot, by resolution, after declaring the business of skin dressing a nuisance and notifying the proprietors to remove, correct, and abate the same within a given time, empower the street commissioners to proceed to abate the same, when such business has not been declared a public nuisance by the common council. They cannot delegate the right to pass upon such question to the street commissioners, and the board of health, in the absence of an ordinance defining what circumstances of abuse render such occupation obnoxious, has itself no power in that matter where the clause in the charter, giving the city power to establish a board of health, contains no warrant to the common council to delegate to, or confer upon, such board the powers and duties which such common council are directed to exercise. *State, Marshall, v. Cadwalader*, 36 N. J. L. 234, 236.

So, although a city has a right by reasonable and general provisions, by its ordinance to restrain all noxious and injurious trades within the city limits, and to designate the particular locality within which such trade may be conducted, yet it must so act that all persons must be free to act and engage in it within such localities by conforming to the municipal regulations. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196, 208.

Upon the question whether or not an established trade or business lawful in itself can be declared a nuisance without judicial investigation, see head IV. of *note* to *Grossman v. Oakland* (Or.) 36 L. R. A. 593.

As to the extent of municipal power over nuisances in the use of buildings in general, see *note* to *Evansville v. Miller* (Ind.) *ante*, 161.

Upon the question of the keeping of explosives and the use of electricity and steam, see *note* to *Harrington v. Providence* (R. I.) *ante*, 305.

II. Slaughterhouses.

While it may be said that the question whether a slaughterhouse is or is not a public or common nuisance depends upon the circumstances of each

lation; and in addition, here it may well be assumed that the dust and other disagreeable and unhealthy matters arising in such quantities from the beating of carpets, as would

naturally be indicated by the use of steam power, are a constant source of danger and menace to the good health and general welfare of the neighborhood where located.

particular case, yet, the power of municipal corporations to limit the existence of such houses to particular localities, and to regulate such business or trade, is a valid exercise of the police power, and in general exists as a means of preventing nuisances and of preserving the health and comfort of the public, so long as the ordinances passed for such purpose contravene no constitutional rights, and follow the general rules of law with respect to city ordinances in general.

In this connection it has been said that the regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, is among the most necessary and frequent exercises of the police power. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 61, 21 L. ed. 394, 404.

A city under the power conferred by charter may prevent slaughterhouses from being maintained, or animals from being slaughtered, in designated localities within the city, and it may be that they can prohibit and wholly restrain it within the city limits. Such bodies have the power to designate the particular quarter of the city within which the business may be conducted, and prohibit it in others, and regulate and restrain them so as to prevent their becoming offensive or injurious, but in doing so all persons should be free to engage in the business within those localities by conforming to the municipal regulations. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196.

And in *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 61, 21 L. ed. 394, 404, it is said that a statute defining the localities within which slaughterhouses may be established, and forbidding slaughtering in any others, does not deprive butchers of the right to labor in their occupation, or the people of their daily service in preparing food, and cannot be said to destroy the business of a butcher or seriously interfere with its pursuit, the power to define such limits and to regulate such business being for the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.

In *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394, the charter of the Slaughterhouse Company, a corporation created by the statute of Louisiana, contained, among other exclusive privileges, the right to establish and maintain stockyards and landing places and slaughterhouses for the city of New Orleans, at which all stock must be landed, and all animals intended for food must be slaughtered. It was held that this grant of privilege, guarded by proper limitation of the prices to be charged, and imposing the duty of providing ample convenience, with permission to all owners of stock to land, and to all butchers to slaughter at those places, was a police regulation for the health and comfort of the people, the statute locating them where health and comfort required, within the power of the state legislature, unaffected by the Constitution of the United States previous to the adoption of the 13th and 14th articles of the Amendment.

So, in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 556, where it was sought to abate the appellant's business of butchering and receiving and landing of live stock intended for butchering within certain limits and certain parishes, it is stated that, although the legislature of the state may give an

exclusive right for the time being to particular persons or to a corporation to provide a stock landing and to establish a slaughterhouse in a city, yet it has no right to continue such right so that no future legislation, nor even the same body, can repeal or modify it; and further, that the state legislature cannot by any contract limit the exercise of the police power of the state to the prejudice of the general welfare in regard to public health and public morals.

In *Liverpool New Cattle Market Co. v. Hodson*, L. R. 2 Q. B. 131, 36 L. J. M. C. N. S. 30, 15 L. T. N. S. 534, 15 Week. Rep. 568, the company was held liable to the penalty imposed by § 64 of the English public health act of 1848, which prohibits the new establishment of the business of slaughtering cattle, etc., or other noxious or offensive business in any building or place in any district, after the act has been applied to it, without the consent of the local board of health. A cattle market-company, cattle having never been slaughtered in the market before, after the act had been applied to the district erected a building in which it allowed persons to slaughter cattle for a certain payment a head; it was held the penalty was rightly imposed.

But where the charter authorizes the city authorities to license or regulate slaughterhouses, and the corporate body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance will be unreasonable and tend to oppression; and if such authorities regard it for the interest of the city that such establishment shall be licensed the ordinance should be so framed that all persons desiring it may obtain licenses by conforming to the prescribed terms and regulations for the government of such business, and it is neither a regulation nor a license of such business to confine it to one building or to give it to one individual, such action being oppressive, creating a monopoly never contemplated by the general assembly, and opposed to the rules governing the adoption of municipal by-laws. *Chicago v. Rumpff*, 45 Ill. 90, 97, 92 Am. Dec. 196.

So, an ordinance confining the business of a slaughterhouse to a small lot, or even to a particular block or ground, is unreasonable and tends to create a monopoly. *Chicago v. Rumpff*, 45 Ill. 90, 96, 92 Am. Dec. 196.

With reference to the question as to whether or not such business is a nuisance, it has been stated that a slaughterhouse is not of itself a nuisance although it may become so by the manner in which it is conducted. *Cooper v. Schultz*, 32 How. Pr. 107, 121.

The business of butchering cattle is a legitimate one, and must necessarily be carried on in the vicinity of each town or city the inhabitants of which need to be supplied with meat, and therefore a pen in which live cattle are kept and a house in which they are slaughtered is not *per se* a public or private nuisance, unless established so near the center of population or to a private dwelling place as to necessarily and unavoidably hurt and annoy the public, or invade and do damage to the private vested rights of an individual, and that such an establishment, if located a reasonable distance from the center of population and from dwelling places of individuals, can only be regarded and treated as a nuisance public or private when the business is conducted in such a negligent or reckless manner as to become offensive and hurtful to the public and

Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se*, and to stand upon different grounds from powder factories, street ob-

structions, and the like, still the case is made no better for petitioner. This is not a question of nuisance *per se*, and the power to regulate is in no way dependent upon such

individuals. *Beckham v. Brown*, 19 Ky. L. Rep. 519, 520.

In *Atty. Gen. v. Steward*, 20 N. J. Eq. 415, 420, it is said, there are certain things and certain trades which are considered as nuisances of themselves, as a slaughterhouse in a thickly populated town, yet these are not nuisances simply because erected within the limits of an incorporated city, the question whether they are nuisances depending upon the extent to which the business is carried on and the manner in which it is conducted.

Again, in *Moses v. State*, 58 Ind. 185, 187, it is said that even the best conducted slaughterhouse if in the wrong place might become a public nuisance. In this case the appellant was prosecuted for maintaining a slaughterhouse in violation of 2 Ind. Rev. Stat. 1876, § 8, p. 460, which provides that every person who shall erect or continue and maintain any public nuisance to the injury of any part of the citizens of this city shall be fined. The court stated that the fact that such business was carried on in an orderly manner, and that the house was kept as clean as can reasonably be expected, does not excuse the defendant.

Such a business, although not of itself a nuisance, may become such by mismanagement or by neglect, and even under the most careful management it may at times become offensive to those who reside upon, or who have occasion to be in, the street where it is situated. *State v. Wilson*, 43 N. H. 415, 420, 82 Am. Dec. 163.

A slaughterhouse may be a nuisance if ill-managed or neglected, though it may not be in any sense in a compact part of the town. *State v. Wilson*, 43 N. H. 415, 420, 82 Am. Dec. 163.

This same principle is also held in private actions for the abatement or restriction of such business as a nuisance, but as such cases do not fall within the scope of this note they are not here noticed.

Where the only provision of the city charter authorizes the common council to compel the owners and occupants of slaughterhouses and other designated establishments to cleanse or abate them whenever necessary for the health, comfort, or convenience of the inhabitants of the city, such power can only be exercised to do away with what are legal nuisances, and does not authorize the common council to interfere with what is not a nuisance in fact. *Wreford v. People*, 14 Mich. 41, 46.

Yet, in opposition to some of the above cases, it has been stated that slaughterhouses are *prima facie* nuisances. *Selfried v. Hays*, 81 Ky. 377, 381, 50 Am. Rep. 167; *Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Swinton v. Pedie*, 1 Macq. H. L. Cas. 74; *Woodyear v. Schaefer*, 57 Md. 1, 10, 40 Am. Rep. 419.

So, slaughterhouses, which to some extent occasion the atmosphere in that vicinity to become impure, noxious, poisonous, and unhealthy, are, when located in a populous part of a city, *prima facie* nuisances. *Reichert v. Geers*, 98 Ind. 73, 76, 49 Am. Rep. 736; *Pruner v. Pendleton*, 75 Va. 516, 40 Am. Rep. 738; *Brady v. Weeks*, 3 Barb. 157, 159.

The occupation of buildings for the business and purpose of a hog yard, slaughterhouse, fat and offal boiling house, in a populous city, is *prima facie* a common nuisance, but it may be shown that such a business can be so conducted and carried on, even in a densely populated part of the city, as not to endanger the health or interfere with the comfort of the neighboring inhabitants; and when such facts are shown the presumption is removed, and the business is not a nuisance. *Dubois v. Budlong*, 15 Abb. Pr. 445, 446.

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Thus, the proceedings of a board of health restraining plaintiff from carrying on his slaughterhouse, upon the ground that the same, and the premises upon which it is conducted, are dangerous to life and health, and a public nuisance, and ordering the business to be abated and discontinued, and directing an order to that effect to be served, without notice or hearing, a subsequent ordinance also prohibiting the slaughtering of animals within certain districts without a special permit will be restrained,—especially where the evidence shows that such business is carried on with great care and cleanliness, and no fault is found by the neighbors, and it is abundantly proved that such a business can be carried on and regulated so as not in any case to become a nuisance or prejudicial to the public health, such a business not being a nuisance at common law. *Schuster v. Metropolitan Bd. of Health*, 49 Barb. 450, 452.

Yet that which would be a manifest nuisance in a crowded thoroughfare, as a slaughterhouse or tannery, on account of the offensive smell, etc., proceeding from it, or a large factory carried on with much noise, or requiring vans and other conveyances constantly to stand at its doors on the street or constantly crossing the crowded sidewalks, or where there is a very frequent deposit of goods on the sidewalks which seriously impedes their usefulness or safety for foot passengers, might not be a nuisance if carried on in an isolated situation, or in a sparsely peopled or little frequented part of a city or town, it would nevertheless be an intolerable nuisance if carried on in a densely peopled or crowded thoroughfare. *McKnight v. Toronto*, 3 Ont. Rep. 284.

A slaughterhouse is a calling in the nature of a nuisance and recognized by the law as such, and therefore may be interdicted by a city council,—especially where the state statute gives the city council power to declare what shall be a nuisance and to abate the same, and to impose fines for the maintenance thereof. *Harrison v. Lewiston*, 46 Ill. App. 164, 165.

An order of the board of supervisors prohibiting the establishment or maintenance of a slaughterhouse, or the keeping of herds of more than five swine, or the curing or keeping of hides, skins, or peltry, slaughtering cattle, swine, sheep, or any other kind of animal, or the pursuing or maintaining, or carrying on, any other business or occupation offensive to the senses, or prejudicial to the public health or comfort, in any part of a city and county after a certain date, except as otherwise provided by law, which order was passed pursuant to an act of the legislature of April 25, 1863, was held valid, the power to regulate or prohibit conferred upon the board of supervisors not only including nuisances, but extending to everything expedient for the preservation of the public health and the prevention of contagious diseases. *Ex parte Shrader*, 83 Cal. 279, 284.

The power to regulate such businesses by limiting their prosecution to particular localities or quarters being within the power conferred by the legislature and not contravening any constitutional provisions. *Ex parte Shrader*, 83 Cal. 279. To the same effect, *Bourland v. Hildreth*, 26 Cal. 162.

The New Hampshire statute (Rev. Stat. chap. 119), giving the health officers power to determine what are nuisances, with full power for their prevention and removal, enforcing the same by specific penalties, is a police regulation in force, and applicable to the compact parts of towns, but it does not cover the whole subject of slaughterhouse

conditions. Indeed, as to nuisances *per se*, the general laws of the state are ample to deal with them. But the business here involved may properly be classed with livery

stables, laundries, soap and glue factories, etc.—a class of business undertakings, in the conduct of which police and sanitary regulations are made to a greater or less de-

nuisances, if, indeed, it covers any part of either, and the purview and purpose of the common law and of such statutes are entirely distinct, the statute not necessarily or naturally preventing or interfering with the application of the common law, it not being inconsistent with, and not superseding it. *State v. Wilson*, 43 N. H. 415, 421, 82 Am. Dec. 163.

Under the New Hampshire statutes (Rev. Stat. chap. 119), persons keeping slaughterhouses in the compact parts of towns without licenses are made liable to the penalty imposed thereby, equally, whether the buildings are or are not nuisances; and it is no defense that the most complete proof can be produced that they are not nuisances. *State v. Wilson*, 43 N. H. 415, 420, 82 Am. Dec. 163.

In *Ex parte Heilbron*, 65 Cal. 609, the court upheld an ordinance of the city prohibiting the slaughtering of animals or the erection and maintaining for use of any building as a slaughterhouse, or for the dressing or cleaning of any slaughtered animals within the city limits, the same being passed in the interest of public health and comfort and in the exercise of the city's police power, although in that case the court did not actually declare the same to be a nuisance.

So, an ordinance prohibiting the slaughtering of cattle within certain prescribed limits specifically named and described, and directing the conduct of such business in the localities from which it is not excluded, being in the interest of health and cleanliness, was upheld in *Cronin v. People*, 82 N. Y. 818, 37 Am. Rep. 564, as within the provisions of the charter of the city.

And in *Pierce v. Bartrum*, 1 Cowp. 290, the proceedings of the chamberlain of the city, under a city by-law made pursuant to a charter prohibiting the slaughtering of cattle within the city and also the keeping of swine or any filth, garbage, or annoyance, were upheld, even as against the defendant who claimed to be a stranger, he being an inhabitant *pro hac vice*.

The power conferred upon a common council to compel the owners and occupants of slaughterhouses and other designated establishments to cleanse or abate them whenever necessary for the health, comfort, or convenience of the inhabitants of the city, can only be exercised to do away with what are legally nuisances, and does not authorize the council to interfere with what is not a nuisance in fact. *Wreford v. People*, 14 Mich. 41.

The mere fact of the prosecution and continuance of a business for more than twenty years in a certain locality, before any buildings were erected or highways located in the neighborhood, will not justify the carrying on of such business as that of a slaughterhouse in the locality after houses have been built and streets laid out therein. *Com. v. Upton*, 6 Gray, 473, 476.

In *Rex v. Watts*, 2 Car. & P. 486, *Moody & M.* 261, a private act of Parliament declared the houses for the slaughtering of horses within 1,000 yards of a certain workhouse to be public nuisances and removable as such; but if they existed before the act the owners were to receive compensation. The court held that if an indictment was framed at common law with counts on that act the defendant might be convicted if he so carried on the trade as to make it a public nuisance, and he was not then entitled to compensation.

But where the defendant, before the passage of Mass. Stat. 1871, chap. 167, prohibiting the carrying on of the business of slaughtering cattle without the written consent of the selectmen of the town but declaring that it should not apply to any build-

ing or premises occupied for such purposes at the time of the passage of the act, and also prohibiting any enlargement or extension of the same without the written consent of the city or town authorities, used and occupied a building for such purposes and continued the same thereafter until it was destroyed by fire, after which he rebuilt the premises and continued the business, the court held that the case came within the exceptions stated in the statutes, and therefore the defendant had not forfeited his right to continue the business in the new building which was of no greater size or capacity. *Watertown v. Sawyer*, 100 Mass. 320.

So, in *Somerville v. O'Neil*, 114 Mass. 353, the same construction was placed upon the above statute with regard to slaughterhouses existing at the time of its passage.

The carrying on of a butchershop for the vending of fresh and butchered meat is a business which is liable in and of itself to become a nuisance, or become injurious to the public, if not properly supervised or carried on, and may become offensive, and is a legitimate subject of sanitary regulation, and therefore a city ordinance which provides for a license for the carrying on of such business is a valid exercise of the police power and is authorized by the legislature. *St. Paul v. Colter*, 12 Minn. 41, 48, 49, 90 Am. Dec. 278.

In *Huesing v. Rock Island*, 128 Ill. 475, it is stated that no argument is necessary to establish the fact that a slaughterhouse in a city is an unwholesome business or establishment.

And where a slaughterhouse exists so near dwelling houses as to impair the comfortable enjoyment of the dwellers therein, an actionable nuisance is created. *Beiling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272; *Beckham v. Brown*, 19 Ky. L. Rep. 519, 520.

Where the defendant was charged with carrying on the business of a slaughterhouse within the bounds of the village near to the highway and to adjoining premises, and it was proved that the stench extended to the neighboring dwellings and was encountered by persons passing on the highway, and was at times so offensive as to require the doors and windows of the dwellings to be closed, and offal, manure, and putrid meat accumulated to such an extent during the winter that when it was removed in the spring the stench was much greater, and rendered persons sick who were at work at a distance of 100 rods from the slaughterhouse, such business was declared a nuisance rendering the enjoyment of life and property uncomfortable and unwholesome. *Taylor v. People*, 6 Park. Crim. Rep. 347, 352.

And in an action against a defendant for maintaining and causing to be maintained a public nuisance by reason of the offal of slaughtered cattle and other animals being accumulated, and producing noisome and offensive smells, an instruction to the jury, in effect, that, if the defendants allowed such offal to accumulate at their slaughterhouses from which such noisome and offensive smells were emitted, thus rendering the air impure and unhealthy, the defendants would be liable, even if the fact were that such noisome and offensive smells were blended with like smells emanating from another slaughterhouse and a deposit of filth in its vicinity, and that such would not justify or excuse a wrongful act of another defendant, constituted no defense in a prosecution against the defendant,—was upheld: nor was it misleading to the jury, such instruction containing a correct statement of the law. *Dennis v. State*, 91 Ind. 291, 292. To the same effect, *Atty. Gen. v. Steward*, 20 N. J. Eq. 415.

gree by every city in the country. And, in this class of cases is no defense to the validity of regulation ordinances to say, "I am committing no nuisance, and I insist upon

being heard before a court or jury upon that question of fact." In this class of cases a defendant has no such right." To the extent that it was material in creating a valid ordi-

So, in *Rex v. Cross*, 2 Car. & P. 463, a certificate and license under the English statute, 28 Geo. III. chap. 17, § 1, authorizing the defendant to keep a house for the slaughtering of horses, was held to be no defense in an action for maintaining a nuisance in the keeping of such house.

Upon the question of the effect of an authority or a license in general, see *notes* to *Grossman v. Oakland* (Or.) 36 L. R. A. 593.

Again, a slaughterhouse erected or conducted in violation of the provisions of a city ordinance becomes a nuisance, especially where power is given to such corporation by the provisions of the state statute, and even though such slaughterhouse might not be a nuisance in the absence of such ordinance. *Rund v. Fowler*, 142 Ind. 214, 217.

Upon general principles, and considering them as nuisances, the right of removing houses for the slaughter of cattle from particular locations, as the public health requires, is within the power of the common council or other local authorities independent of a statute by which such right is given. *Metropolitan Bd. of Health v. Heister*, 37 N. Y. 661.

Yet where the city charter only allows the council to prevent the future erection and location of such establishments, it has no right to put an end to an existing slaughterhouse business so long as it is not a nuisance *per se*, inasmuch as it cannot declare that to be a nuisance which is not one in fact. *Wreford v. People*, 14 Mich. 41, 46.

In *Tugman v. Chicago*, 78 Ill. 405, 408, it is said that if the health or comfort of a city requires the prohibition of new slaughterhouses within a designated part of the city, the same reason would demand that old ones should be discontinued, and that the fact that certain persons were engaged in the business, within the district designated in the ordinance, at the time of its adoption, gives them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons may continue such business while others are deprived of a like privilege who engage in the business at a later period.

The course of legislation in the state of New York has been to confer upon the local authorities large discretionary powers, to be exercised upon emergencies for the public welfare, and they have been authorized to do, or cause to be done, whatever may be necessary for the preservation of the public health, and therefore, if the board of health come to the conclusion that the removal of a slaughterhouse is necessary for such purposes, it is a matter upon which they may clearly exercise their judgment, and with the fair exercise of it no judicial tribunal should interfere. *Cooper v. Schultz*, 32 How. Pr. 107, 121, 135.

In *Cooper v. Schultz*, 32 How. Pr. 107, an ordinance of the board prohibiting the engaging or continuing in the business of a butcher or cattle dealer at or in any public or private market in the cities of New York or Brooklyn without a permit, and further prohibiting the driving of cattle in the built-up portions of the cities between certain hours of the day, and also the yarding in, in built-up portions, of cattle without a permit, was held constitutional. In that case, however, it was not shown that such trade or business constituted a nuisance.

The proceedings and regulations of a board of health in abating the defendant's slaughterhouse business as dangerous to the public health and a nuisance do not deprive a man of his property or liberty, and are therefore not contrary to the Constitution, the same being merely health regulations 38 L. R. A.

by the district. *Metropolitan Bd. of Health v. Heister*, 37 N. Y. 661, 668.

See in general, as to such proceedings being an infringement of constitutional rights, *notes* to *Grossman v. Oakland* (Or.) 36 L. R. A. 593.

And the proceedings of a board of health under the New York act of 1866, creating a metropolitan sanitary district in cases relating to slaughterhouses and the driving cattle as dangerous to health and a public nuisance, will more certainly be upheld where the evidence shows that the same is offensive to the senses of the people in the vicinity, and renders their life uncomfortable,—especially when the board has given notice to the defendant to abate such nuisances, and also afforded him an opportunity to be heard, which notices he has disregarded. *Metropolitan Bd. of Health v. Heister*, 37 N. Y. 661.

So, an ordinance authorized by statute, prohibiting the maintenance of any slaughterhouse within the city, cannot be defeated upon the ground that it is unreasonable, it being a business subject to legislative control, as the Indiana act of 1893, § 213, giving power to the common council of cities to declare what shall constitute a nuisance, and to prevent the same and require its abatement, authorizes the removal of the same by the proper officers, and also gives power to prevent or regulate the location and to manage certain specified trades, (slaughterhouses being especially mentioned), the business of which may become noxious or injurious to public health. *Beiling v. Evansville*, 144 Ind. 644, 35 L. R. A. 273.

And, under a charter giving a municipal corporation power to enact ordinances necessary and proper for the preservation of the public health, and to prevent and remove nuisances, a slaughterhouse kept within the city limits upon private property, in a manner detrimental to the public health and comfort, is a nuisance. *State v. Shelbyville*, 4 Sneed, 176.

Again, under a city charter giving the city power, *inter alia*, to provide for the abatement and removal of all nuisances under its ordinances, or at common law, and also to direct the location and management of slaughterhouses and markets, an ordinance establishing a city slaughterhouse and regulating the management of slaughterhouses and packing houses in the city, and prohibiting the sale of diseased meat in the city, and directing the city controller to procure a city building and ground to be used as a city slaughterhouse by all the butchers of the city, and making it unlawful for any person to sell or dress any animal within any other limits of the city, is valid and reasonable and not in restraint of trade. *Milwaukee v. Gross*, 21 Wis. 241, 91 Am. Dec. 472.

But the English improvement act, providing that "no one shall slaughter cattle or dress any carcass for sale as human food in any place within the limits, other than" such slaughterhouse as therein described, applies only to the slaughtering of beasts intended by the person slaughtering for sale as human food. *Elias v. Nightingale*, 8 El. & Bl. 606, 27 L. J. M. C. N. S. 151, 4 Jur. N. S. 166.

So, in *St. Paul v. Smith*, 25 Minn. 372, it was held that a city ordinance prohibiting the carrying on of the business of slaughtering, dressing, or packing of cattle without a permit, and specifying the conditions upon which such business is to be carried on, and requiring the person so carrying on such business at all times to keep his premises in a clean, healthy, and inoffensive condition, which ordinance is known as the ordinance relating to slaughter and

nance, we must assume that such question was decided by the municipal authorities, and decided against petitioner and all others similarly situated. This court said in *Ex*

parte Shrader, 38 Cal. 284: "The legislature can add to the *mala in se* of the common law the *mala prohibita* of its own behest. . . . The power to regulate or prohibit, conferred

packing houses, does not apply to the case of a person who merely kills, slaughters, and dresses one animal, the same not constituting a nuisance as understood and intended by such ordinance.

In *Belling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272, the court did not pass upon the question whether the slaughtering of a single animal by a person within the city for meat for his own consumption would come within the inhibition of the ordinance.

And where the terms of a charter give the council power to prohibit and prevent within certain limits, to be determined by them, the location or construction of buildings for slaughterhouses and yards, butcher shops, etc., and such buildings, etc., whether within or without the city limits, are subject to such regulations as to their construction and management as such council may make with a view to the protection of property from injury by fire, or to the health and safety of the inhabitants, and to prevent them from becoming nuisances, the common council has no power to prohibit the slaughtering of animals anywhere upon a person's own premises, unless the building is devoted to such purposes. *Wreford v. People*, 14 Mich. 41, 46.

In the case of *Villavaso v. Barthet*, 30 La. Ann. 247, the court passed upon the power of a municipal corporation to regulate slaughterhouses within the municipal limits, and to declare the same nuisances, but in that case the action was not brought by the municipality to abate the nuisance, but by the plaintiff as a private citizen and in his own right.

But a city ordinance which prohibits the carrying on of certain businesses without the consent of certain persons cannot be upheld, even though the city authorities may have power to regulate businesses; and therefore an ordinance which prohibits the erection and carrying on of slaughterhouses without the consent in writing of the owner and occupant of every house within a certain distance from the proposed location of the business cannot be upheld, even though under the city charter a city has power to abate nuisances on public or private property, and the causes thereof. *St. Louis v. Howard*, 119 Mo. 41.

So, a by-law that no person shall keep a slaughterhouse within the city without a special resolution of the council is invalid as not within the provisions of the Canada statute of 1866, § 296, subsec. 23, which prevents or regulates the erection or continuance of slaughterhouses which may prove nuisances, as it shows there may be favoritism and restraint of trade, or it may be used to create a monopoly, and persons may not therefore all be placed upon an equal footing. *Re Nash*, 33 U. C. Q. B. 181.

But the Massachusetts Statutes of 1871, chap. 167, which prohibit the use of any building for slaughtering cattle, etc., or for other noxious or offensive trades, without the written consent and permission of the selectmen of any city or town containing more than 4,000 inhabitants, are constitutional and a valid exercise of the police power for the preservation of the public health, and the suppression and abatement of nuisances. *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694, 696.

And even though the legislature, since the enactment of the city charter, may have enacted laws relating to the incorporation of cities, ordinances previously enacted pursuant to the original charter are not inconsistent with the provisions of the state statute, and therefore such ordinances are not repealed thereby. *Belling v. Evansville*, 144 Ind. 644, 35 L. R. A. 272.

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The city authorities have no power either legislative, judicial, or administrative, to pass an ordinance prohibiting the slaughtering or keeping or maintaining of a slaughterhouse within the limits prescribed by the city ordinance without permission of the city council, for the reason that the power delegated to a city in articles 248, 258, of the Constitution of Louisiana were exhausted when the city officials laid out the limits in which it was declared lawful to slaughter animals for food, and therefore the act of a city in so doing will be restrained by injunction *pendente lite*. *Barthet v. New Orleans*, 24 Fed. Rep. 563, 568.

In *St. Paul v. Byrnes*, 38 Minn. 176, 177, the defendants were charged with the violation of a city ordinance relating to slaughter and packing houses, and the question involved the construction of chapter 370 and the special laws of Minnesota of 1887, and the effect thereof as respected the operation of such ordinance. The 1st section of such ordinance declares that no person shall kill, slaughter, dress, or pack any animals, or establish a manufactory of candles or soap within the city limits without a permit, while the 2d section relates to the procedure for obtaining the permit, and the 3d and 4th included regulations for the management of the business, while the 5th provided that no slaughtering or rendering establishment shall be permitted or suffered within the seventh ward of the city of St. Paul north of a certain street, nor shall any slaughtering or rendering by butchers or others be permitted within such ward, and declares the party offending guilty of a misdemeanor. The 2d section of the act exempts existing establishments or persons then engaged in the business until the city shall have paid to the parties so carrying on such business the damages occasioned by the operation thereof. The court held that the act was specially limited to the particular district, and entirely superseded the jurisdiction of the city authorities to grant or refuse permits, or to control the locations of the business of slaughtering or butchering within the city limits, and further withdrew from the city its delegated authority and right to legislate upon that particular matter, absolutely forbidding the presence of such houses and business within the district, excepting persons who were established in the business when the act was passed, although the act had no reference to the authority of the city to enforce reasonable sanitary regulations in respect to the manner of conducting the business as to the cleanliness of premises, disposal of offal, etc.

III. Laundries.

The control and regulation of the laundry business have generally been held to be vested in municipal corporations in the exercise of their police power in order to prevent such business becoming dangerous to public health, safety, and comfort, and constituting itself a nuisance. In many cases the courts have upheld ordinances relating to such business as being strictly within the general exercise of the police power vested in such corporations, although the ordinance had not specifically called for their abatement or regulation as nuisances.

Thus, in *Barbler v. Connolly*, 113 U. S. 27, 28 L. ed. 823, the ordinance of the city and county of San Francisco, prohibiting the carrying on of public laundries and wash-houses within certain prescribed limits of the city and country from 10 o'clock at night until 6 o'clock in the morning, was held to be purely a police regulation

upon the board of supervisors, not only includes nuisances, but extends to everything 'expedient for the preservation of the public health and the prevention of contagious dis-

eases.' Now, there are many things not coming up to the full measure of a common-law or statute nuisance, that might, both in the light of scientific tests and of general expe-

within the competency of any municipality possessed of the ordinary power to make; a Federal tribunal having no power to supervise such regulations, any correction of the action of municipal bodies in such matters coming only from the state legislation or state tribunals.

So, in *Soon Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145, it was held that a similar ordinance was not void on the ground that it was not within the police power of the city and county; neither was it void on the ground that it discriminated between those engaged in the laundry business and those engaged in other classes of business, or between the different classes of persons engaged in the laundry business; neither was it void on the ground that it deprived a man of the right to labor at all times, or upon the ground that it was unreasonable in its requirements, in restraint of trade, or upon any other ground apparent upon the face of the ordinance.

Again, in *Ex parte Moynier*, 65 Cal. 33, the ordinance of the city and county of San Francisco which declared that no person or persons owning, or employed in, a public laundry or public wash-house, provided for in the 1st section of the order, should wash or iron clothes between the hours of 10 o'clock in the afternoon and 6 o'clock in the morning, nor upon any portion of the day known as Sunday, and also that it should be unlawful for any person to carry on such business within certain limits without the certificate of the health officer to sufficient drainage, and that the business could be carried on without injury to the sanitary condition of the neighborhood, and a certificate of the board of fire wardens that the heating appliances were in good condition and that their use was not dangerous to surrounding property, was held constitutional as within the police and sanitary regulations.

And in *Ex parte Sisto Li Prototi*, 68 Cal. 635, where the charter declared that "licenses shall be discriminating and proportionate to the amount of business," it was held that an ordinance making the license fee to be paid by the owners or keepers of laundries proportionate to the number of persons so employed and the amount of business done, was valid, although in that case there was a dissenting opinion by Justice Thornton holding that the ordinance was not in accord with the charter.

And again, in *Ex parte White*, 67 Cal. 102, an ordinance providing that all buildings erected and used as laundries within the corporate limits of the city and county should be constructed but one story in height with brick or stone walls not less than 12 inches in thickness, covered with a metal roof, and provided with metal or metal covered doors and window shutters, was held constitutional.

But in *Re Wo Lee*, 28 Fed. Rep. 471, it was held that the arbitrary power of a board of health under a municipal ordinance to give or refuse permits to carry on the laundry business was unconstitutional.

So, an ordinance of the city and county of San Francisco forbidding the establishment, maintenance, or carrying on of any laundry within certain limits without the consent of the board of supervisors, which consent was to be granted only upon the recommendation of not less than twelve citizens and taxpayers in the vicinity in which the laundry was to be established, and which vicinity embraced more than half the city and county, was held to be invalid by reason of the power of the supervisors being dependent upon the approval of others. *Re Quong Woo*, 13 Fed. Rep. 229, 231.

Again, a city ordinance which prohibits such a

business in wooden buildings within a certain part of the city without the consent of a board of supervisors, not prohibiting such business in buildings erected in brick or stone, confers upon such authorities an arbitrary power, and is unconstitutional as an invalid exercise of police power and of the powers vested in the board of supervisors, by virtue of the California act of April 19, 1850, under which they are empowered *inter alia*, to provide by regulation for the prevention and summary removal of a nuisance for public health. *Yick Wo v. Hopkins*, 118 U. S. 373, 30 L. ed. 227, *Reversing Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12.

Upon the question of discrimination generally, see *note to Grossman v. Oakland (Or.)* 36 L. R. A. 593.

In many cases, however, it has been sought to declare such trade or business a public nuisance and to abate it as such, and in this connection it has been said that the business of a laundry is not of itself against good morals or contrary to public order or decency, neither is it offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. *Re Quong Woo*, 13 Fed. Rep. 229, 231; *Re Yick Wo*, 68 Cal. 294, 58 Am. Rep. 12.

And washing for hire cannot make the operation a nuisance, if it be not otherwise a nuisance. *Stockton Laundry Case*, 26 Fed. Rep. 611, 612.

So, a laundry cannot be deemed a nuisance *per se* being harmless in itself, and, if properly conducted with reference to sanitary and other conditions which may easily be complied with, is not offensive or dangerous to the health of the community in which it may be located, and such being the case a person has under the Constitution of the United States the same right to engage in the business of conducting a public laundry as in any other, and has equally with the grocer, the lawyer, or the carpenter the right to select the particular location in which he shall conduct such business. *Re Hong Wah*, 32 Fed. Rep. 623, 624.

Such a business is not a nuisance *per se*, neither is the occupation one that is *prima facie* a nuisance, like a slaughterhouse, or a house for the manufacture of gunpowder or dynamite. *Stockton Laundry Case*, 26 Fed. Rep. 611, 612.

The business of conducting a laundry is a lawful occupation, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within the vicinity; and no municipal corporation has the power to make the right of a person to follow such business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, but a town or city may, when deemed necessary for the purpose of the public health or safety adopt reasonable regulations as to the manner in which such a business shall be conducted, and, in the exercise of its police power, may impose reasonable restrictions as to the kind of buildings to be used, and as to the sufficiency of the drainage, so as to prevent a nuisance arising therefrom. *Ex parte Sing Lee*, 93 Cal. 354, 357, 21 L. R. A. 193.

But a city ordinance which makes the carrying on of a laundry business a nuisance by the arbitrary declaration of the ordinance itself, is unconstitutional. *Re Sam Kee*, 31 Fed. Rep. 630.

An ordinance making it unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house for hire within a city except within a part thereof lying without certain designated limits, and declaring any such laundry

rience, pave the way for the introduction of contagion and its uncontrollable spread thereafter. Slaughterhouses, as ordinarily and perhaps invariably conducted in this country,

might, within the limits of reasonable probability, be attended with these consequences. A competent legislative body has passed upon the question of fact involved, and we

carried on in violation thereof to be a public nuisance, and making the violation of such ordinance a misdemeanor punishable by fine or imprisonment, or both, was held to be in conflict with § 1 of the 14th Amendment of the Constitution of the United States, inasmuch as it denied the right to select the particular locality in which the conducting of a lawful business not in itself a nuisance might be carried on. The court further held that such conflict was not removed by the fact that there were within the limits of the city outside of the district from which laundries were excluded places equally as well suited for their location as any within the district from which they are excluded. *Re Hong Wah*, 82 Fed. Rep. 623, 624.

So, a city ordinance which absolutely and unconditionally forbids the keeping of a laundry for washing clothes for hire, at any point within the inhabited, and even within the habitable, part of a city, the remainder of the city being in an uninhabitable condition, violates the constitutional provisions, and will not be enforced, upon the ground that such business constitutes a nuisance, such ordinance not regulating but extinguishing the business. *Stockton Laundry Case*, 26 Fed. Rep. 611-613.

Again, a rural city, not compactly built up, has no authority to prohibit within its inhabited limits the washing of clothes for hire, such occupation not only being useful but absolutely necessary in a civilized community; and it has no power to declare such occupation, and every other that may be followed by civilized man, to be a public nuisance without regard to the question whether it is in fact a nuisance or not. *Stockton Laundry Case*, 26 Fed. Rep. 611, 612.

And a laundry business carried on by the petitioner and his predecessors, at the location occupied by him for twenty years, and by the petitioner himself for eight years, in the absence of anything tending to show that it is in fact a nuisance, cannot be so declared under the provisions of a city ordinance declaring the carrying on of such business to be a nuisance, such ordinance being unconstitutional. *Re Sam Kee*, 31 Fed. Rep. 680.

Yet it has been said that, although the business of a laundry is not opposed to good morals or subversive of public order or decency, it may, when conducted in certain localities, be highly dangerous to the public safety so as to require its regulation by the terms of a city ordinance. *Re Yick Wo*, 68 Cal. 204, 58 Am. Rep. 12.

But a laundry established for the purpose of washing for hire can only become a nuisance upon gross negligence or carelessness, or gross imperfections in the arrangements and appliances by means of which it is carried on. *Stockton Laundry Case*, 26 Fed. Rep. 611-613.

So, if a laundry business is conducted in a manner offensive or dangerous or so as to become a nuisance, the public authorities may direct the manner to be changed and prescribe regulations for its prosecution. *Re Quong Woo*, 13 Fed. Rep. 229, 231.

And this is so for the reason that all businesses must be so conducted as not to endanger public safety and health. *Re Quong Woo*, 13 Fed. Rep. 229, 231.

But a city ordinance, providing that it shall be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house for hire within the city, except within a specified part thereof, and further declaring that any laundry so carried on in violation of such section 33 L. R. A.

shall be a nuisance, is within the power of the city to enact, the city having power to so restrict the business within the specified section of the city; and such ordinance is not unreasonable, it being a police or sanitary regulation. *Re Hang Kie*, 69 Cal. 149.

In *Re Hong Wah*, 82 Fed. Rep. 623, 625, the case of *Re Hang Kie*, 69 Cal. 149, was looked upon as virtually, although not expressly, overruled by the supreme court of the state, and was said ought not to be regarded as an authority upon the question. In that case a similar ordinance was upheld as a valid exercise of police power.

And if the structure or building in which the laundry business is carried on is by its structure, form, or material, unsafe, the public authorities may by proper proceedings have it altered or removed, such power being possessed with reference to all vocations and buildings in which they are prosecuted. *Re Quong Woo*, 13 Fed. Rep. 229, 231.

IV. Fertilizers.

It has been held that the manufacture of fish into scrap as a fertilizer is a nuisance *per se*. *State v. Luco*, 9 Houst. (Del.) 396.

In *Czarniecki v. Bollman* (Pa.) 10 Cent. Rep. 96, the defendant's business of a bone-boiling and fertilizing establishment was declared a nuisance *per se* and abated as such, for the reason that carrion cannot be gathered together in any populous neighborhood without being offensive; and the use of the buildings for such purposes was therefore restrained.

And the city authorities, after notice to the company by the street commissioners, may abate a fertilizer's business as a public nuisance by proceeding to destroy, break down, and injure, and otherwise abate the nuisance by force, and the court will refuse an injunction to restrain their proceedings, the summary process for the abatement of public nuisances being authorized by common law, the plaintiffs not showing damages irreparable at law. *Manhattan Mfg. & Fertilizer Co. v. Van Keuren*, 23 N. J. Eq. 251, 253.

Where the party charged with a nuisance had received a license from the board of health to carry on the business of manufacturing fertilizers, and sought to vindicate his action by virtue of such license, it was held that he was not entitled to carry on such business so as to create a nuisance, the license being no defense. *Garrett v. State*, 49 N. J. L. 103, 60 Am. Rep. 592.

So, in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 670, 24 L. ed. 1038, 1040, it was held that a charter authorizing the manufacture of animal matter into a fertilizer was not a contract guaranteeing in the locality originally selected exemption from the exercise of the police power of the state, however serious the nuisance might become in the future by reason of the growth in population around it, and therefore a village incorporated by a charter authorizing it to abate a nuisance might by an ordinance abate such nuisance.

As to the effect of an authority or license in general, see *note* to *Grossman v. Oakland* (Or.) 36 L. R. A. 593.

V. Livery stables.

Without attempting to exhaust the authorities upon the question as to whether or not, and how far, livery stables are nuisances, the note being confined to the consideration of municipal control over them as such, it may be stated that although a livery stable is not of itself a nuisance, yet when

cannot go behind the finding. So far as we can know by this record, the power conferred has been exercised intelligently and in good faith." It must be borne in mind that the

court was not discussing this question from the standpoint that the conduct of a slaughterhouse within municipal territory constituted a nuisance *per se*. In the case of *Johnson v.*

situated in close proximity to private residences, and in a manner dangerous to the health and comfort of the residents of such houses, it may be declared a nuisance. *Shiras v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138; *Flint v. Russell*, 5 Dill. 151; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721; *Dargan v. Waddill*, 9 Ired. L. 244, 49 Am. Dec. 421; *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45; *Keiser v. Lovett*, 85 Ind. 240, 242, 44 Am. Rep. 10; *Aldrich v. Howard*, 7 R. I. 87, 80 Am. Dec. 636; *Coker v. Birge*, 10 Ga. 336; *Rounsaville v. Kohlheim*, 68 Ga. 668, 45 Am. Rep. 505; *Shivry v. Streeper*, 24 Fla. 103, 109; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Harrison v. Brooks*, 20 Ga. 537; *Curtis v. Winslow*, 38 Vt. 690.

It has been stated that the power of a city to regulate livery stables includes the right to designate the places, and in what parts of the town or city they may be located, and to prohibit their erection at any other place. *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721.

A city charter giving power to pass ordinances to declare, prevent, and abate nuisances on public or private property, and the causes thereof, is sufficient to authorize an ordinance regulating the keeping of livery stables as being for public health and safety, even though the subdivision of the ordinance does not define livery stables, although it confers the power to prohibit the erection of an analogous establishment, with power to remove and regulate the same, and also power to regulate and prevent the carrying on of any business which may be dangerous or detrimental to the public health. *State, Russell, v. Beattie*, 16 Mo. App. 131.

But a mayor and municipal assembly, under a grant of power to declare nuisances, have no authority by ordinance to declare an existing livery stable a nuisance, such an act being the deprivation of property without due process of law and an invasion by the legislature of the powers of the judicial department of the government. *State, Russell, v. Beattie*, 16 Mo. App. 131.

Although in *Chicago v. Stratton*, 162 Ill. 494, 35 L. R. A. 84, 86, the main question involved was the delegation of municipal power to direct the location of livery stables to lotowners, yet the court stated that, although a livery stable in a city or town was not *per se* a nuisance, it might be injurious to the comfort and even health of the occupants by the permeation of deleterious gases, and by the mere deposit of offal removed therefrom, if situated in close proximity to an existing residence. To the same effect, *Shiros v. Olinger*, 50 Iowa, 571, 32 Am. Rep. 138; *Dargan v. Waddill*, 9 Ired. L. 244, 49 Am. Dec. 421; *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665; *Green v. Lake*, 54 Miss. 404, 28 Am. Rep. 873; *Kirkman v. Handy*, 11 Humph. 406, 54 Am. Dec. 45.

In *Brookline v. Hatch*, 187 Mass. 380, 36 L. R. A. 495, an injunction was sought to restrain the defendant from using or occupying certain premises and buildings thereon for a stable, contrary to the provisions of the Massachusetts statute, which prohibited the use of such premises as stables for more than four horses in certain specified buildings without a license, but the question did not turn upon the point of nuisance, the decision being mainly to the point as to what constituted a place within the meaning of the statute.

VI. Brick and lime kilns.

A brick kiln is not a nuisance *per se* although it may become such by the growth of the surrounding neighborhood. *State, Horscottle, v. St. Louis* 88 L. R. A.

Bd. of Health, 16 Mo. App. 8; *Huckensstine's Appeal*, 70 Pa. 106, 10 Am. Rep. 669.

So, brickmaking is not of itself a noxious or offensive trade, business, or manufacture, within § 64 of the English public health act of 1848, so as to call for its abatement as a nuisance, by a local board under the provisions of such statute. *Wanstead Local Bd. of Health v. Hill*, 13 C. B. N. S. 473, 32 L. J. M. C. N. S. 135, 9 Jur. N. S. 972, 7 L. T. N. S. 744, 11 Week. Rep. 368.

And brickburning, which is an essential part of brickmaking, is not a nuisance *per se*. *Huckensstine's Appeal*, 70 Pa. 102, 106, 10 Am. Rep. 669.

A city ordinance prohibiting a brick kiln from being located within a certain distance of any dwelling house without certain consents, passed under its charter which authorizes the city authorities to declare, prevent, and abate nuisances, covers a brick kiln in operation at the time of the charter, the provisions of the ordinance not saying or implying that existing brick kilns within the limits of the city are to be allowed to remain, no matter what changes may have taken place in the locality in which they exist, and whether they become nuisances or not. *State, Horscottle, v. St. Louis Bd. of Health*, 16 Mo. App. 8.

It has been held that the burning of lime, irrespective of location, is neither an unlawful business nor a nuisance *per se*, but is a useful and necessary process for the benefit of society, although it may from mere local conditions become a nuisance. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105. To the same effect, *Slight v. Gutzlaff*, 35 Wis. 673, 676, 17 Am. Rep. 476.

A city ordinance, passed pursuant to the power contained in art. 4, § 797, of the Maryland Code, Public Local Laws, which makes it unlawful for any person or persons to work, operate, or continue in use, for the purpose of burning oyster shells or stone lime, any kiln situated or erected within the limits of such city, under certain penalties for each and every day such kiln is worked, operated, or continued in use, is invalid, inasmuch as it prohibits the entire industry of lime burning within the limits of the city, even though the kiln may be on the remotest outskirts of the city, beyond the reach of habitations, the same not then being, and the evidence not showing that it ever would become, a nuisance, the health of the city not being affected in any manner. *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105.

In *Reynolds v. Schultz*, 34 How. Pr. 147, an order had been made by the metropolitan board of health directing the suspension of the business of manufacturing shell lime conducted by the plaintiff on certain premises in the city of New York until the mode of conducting such business should be so altered as that no odors could escape into the open air, and directing that certain materials consisting of shells and other substances should be removed, and such premises cleaned. The plaintiff denied that his premises or the business carried on thereon were a nuisance detrimental to life or health, and offered to establish the fact before any tribunal acting according to the ordinary course of the law. The defendants, the board of health, alleged that they had filed sufficient proof as to the premises and business to authorize its declaration that the same were in a condition and in effect dangerous to life and health and a public nuisance, and made abatable after notice. The court upheld the proceedings of the board, the same not appearing to be arbitrary or more summary than its authority called for. the preponderance of evidence being in

Simonton, 43 Cal. 249, which involved the constitutionality of an ordinance of the board of supervisors of San Francisco prohibiting the feeding of still slops to milch cows, the

court says: "If it indeed be a fact that the milk of cows, fed in whole or in part upon still slops, is unwholesome as human food, there can be no doubt of either the authority

support of their contention that the same was a nuisance.

VII. Stockyards.

The council of a city of the second class has power to declare those annoyances peculiar to stockyards and hog-pens nuisances, whenever they become offensive to the public. *Burlington v. Stockwell*, 5 Kan. App. 569.

The fact that a stockyard company authorized to operate a railroad through a city for the transportation of freight creates a nuisance by the transportation of live stock, or other substances injurious to the public health and general welfare, does not justify the municipal authorities in removing the tracks of such company from the streets as a means of abating such nuisance, thereby destroying the value of its road. *Chicago v. Union Stock Yards & T. Co.* 164 Ill. 224.

Where the compiled laws of the state provide that the council may purchase, or condemn, and hold for the city within, or within 5 miles outside of the city limits, all necessary lands for hospital purposes and waterworks, and erect, establish, and regulate hospitals, workhouses, and poorhouses, and gives power to make regulations for the government and support of the same and to secure the general health of the city, and to prevent and remove nuisances, the police jurisdiction of the city thereby extending over such lands and property to the same extent as over public cemeteries, the city has no power under such act to condemn as a nuisance a stock yard kept by the defendant within 3 miles of the corporate limits of the city, the lands upon which such nuisance exists not being used for the purposes designated by the act. *State, Humphrey, v. Franklin*, 40 Kan. 410.

By § 4089 of the Iowa Code the act of keeping a stock yard in such a condition as to constitute a nuisance is declared a nuisance, and under § 456 of the Code power is given to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated; yet it has been held that a city has no authority by its ordinance to provide for the imposition of fines against persons committing such a nuisance as defined by the ordinance, the power of the city being limited to providing for the abatement of such nuisances. *Knoxville v. Chicago, B. & Q. R. Co.*, 83 Iowa, 638.

See also, as bearing upon the establishment of stock yards, the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394, *supra*, II.

VIII. Tallow, fat, hides, etc.

In *Zylstra v. Charleston*, 1 Bay, 382, the proceedings of the city council under their ordinance prohibiting the keeping of a tallow chandler shop within the city, for which the defendant was fined, were held to be *coram non judge* and void.

In *Rankett's Case*, Pasch. 3 Ja. B. R. cited in 16 Vin. Abr. 23, it was said that the making of candles which caused a noisome scent to the inhabitants was not a nuisance because of the needfulness of them, which dispensed with the noisomeness of the smell. In *Hawkins' Pleas of the Crown*, 190, chap. 75, fol. 10, the same case is cited, but the author takes exception to the reasonableness of the opinion because whatever necessity there might be for candles to be made yet it could not be pretended to make them in a town, and that, as a trade of a brewer which was as necessary as that of a chandler carried on in an inconvenient place and so as to incommode the neighborhood had been held to be a nuisance, so ought the chandler's shop.

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Yet it has been held that a tallow furnace erected in a populous neighborhood is a nuisance. *Morley v. Pragnel*, Cro. Car. 510; *Tohoyles's Case*, cited in Cro. Car. 510.

In *Allen v. State*, 84 Tex. 230, 233, it is stated that it requires no aid of the common law to convince anyone accustomed to pure air, and who has been brought by accident or necessity within the sickening and malarious influence of a modern tallow and beef factory, that it is a nuisance, especially when it is a disgusting and nauseous nuisance even for miles around it; and therefore any person who, knowing the effect of that business, will erect a beef or tallow factory in the vicinity of a town or city or in a thickly settled neighborhood or on a public thoroughfare of the highway is guilty of creating a nuisance and liable therefor.

So, in *Grand Rapids v. Weiden*, 97 Mich. 82, a rendering establishment where tallow was tried out from slaughterhouses and meat-market offal, which offal was more or less decomposed on its arrival, and the accumulation of the matter and the aggregation of large quantities of bones from which the marrow had not been entirely extracted, and in which manure was allowed to be accumulated, and large quantities of hogs were kept about the premises running in an inclosure and fed with a mixture which came from the bones, it was held that such facts, together with the crudity of the rendering process, all of which created an intolerable stench which permeated the neighborhood, and was borne by every breeze through the entire section of the city, and caused, nausea, debility, and discomfort, compelling citizens to shut their doors and windows, was a public nuisance abatable by the public authorities.

In *Winslow v. Bloomington*, 24 Ill. App. 647, the defendant's soap factory and tallow chandlery emitted and gave out bad, offensive, and unwholesome smells and odors to the annoyance and detriment of the community. It was held proper to charge the jury that if such business could not be carried on without emitting such odors so as to be detrimental and offensive to the people in its locality, then the owner of such factory had no right to carry it on in a populous city, and that it was no defense to say that it was conducted as well as it could be. In this case the defendant had violated a city ordinance preventing the erection of such establishments and declaring them nuisances.

A fat rendering establishment so far as it proves hazardous to the public health is abatable by the board of health under N. J. stat. 1887 (N. J. Pub. Laws 1887, p. 80). *State, Board of Health, v. Neidt* (N. J.) 19 Atl. 318.

So, a melting house erected for the purpose of trying animal fat from a slaughterhouse is *prima facie* a nuisance. *Peck v. Elder*, 3 Sandf. 128, 132.

And the trades of soap boiling, calendering, and brewing, though lawful, yet if carried on to the annoyance of the neighborhood, are nuisances. *King v. Pierce*, 2 Show. 329.

In *Seacord v. People*, 121 Ill. 623, 632, where it was sought to charge the defendant with unlawfully and wilfully suffering the carcasses of dead animals and large quantities of offal, filth, and noisome substances to be collected and deposited near certain dwelling houses so as to amount to a common nuisance, the court stated that in determining whether such establishments which belonged to the class denominated *prima facie* nuisances were nuisances in fact, the location whether convenient or otherwise, as well as the management and the ef-

or the duty of the board to enact the ordinance in question, and the scientific correctness of the determination by the board of the matter of fact involved is not open to inquiry

here." In the case of *Re Jacobs*, 93 N. Y. 93, 50 Am. Rep. 636, the court declares the following rule for testing the validity of ordinances enacted under the police power of a

fact produced on the neighborhood, must be considered.

An ordinance prohibiting a cremator or soap-boiling manufacture within the limits of a borough incorporated under Pa. act April 3, 1851, without the consent of the authorities, was upheld in *Schrack v. Coatesville*, 19 Pa. Co. Ct. 334, as it was likely to prove noxious or offensive to the inhabitants, the act of incorporation giving the borough power to pass such ordinances.

A fat boiling establishment carried on within a city so that offensive odors escape into the external air is a public nuisance *per se* which may be summarily abated by a metropolitan board of health, after a notice given to suppress and abate the nuisance has been disregarded, an opportunity to be heard having been given. *Well v. Schultz*, 33 How. Pr. 7, 8.

This is so for the reason that it is enough to create a public nuisance that the enjoyment of life within the house is made uncomfortable whether it be by infecting the air with noxious smells or with gases injurious to health. *Well v. Schultz*, 33 How. Pr. 7, 8.

In *Baugh v. Sheriff*, 7 Phila. 82, the proceedings of the board of health in declaring, by resolution, the plaintiff's fat-boiling and hide-curing establishment a nuisance were held not to be sufficient to authorize such board to abate the same as a nuisance, as under the Pennsylvania act of 1818, the complaint must be made upon the oath or affirmation of two householders, and a warrant must be obtained from a justice of the peace directing the sheriff or his deputy, by virtue thereof, to enter upon the premises and determine the question of a nuisance.

In *Westheimer v. Schultz*, 33 How. Pr. 11, the court refused to proceed by way of injunction to restrain the proceedings of the board of health in abating the plaintiff's fat-melting establishment as a nuisance, upon the ground that the public health of the city required that the board of health abate such nuisance.

In order to sustain a prosecution under N. Y. Laws 1892, chap. 646, the carrying on the business of a fat rendering establishment, etc., as a public nuisance within the corporate limits of the city, it must be shown that such business is carried on as a public nuisance. *People v. Rosenberg*, 138 N. Y. 410, 415.

The business of storing green and dried hides or pelts within a city may become a nuisance, but it is not a nuisance *per se*. *May v. People*, 1 Colo. App. 157, 159.

Yet neither a street commissioner nor a board of health, in the absence of any city ordinance defining what circumstances of abuse shall render certain specified occupations obnoxious, has power to abate a tannery as a nuisance until it has been found to be such. *State, Marshall, v. Cadwalader*, 36 N. J. L. 233, 235.

In a case where the board of health, in the exercise of their powers, sought absolutely to prohibit the plaintiff's business of salting and curing hides and dealing in rough fat, the court restrained the action of the public authorities and confined their interference to such interruptions as were reasonably necessary to enable them to abate any nuisance he might create in conducting such business, which was lawful and not a nuisance *per se*. *Well v. Ricord*, 24 N. J. Eq. 169, 173.

And as the business of a tannery and skin-dressing establishment is not *per se* a nuisance, it requires acts of a judicial nature to determine 88 L. R. A.

whether such an occupation, lawful in itself, is so conducted as to become liable to abatement. *State, Marshall, v. Cadwalader*, 36 N. J. L. 233, 235.

The resolution of a city council, acting under the city ordinance, directing the street commissioner to cause the owner or occupant of premises used as a hide-curing establishment to discontinue such use, and on his failure to do so to close the premises as a public nuisance, is valid, such ordinance preserving the health and promoting the comfort, convenience, and general welfare of the inhabitants. *Kennedy v. Phelps*, 10 La. Ann. 227.

Yet a city ordinance is discriminating and therefore not within the authority conferred upon the municipal authorities by § 3312, subdivisions 45 and 53 of the Colorado General Statutes, where it prohibits the keeping and storing of green or dried hides or pelts within the city without the permission from the city council, as it does not declare the storing of hides and pelts within the city limits a nuisance, but assumes that the city council may prohibit, by declining to grant permission, or may grant permission as their inclination may prompt. *May v. People*, 1 Colo. App. 157, 159.

So, under the powers given to a common council to make, modify, amend, or repeal ordinances, rules, and regulations to abate or remove nuisances of every kind, and to require the owner or occupant of any grocery, cellar, tallow chandler's shop, butcher's stall, soap factory, or tannery, or other offensive or unwholesome house or place, to cleanse, remove, or abate the same, such council cannot abate every grocery, butcher's stall, or tannery, and such places are secure against interference or restraint until they are adjudged to be so employed as to be inimical to public health or safety, or until their owners contravene some ordinance prescribing the mode in which they shall be used, thereby making them nuisances. *State, Marshall, v. Cadwalader*, 36 N. J. L. 233, 235.

And a board of health cannot by resolution, after declaring the business of a skin dresser to be a nuisance, and notifying the owner to remove, correct, or abate the same within a given time, empower the street commissioners to proceed to abate the same, no such power existing, the act not having been declared a public nuisance by the common council, who have no power to delegate the right to pass upon the question to the street commissioners, the board of health, in the absence of an ordinance defining what circumstances of abuse render such occupation obnoxious, having no power in the question, the clause in the charter giving the city council power to appoint a board of health containing no warrant for the council to delegate to or confer upon such board the power which the council were called upon to exercise. *State, Marshall, v. Cadwalader*, 36 N. J. L. 233, 236.

The order of a board of health prohibiting the trade or employment of the business of preparing tripe, and other trades of a similar nature, is a valid exercise of the power conferred upon the board by § 52, Mass. Gen. Stat. chap. 24, the board acting in behalf of all the inhabitants; § 55 of the same statute giving express power to take all necessary measures to prevent the exercise of any trade in violation of its order; and for that purpose such a board may, without special authority, bring suit in the name of the city to restrain such business. *Taunton v. Taylor*, 116 Mass. 234, 231.

A complaint which charges the defendant with keeping a large quantity of hides, tallow, and other substances emitting a disagreeable odor, but

municipality: "When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process

of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and

not apprising him of the fact whether he is to answer a public or a private nuisance, the facts themselves not constituting a nuisance either public or private, is erroneous, and a judgment thus rendered in favor of a municipality will be reversed and the case remanded. *Lippman v. South Bend*, 84 Ind. 276, 279.

In *First Municipality v. Blinneau*, 8 La. Ann. 688, a city council, with the approval of the mayor, directed the defendant's business of a soap factory to be removed within twenty days, unless it should be put in such condition as not to be a nuisance, and further ordered that at the expiration of such period, on complaint of three inhabitants under oath that the factory was, and continued to be, a nuisance, the proprietor or any persons interested therein should be fined. The court held that, even conceding the power of the city council to impose fines for the violation of an ordinance, and the duty of the municipal government to maintain by lawful means the cleanliness and salubrity of the city, yet the resolution of the council was illegal and could not be enforced.

But in *Winslow v. Bloomington*, 24 Ill. App. 647, the defendant's business of a soap manufacturer carried on in connection with that of a tallow chandler was held properly declared and abated as a nuisance where it produced bad, offensive, and unwholesome smells and odors to the annoyance of the neighboring community.

See also, as bearing upon this branch of the subject, *Dubois v. Budlong*, 15 Abb. Pr. 445, 446; *McKnight v. Toronto*, 3 Ont. Rep. 284; *Ex parte Shradler*, 83 Cal. 279, 284; *Bourland v. Hildreth*, 26 Cal. 162; *St. Paul v. Byrnes*, 38 Minn. 176, 177.

IX. Dairies.

A city ordinance which prohibits the keeping of a dairy within certain limits, and gives the city authorities power to grant permission for the keeping of the same within such limits, is void as prohibiting a lawful business, for the reason that such business if carried on without such permission would be declared a nuisance, while if carried on with such permission it could not be declared a nuisance, even though the business in both cases might be perfectly harmless and in no way detrimental to public health. *State v. Mahner*, 43 La. Ann. 496. To the same effect, *State v. Dulaney*, 43 La. Ann. 500.

Where the nuisance which it sought to abate is a dairy, which is not a nuisance either by law or ordinance, and is not such *per se*, the decision of the board of health making it such is not conclusive. *St. Louis v. Schnuckelberg*, 7 Mo. App. 540.

As to the validity of a city ordinance requiring vendors of milk to furnish gratuitously on application of the sanitary inspectors samples of the milk for inspection and analysis, see *State v. Dupaquier* (La. Ann.) 26 L. R. A. 162.

And upon the question of the validity of an ordinance providing for the destruction of milk found to be impure, see *Deems v. Baltimore* (Md.) 28 L. R. A. 541.

X. Pawnbrokers, junk and secondhand clothes dealers.

Upon the question of police power as exercised by municipalities over the business of pawn brokers, junk dealers, and dealers in secondhand clothes, see note to *Grand Rapids v. Brady* (Mich.) 82 L. R. A. 116; *State v. Taft* (N. C.) 82 L. R. A. 122; *Rosenbaum v. Newbern* (N. C.) 82 L. R. A. 123.

An ordinance making it unlawful to import into 88 L. R. A.

any town any secondhand clothing, garment, cloth, or bed furniture, for the purpose of selling or offering it for sale, is void as an attempt absolutely to prohibit a lawful business not in itself necessarily a nuisance, but which may be conducted without danger to the community when properly regulated. *State v. Taft* (N. C.) 82 L. R. A. 122.

XI. Miscellaneous trades.

An ordinance of a city passed pursuant to the authority of the general assembly, prohibiting the cultivation of rice within the city limits, declaring it injurious to health, and giving power to remove and destroy the same, upon the ground of its being a nuisance, is a valid exercise of the police power, the municipal authorities having full power to declare it, and abate it as a public nuisance. *Green v. Savannah*, 6 Ga. 1.

In *Prescott's Case*, 2 N. Y. City Hall Rec. 161, the defendant's distillery with large furnaces emitting large quantities of smoke was held to be a common nuisance to the public.

The trade of a varnish maker, from which offensive smells are emitted annoying persons passing along the road, is a public nuisance, and it is not necessary that such smells should be injurious to health in order to constitute such nuisance, but it is sufficient that they are offensive to the senses. *Rex v. Neil*, 2 Car. & P. 483.

Under § 665 of the Civil Code of Louisiana, which provides that if the works or material of any manufactory or other operation are an inconvenience to those in the same or in the neighboring houses by diffusing smoke or noxious smell, no servitude being established by which they are regulated, their sufferance must be determined by the rules of the police or the customs of the place, a city ordinance condemning a blacksmith shop as a nuisance is valid, and an injunction will be granted to restrain the owner of such premises from continuing it. *New Orleans v. Lambert*, 14 La. Ann. 244.

A gas company carrying on business under authority derived from the legislature which in the course of such business occasions unwholesome smells, smoke, and stench, is not liable for a public nuisance where it is shown that due care and diligence are used in the business. *People v. New York Gaslight Co.* 64 Barb. 55, 66.

When gas, furnished by a gas company, becomes a dangerous and offensive nuisance by reason of defective pipes, a municipal corporation has power to prohibit its continuance, and therefore the court will dissolve an injunction obtained by such company restraining the municipal authorities from abating the nuisance. *Butler's Appeal* (Pa.) 1 Cent. Rep. 594.

Upon the question of liability in the escape and explosion of gas, see note to *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337; *Lebanon Light, Heat, & Power Co. v. Leap* (Ind.) 29 L. R. A. 342, and *McGahan v. Indianapolis Natural Gas Co.* (Ind.) 29 L. R. A. 355.

Where, by the terms of its charter, the city has power not only to abate but also to define nuisances, the fact that the defendant, in preparing a rock-crushing machine, makes use of the most modern appliances, and thereby reduces its offensiveness and annoying character to the minimum is no defense to the charge brought against him under the city ordinance for the maintaining of a nuisance. *Kansas v. McAleer*, 81 Mo. App. 433, 436; *State v. Boll*, 59 Mo. 321.

A city ordinance making the keeping or raising

adapted to that end." Tried by this rule, the ordinance in question fairly and fully fills the requirements of the law. It cannot be urged that petitioner is deprived of his property without due process of law, for, as is said by Judge Dillon in his work upon Municipal Corporations (§ 141), in speaking of police and sanitary regulations: "It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." This ordinance is not unreasonable nor arbitrary nor discriminating. It treats all persons alike who are engaged in the business named therein. All have the same rights, and all are subject to the same burdens. It is not unreasonable in the limits of distance fixed. As to the lo-

cation of the exact spot distant from a church or a schoolhouse or a dwelling house, where an ordinance would cease to be reasonable, it is not for this court now to say. The limits here prescribed are those with which we are to deal, and those limitations of distance may well be said to be reasonable. We see no substantial objection that can be made to the validity of this ordinance. Upon the contrary, the subject-matter covered by it is clearly one with which the city had the constitutional right to deal, and the businesses there enumerated are unmistakably those which the municipal authorities had the right to regulate, in the interest of the comfort and good health of the people of the city. The power is vested in the city, by direct grant from the Constitution, to control and regulate business undertakings of the character here involved, and petitioner's constitutional rights have in no way been trespassed upon.

It is therefore ordered that petitioner be remanded.

We concur: **McFarland, J.; Harrison, J.; Van Fleet, J.; Temple, J.**

of bees within the city a nuisance is too broad and therefore invalid, as neither the keeping, owning, nor raising of bees is in itself a nuisance, the ordinance having no regard to the fact whether the act is a nuisance or not, or whether bees in general have become a nuisance in the city. *Arkadelphia v. Clark*, 52 Ark. 23.

A fish-frying business which is, as a fact, an offensive business by reason of effluvia arising therefrom extending to a distance of 200 or 300 yards is not a noxious or offensive business within the

meaning of § 112 of the English public health act of 1875, which only applies where a business is "necessarily obnoxious or offensive." *Braintree Local Bd. of Health v. Boyton*, 52 L. T. N. S. 90, 48 J. P. 582.

An order of the board of selectmen of the town acting as a board of health prohibiting the manufacture of kerosene or other oils within the town as a nuisance dangerous to public health is valid, and legal under Mass. Gen. Stat. chap. 62, § 52. *Winthrop v. Farrar*, 11 Allen, 308. **E. W.**

MICHIGAN SUPREME COURT.

SUPREME LODGE, KNIGHTS OF PYTHIAS, *Appl.*,

v.

IMPROVED ORDER, KNIGHTS OF PYTHIAS *et al.*

(.....Mich.....)

1. The name "Improved Order, Knights of Pythias," can be lawfully taken as the name of a new order formed by members who withdraw from the Knights of Pythias chiefly because the old order refuses to permit them to have the ritual printed in the German language.
2. The Supreme Lodge, Knights of Pythias, which becomes incorporated after the words "Knights of Pythias" had been used by the order as an existing voluntary society cannot claim any greater right to that name than the order of which it is the head.

(May 28, 1897.)

A PPEAL by complainant from a decree of the Circuit Court for Wayne County dismissing a bill filed to enjoin defendants from

infringing the plaintiffs' name, ritual, and jewels. *Affirmed.*

The facts are stated in the opinion.

Messrs. Phillip T. Colgrove and John C. Burns, for appellant:

The complainant is a legal entity, incorporated by special act of Congress, June 29, 1894.

In the autonomy of the order Knights of Pythias neither a grand lodge nor a subordinate lodge can be organized or exist except by warrant or charter issued by either the supreme lodge of the order or by a grand lodge of a grand domain. Grand lodges exist only by charter issued by the supreme lodge, and subordinate lodges not under the control of a grand lodge exist only by warrant or charter from the supreme lodge.

Baldwin v. Hosmer, 101 Mich. 119, 25 L. R. A. 789; *Heiskell v. Chickasaw Lodge*, No. 8, 1. O. O. F. 87 Tenn. 668, 4 L. R. A. 669; *Reeves v. Reeves*, 5 Lea, 646.

An individual, subordinate, or grand lodge could not maintain this action because the wrongs complained of are wrongs affecting all the members and lodges of the supreme juris-

NOTE.—As to rights in name of corporation, see also *American Order of Scottish Clans v. Merrill (Mass.)* 8 L. R. A. 820; *International Trust Co. v.* 39 L. R. A.

International Loan & T. Co. (Mass.) 10 L. R. A. 758; and *Grand Lodge, A. O. of U. W. v. Graham (Iowa)* 81 L. R. A. 183.

diction and the action should be brought in the name of that body representing all those members and lodges, that is by the complainant.

Hirschl, *Fraternities & Societies*, 47.

Unless expressly forbidden by the Constitution, state legislatures can create corporations for any purpose.

Bacon, *Ben. Soc.* ¶ 42.

Congress recognized the organization or fraternity for whose benefit the act was passed in incorporating as it did the supreme representative body of that order, whose existence was a matter within common knowledge; and the courts will take judicial notice of the fact that every organization whose proportions have assumed those of the order of Knights of Pythias has a supreme lodge.

Burdne v. Grand Lodge of Alabama, 37 Ala. 478; Hirschl, *Fraternities & Societies*, pp. 10, 11.

Not only the statute law but the common law extends to foreign corporations the right to sue in our courts.

Silver Lake Bank v. North, 4 Johns. Ch. 370; How. Anno. Stat. § 8135; 6 Thomp. Corp. § 7884; *Thompson v. Waters*, 25 Mich. 214, 12 Am. Rep. 243; *Isle Royale Land Corp. v. Osmun*, 76 Mich. 162.

Societies of this nature are much favored, and are considered as peculiarly under the protection of the legislature and the courts of justice.

Pearce v. Piper, 17 Ves. Jr. 19.

The name "Knights of Pythias" belongs to the general corporation. The general corporation adopted and used the ritual. The books containing the ritual are the private property of the order of Knights of Pythias.

Clearly any cause of action arising from the use of the name "Knights of Pythias" or of the ritual mentioned in the complaint, ought to be brought by the corporation which has that name, and which adopted the ritual and in which is the private and exclusive property of the books containing the ritual.

Supreme Lodge, K. of P. v. La Malta, 95 Tenn. 157, 30 L. R. A. 838.

There is no question but that the courts of equity will restrain the piracy of trademarks.

Partridge v. Menck, 2 Barb. Ch. 101, 47 Am. Dec. 281; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114; 2 Story, Eq. Jur. 12th ed. ¶ 951 f.

The name of a corporation is a necessary element of its existence, and aside from any statute the right to its exclusive use will be protected, upon the same principle which protects persons in the use of trademarks.

1 Thomp. Corp. ¶ 296, p. 198; Boone, Corp. ¶ 32; *Newby v. Oregon C. R. Co.* Deady, 609; *Ex parte Walker*, 1 Tenn. Ch. 97; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 87 Conn. 278, 9 Am. Rep. 824; *Hendriks v. Montague*, L. R. 17 Ch. Div. 638; *American Order of Scottish Clans v. Merrill*, 151 Mass. 558, 8 L. R. A. 320; *Boston Rubber Shoe Co. v. Boston Rubber Co.* 149 Mass. 436; *Ex parte Walker*, 1 Tenn. Ch. 97; *Re United States Mercantile Reporting & Co. Assn.* 22 N. Y. S. R. 494; *First Presby. Church*, 2 Grant, Cas. 240; *Russia Cement Co. v. Le Page*, 147 Mass. 206; *Christy v. Murphy*, 12 How. Pr. 77; *Knot v. Morgan*, 2 Keen, 218; 88 L. R. A.

Lee v. Haley, L. R. 5 Ch. 161; *Grand Lodge, A. O. U. W. v. Graham*, 96 Iowa, 592, 31 L. R. A. 133; Cook, Stock & Stockholders, 2d ed. § 699, notes.

Act No. 189 of Michigan Public Acts of 1895 provides that "no two corporations shall assume the same name nor a name that shall be so similar as to be liable to mislead," and the same rule applies to partnerships.

1 Lindley, Partn. 114.

When a corporation is erected a name must be given to it; and by that name alone it must sue and be sued and do all legal acts. Such name is the very being of its constitution; and though it is the will of the King that erects the corporation yet the name is the knot of its combination without which it could not perform its corporate functions.

1 Bl. Com. 475.

This right in the name, Knights of Pythias, will be protected upon the same principle that persons are protected in the use of trademarks.

1 Beach, Corp. § 81.

The defendants with no changes in most, and with very slight changes in some, have appropriated jewels of the same kind so close as to constitute a direct infringement upon the jewels of complainant's lodges. The complainant has a copyright which should protect its property.

4 Am. & Eng. Enc. Law, p. 168; 2 Story, Eq. Jur. 980, 943.

Churches, secret societies, benevolent institutions, civic societies, boards of trade, etc., have the inherent right to adopt constitutions and by-laws for their own government, and to legislate regarding their several ceremonies, and prescribe offenses, violations of law, and penalties therefor.

Bauer v. Samson Lodge, K. of P. 102 Ind. 263; Bacon, *Ben. Soc.* 81; *Bagley v. Grand Lodge, A. O. U. W.* 131 Ill. 498; *Grand Lodge, A. O. U. W. v. Jesse*, 50 Ill. App. 101; *Cincinnati Lodge, I. O. O. F. v. Littlebury*, 6 Week. L. Bull. 237; *Stadler v. District Grand Lodge, I. O. B. B.* 3 Am. L. Rec. 589; *State, Poulson, v. Grand Lodge of Missouri, I. O. O. F.* 8 Mo. App. 148; *Gregg v. Massachusetts Medical Soc.* 111 Mass. 185, 15 Am. Rep. 24; *Wentherly v. Medical & Surgical Soc.* 76 Ala. 567.

The power to enact by-laws is an inherent one.

Supreme Commandery, K. of G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; *St. Luke's Church v. Matheus*, 4 Desauss. Eq. 578, 6 Am. Dec. 619.

And with that power goes, of necessity, the power to enforce them by reasonable penalties.

Calill v. Kalamazoo Mut. Ins. Co. 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; *Dickenson v. Milwaukee Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *People, Page, v. Chicago Bd. of Trade*, 45 Ill. 112; *Taylor v. Edson*, 4 Cush. 522.

What is said of the efficacy of by-laws to control and terminate individual membership may with propriety be applied to subordinate branches of a grand lodge.

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409; *Hussey v. Gallagher*, 61

Ga. 86; *People v. St. George's Soc.* 28 Mich. 261; *Spillman v. Supreme Council of Home Circle*, 157 Mass. 128; *Lafond v. Deems*, 81 N. Y. 507; *Olerly v. Brown*, 51 How. Pr. 92; *Dawkins v. Antrobus*, L. R. 17 Ch. Div. 615; 1 Thomp. Corp. §§ 914, 919.

The by-laws of such societies are binding, whether reasonable or not.

Weatherly v. Medical & Surgical Soc. 76 Ala. 587; *Kehlenbeck v. Logeman*, 10 Daly, 447; *Eless v. Alford*, 1 N. Y. City Ct. Rep. 123; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409.

A member is bound by the by-laws in force when he became a member, and such as shall thereafter be regularly passed.

Niblack, Mut. Ben. Soc. § 12; Schmidt v. Abraham Lincoln Lodge, 84 Ky. 490; *Lamb v. Cain*, 129 Ind. 486, 14 L. R. A. 518.

It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation.

Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. 87 Conn. 291, 9 Am. Rep. 324; *Ex parte Walker*, 1 Tenn. Ch. 97; *Newby v. Oregon C. R. Co.* Deady, 609; *Rudolph v. Southern Beneficial League*, 28 Abb. N. C. 199; *Lee v. Haley*, L. R. 5 Ch. 161; *First Presby. Church*, 2 Grant, Cas. 240; *State, Hutchinson v. McGrath*, 92 Mo. 356; *Stokes v. Allen*, 19 N. Y. S. R. 58; *Howard v. Henriques*, 3 Sandf. 725; 4 Am. & Eng. Enc. Law, p. 206; 10 Cent. L. J. 461, 481; 1 Waterman, Corp. § 31; 2 Waterman, Corp. § 318; 1 Beach, Corp. § 373; 2 High, Injunctions, 3d ed. § 1081.

Mr. Philip T. Van Zile, also for appellant:

The complainant is a legal entity, incorporated by the Congress of the United States as alleged in the bill of complaint, first May 5, 1870, and afterwards June 29, 1894.

The courts will recognize the complainant, hear the prosecution of its complaint, and protect its right.

Elliott, Priv. Corp. 171; *Isle Roynle Land Corp. v. Osmun*, 76 Mich. 171; *Baldwin v. Hosmer*, 101 Mich. 119, 25 L. R. A. 739; *Merrick v. Van Santvoord*, 34 N. Y. 215; *Taylor v. Carpenter*, 2 Sandf. Ch. 604.

The law will protect the literary production.

The ritual of every secret organization is sacred and exclusive to the use of the particular body.

2 Story, Eq. Jur. § 950; *Palmer v. De Witt*, 47 N. Y. 535, 7 Am. Rep. 450; *Fleron v. Lackaye*, 14 N. Y. Supp. 292; *Munro v. Beadle*, 55 Hun, 812; *Boucscault v. Hart*, 13 Blatchf. 47; 18 Am. & Eng. Enc. Law, pp. 918-922, and notes.

A corporation has a right to the exclusive use of its name, and this right will be protected upon the same principle that persons are protected in the use of trademarks.

1 Thomp. Corp. § 296; *Newby v. Oregon C. R. Co.* Deady, 609; *Boston Rubber Shoe Co. v. Boston Rubber Co.* 149 Mass. 486; 4 Am. & Eng. Enc. Law, p. 206; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 87 Conn. 278, 9 Am. Rep. 324; *Merchants' Detective Assn. v. Detective Mercantile Agency*, 25 Ill. App. 250; 88 L. R. A.

Investor Pub. Co. v. Dobinson, 72 Fed. Rep. 603; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L. R. A. 182; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 82 Fed. Rep. 97; *Russia Cement Co. v. LePage*, 147 Mass. 206; *Van Auker Co. v. Van Auker Steam Specialty Co.* 57 Ill. App. 240; *Clark Thread Co. v. Armistage*, 67 Fed. Rep. 896; *Woodward v. Lazar*, 21 Cal. 449, 82 Am. Dec. 751; *Knott v. Morgan*, 2 Keen, 213; *Marsh v. Billings*, 7 Cush. 323, 54 Am. Dec. 723; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *McGlynn v. Post*, 21 Abb. N. C. 97; *Ex parte Walker*, 1 Tenn. Ch. 97.

Prefixing the word "improved" will make no difference.

Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401, and notes, 410; *Paulino v. Portuguese Ben. Assn.* 18 R. I. 165, 20 L. R. A. 273; *Smith v. Walker*, 57 Mich. 474. See Cooley, Torts, 2d ed. p. 423, etc., and notes.

Mr. Edwin F. Conely, with *Messrs. Flores & Seidensticker*, for appellees:

The complainant is a foreign corporation, and therefore not entitled to the relief sought.

Lehigh Valley Coal Co. v. Hamblen, 23 Fed. Rep. 225; *Home L. Ins. Co. v. Home L. Assur. Co.* (Mich.) 3 Det. L. N. 727.

In no case *inter partes* has the court of last resort ever held that a complainant corporation could restrain the use of its name by others, on the ground of mere confusion. It was necessary for the complainant to show, in addition, that its trade or other business for gain or profit would be injured by the alleged wrongful conduct of the defendant.

London & P. Law Assur. Soc. v. London & P. Joint-Stock L. Ins. Co. 11 Jur. 938.

Montgomery, J., delivered the opinion of the court:

Complainant filed a bill for an injunction, praying that defendants be restrained from using the ritual and jewels of the order of the Knights of Pythias, and from using the name "Improved Order, Knights of Pythias." A careful examination of the authorities cited by counsel, and of the reasons urged by them, has failed to convince us that the learned trial judge erred in dismissing the bill. The opinion of Judge Carpenter contains so full a review of the case, and its reasoning is so satisfactory, that we adopt it as our own. That opinion is as follows:

"The Knights of Pythias is a secret unincorporated society, organized in 1864, and has about 500,000 members. Complainant is the Supreme Lodge of the Knights of Pythias, and was incorporated by special act of Congress in 1894. The Improved Order, Knights of Pythias is also a secret, unincorporated society, and had June 30, 1895, when the last report was made, 1,738 members. It was formed in December, 1894, by former members of the Knights of Pythias. These last-mentioned members left the old order, and formed the new, because a convention of the Supreme Lodge, Knights of Pythias, in August, 1894, declared that 'henceforth and forevermore the ritual used in this and all other English-speaking countries shall be printed in the English language only.' Both orders

are fraternal and benevolent. They have many resemblances. The important difference between them, as already indicated, is this: The ritual of the improved order may be printed in German, while that of the Knights of Pythias cannot be. Complainant asks an injunction restraining defendants from using the name 'Improved Order, Knights of Pythias,' and from using the name 'Knights of Pythias,' or any derivative thereof, and from printing or using any ritual in substance like that used by the Knights of Pythias. There is no proof that the defendants' ritual is so nearly like complainant's as to justify the interference of a court. The sole question is, then, whether defendants shall be enjoined from using the name 'Improved Order Knights of Pythias.' Complainant's counsel insist that by the act incorporating complainant as 'Supreme Lodge, Knights of Pythias' an exclusive right to the name 'Knights of Pythias' was acquired. Numerous cases are cited holding that a corporation has an exclusive right to its name. No case, however, is cited holding that incorporation gives an exclusive right to a name already in use as the name 'Knights of Pythias' was, by an existing voluntary society. On the contrary, *McGlynn v. Post*, 21 Abb. N. C. 97, cited by complainant's counsel, and *Black Rabbit Assn. v. Munday*, 21 Abb. N. C. 99, hold that in such a case an exclusive right is not acquired. Indeed if complainant, by incorporating, acquired the exclusive right to the name 'Knights of Pythias,' it could at will compel the order of which it is only the head, and all other lodges, subordinate and grand, to cease using the name 'Knights of Pythias.' It seems clear, therefore, that complainant did not, by becoming a corporation, acquire the exclusive right to the name 'Knights of Pythias,' and that, whatever are its rights, they cannot exceed those of the order of which it is the head. The question, then, arises, Are the rights of the order violated? Nearly all the members who withdrew from the old order and went into the new are Germans, and many of them are unable to read and understand a ritual not printed in German. Prior to the action of the order which was the occasion of their withdrawal, the order furnished for their use, and they used, rituals printed in German. Defendants therefore withdrew from the society of which they were members, because it changed, not because it continued, its policy. The propriety of the conduct of complainant in forbidding the printing of the ritual in German, the propriety of the conduct of defendants in withdrawing from the order, are questions solely for the consideration of the parties themselves. The Knights of Pythias had a lawful right to declare that its ritual should be printed only in English, and defendants had an equally lawful right to found an order whose ritual might be printed in German. Having formed this order, is it possible that defendants cannot give it an appropriate name, a name which will properly describe it? This new order is formed by the members of the Knights of Pythias who withdrew from the Knights of Pythias because that order changed its policy in a matter which it must be presumed they thought important. This order resembles the Knights of Pythias. It stands

to these members in the place which the Knights of Pythias has vacated. To a certain extent it carries out a policy which the Knights of Pythias formerly carried out and abandoned. Complainant charges that the defendants have seceded from it, and have established a rival and very similar organization. No name could appropriately be adopted, under these circumstances, which did not contain the words 'Knights of Pythias,' because no name could properly describe it, either by reference to its origin, its history, or its purposes, which did not contain those words. Suppose that this new order had received some other name. It would have been none the less, in the minds of complainant, a seceding faction of the Knights of Pythias; it would have been none the less, to defendants, a substitute for the Knights of Pythias; and it would have been none the less, to the impartial historian, an offshoot of the Knights of Pythias. One excellent test of an appropriate name to select under such circumstances is furnished by the history of schisms in other societies. Nearly all our varieties of churches of the same denomination are the results of secession or withdrawals from the parent church of that name, and it has been the usual course for the new church society to adopt as a permanent part of its name the name of the parent organization. Take one instance: A part of the Methodist Episcopal Church withdrew and established the Protestant Methodist Church. So we have the Order of Foresters of America, formerly the Ancient Order of Foresters of America; the Canadian Order of Foresters; the Independent Order of Foresters,—all of which are, as I understand, offshoots of the Ancient Order of Foresters of England. No one has ever questioned the appropriateness of using the parent name as a part of the name of a new society formed under these circumstances, so far as I can learn. To my mind, it is clear therefore, that defendants, in naming their order, not only could, but were almost bound, in order to properly describe it, to make use of the words 'Knights of Pythias.' Of course, there is this limitation: Defendant should not use a name so much like the name of the order from which they have withdrawn as to work a damage to that order. The only way that the order can be damaged, as the least reflection will prove, is by depriving it of members who would otherwise join it. Let us apply to this case the principles by which courts determine similar controversies of trading concerns. The decisive principle is this: 'No man has a right to sell or advertise his own business or goods as those of another.' *Williams v. Farrand*, 88 Mich. 478, 14 L. R. A. 161. 'One must not, therefore, adopt a name so similar to that of another as to draw to himself business intended for that other.' *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 43; *Tallcot v. Moore*, 6 Hun, 106; *Potter v. McPherson*, 21 Hun, 559; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 296, 9 Am. Rep. 324. The correct principle is stated in complainant's brief (page 71) as a quotation from the opinion of Judge Foster, of the superior court of Vanderburgh county, Indiana, rendered in the suit of *St. George Lodge, K. of P. v. Rosenthal*. 'Where a corporation

has appropriated and used a name for such length of time as to become identified by the name, and had established a character and reputation under it, it is a fraud upon the corporation and the public if this name be assumed by others under such circumstances as would lead the public to believe that they constitute the original corporation; and where injury will result to the corporation on account thereof, courts of equity will, at the suit of the injured parties, by injunction restrain the further perpetration of the wrong. It is the special injury to the party aggrieved and the imposition upon the public that constitute the wrong which the courts will redress. It is not necessary that the wrong should be intentionally committed. It is enough that the name should be used under such circumstances as would lead the public to believe that the latter organization was the former, and thereby cause injury to the former corporation.'

"Where one uses the name of another for the fraudulent purpose of attracting to himself business which belongs to that other, no injustice will be done if the court assumes that the name chosen accomplishes this purpose, even though the resemblance be not great. If one intends that the name he has chosen shall be believed to be that of another, it is fair to infer that he will so use that name as to promote the desired belief. Accordingly we find that the motives with which a name is chosen, and the circumstances attending its use, as well as the similarity of names, have a bearing in determining whether business is liable to be diverted, and, consequently, whether the courts shall interfere. Compare *Myers v. Kalamazoo Brigg Co.* 54 Mich. 215, 52 Am. Rep. 811, and *Williams v. Farrand*, 88 Mich. 479, 14 L. R. A. 161. See also *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 471, 27 L. R. A. 42. Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons proceeding with ordinary care to justify the interference of a court. High. Inj. § 1888; *Seizo v. Provezende*, L. R. 1 Ch. 192; *McLean v. Fleming*, 96 U. S. 251, 24 L. ed. 880. There is not a particle of evidence in the case that defendants chose the name, 'Improved Order, Knights of Pythias' with the intention that their order should be supposed to be the order Knights of Pythias, nor that they have done anything since the order was founded to lead the public to believe that the orders were the same. On the contrary, the official communications issued by defendants, some of which are set up in complainant's bill, inform all who read them that their order is not the Knights of Pythias, but is a separate, and, they claim, an improved, order. Defendants seem quite as anxious as complainant to have it understood that their order is not the Knights of Pythias. This, then, is the test: Is the name 'Improved Order Knights of Pythias' so nearly like the name 'Knights of Pythias' that ordinary persons using ordinary care would think them identical, would think them two names for the same order, or for branches of the same order, so that they would become members of the defendants' society when they really wanted to join complainant's society? In considering 88 L. R. A.

this question, it should be borne in mind that no complaint is or can be made on account of any damage resulting from the fact that the defendant society is a rival and competing organization, and that the founders of an order have the right to claim that their order is superior to any and every other order. It is fatal, 'therefore, to complainant's case, if the difference of names indicates that defendants' society is a different society (even though it is claimed to be better) from complainant's. The law does not protect the name from any consideration for the feelings of those who bear it. *Day v. Brownrigg*, L. R. 10 Ch. Div. 294. The sole question is, as already stated, the effect, or probable effect, of the similarity of names, in diverting business. In determining this question, courts do not receive much, if any, aid from adjudicated cases. In the communications of defendants set up in complainant's bill the name of their society appears as follows: 'Improved Order, K. of P.' The name of the complainant is set forth as follows: 'Supreme Lodge Knights of Pythias.' It is the head of the 'Order Knights of Pythias.' To me it is self-evident that no careful person could think that these two orders were identical, and, as has been said, in cases of this class the question is whether the similarity is calculated to mislead the ordinary run of mankind. There certainly is just as much distinction between these names as there is between that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church. But we are referred to the case of *Russia Cement Co. v. Le Page*, 147 Mass. 206, holding that the introduction of the word 'improved' into the name of the article manufactured by defendant will not justify its use if, in other respects, its use is unjustifiable. Another case very similar is that of *Hohner v. Gratz*, 52 Fed. Rep. 871. In the former case it was held an invasion of the rights of the owner of the name 'Le Page's Liquid Glue' to use the name 'Le Page's Improved Liquid Glue.' In the latter case it was held an invasion of the rights of Mr. Hohner, who made and sold harmonicas under his own name, to use the name on harmonicas, 'Improved Hohner.' The distinction between these cases and the case at bar is obvious. In those cases the word 'improved' indicated, not a different glue, but an improved quality of the same glue. One wishing to buy 'Le Page's Liquid Glue' would naturally wish to buy 'Le Page's Improved Liquid Glue.' In the *Hohner Case* the court said 'The words "Improved Hohner" would signify his (Hohner's) make of a better quality,' and upon this ground an injunction was granted. Now, the name 'Improved Order, Knights of Pythias' does not mean, and no one can think for a moment that it does mean, that it is the same order as the Knights of Pythias. Everyone who knows enough about secret societies to be qualified to join them knows that a different name of a society means a different society. He would know that the Improved Order, Knights of Pythias was not a variety of the Order Knights of Pythias. The difference of names would indicate to him possibly a claim on the part of defendants that theirs was the better order, of

which he must for himself determine; but certainly that it was a different order. If, in the *Le Page* or *Hohner Case*, the names had only indicated that a different article was claimed to be superior to one of similar name it is obvious that the court would not have interfered. 'Improved' has a different signification when prefixed to the name of an order from what it has when prefixed to the name of an article.

"The case of *St. George Lodge, K. of P. v. Rosenthal*, decided by Judge Foster, of the superior court of Vanderburgh county, Indiana, is more nearly in point. This case was brought by a subordinate lodge Knights of Pythias against some of the defendants in this suit, and the same relief was sought that is sought in this suit. That case arose upon demurrer to a complaint. Judge Foster, though sustaining the demurrer on the ground that the cause of action must be enforced by the Order Knights of Pythias, in that complaint stated to be a corporation, indicated his opinion, as candidly stated by him, on each question presented. He stated it to be his opinion that the assumption of the name 'Improved Order, Knights of Pythias,' under the circumstances alleged in the complaint, was wrongful. I have no criticism to make on this conclusion, nor, with the exception hereafter presented, on the reasoning upon which it is based. The facts alleged in that complaint and the facts established in this case differ radically. It was alleged in that case that defendants, in organizing and naming their society, were seeking to disrupt and defeat the Knights of Pythias. It did not appear, as, in my opinion, it does in this case, that the name 'Knights of Pythias' was in any way descriptive of the new organization. This circumstance is expressly alluded to in the reasoning by which Judge Foster reaches the conclusion that the assumption of the name is wrongful. I must conclude, therefore, that Judge Foster's opinion has no application to the facts established in this case. In speaking of the difference between the name of complainant and defendants' society, Judge Foster said, 'It is established by authorities too numerous to need citation that such a differentiation amounts to nothing.' This is the only statement in Judge Foster's opinion in which I cannot concur. I have already indicated my opinion concerning this difference, and the only cases which it is claimed hold that this differentiation amounts to nothing which I have been able to find, or which eminent counsel brought to my attention, are the cases which I have just tried to show are not in point. The best possible evidence that names are sufficiently similar to mislead the public is the fact that the public, or some portion thereof, has been misled. The defendant order was in existence more than a year before the testimony in this case was taken, and yet not a particle of evidence was introduced showing or tending to show that the similarity of names ever misled or deceived anyone. This case must be decided, not by citation of authorities, but by answering the question: Would an ordinary person, using ordinary care, wishing to join the Knights of Pythias, join the Improved Order, Knights of Pythias? For the reasons above stated, I must answer this question, No.

38 L. R. A.

A decree will be accordingly entered dismissing complainant's bill."

The decree will be affirmed.

Long, Ch. J., did not sit. The other Justices concurred.

Henry HOFFMAN, Relator,

JUDGE OF THE CIRCUIT COURT FOR
BAY COUNTY.

(.....Mich.....)

1. The privilege of exemption of attorneys from arrest in certain cases, given by How. Ann. Stat. § 7253, is not exclusive of the common-law privilege from service of process while attending court or returning therefrom.

2. An attorney at law is privileged from the service of process while attending upon the supreme court and while going to and returning from the court to the county of his residence.

(May 25, 1897.)

APPLICATION by relator for a writ of mandamus to compel defendant to dismiss a proceeding against relator which had been instituted out of his home jurisdiction while he was returning from court. *Granted.*

The facts are stated in the opinion.

Mr. Charles R. Brown for relator.

Mr. C. L. Collins, for respondent:

At the common law the privilege of an attorney from arrest was an incident to a privilege he had in the manner by which he might be proceeded against in court. He had the privilege of being sued by a "bill of privilege," and that was the only method by which he could be sued.

It followed that he could not be arrested on a civil warrant, which was not allowed in proceeding by that method.

3 Bl Com. 289; Burrill, Law Dict. article, *Bill of Privilege*; Tidd, Pr. 2d Am. from 8th Eng. ed. 72-77; 1 Burrill, Pr. 2d ed. note C, p. 39; 2 Burrill, Pr. 101; 3 Burrill, Pr. 52, *Form of Declaration by Bill*; Wyche, Pr. 202-206.

An attorney could not take the benefit of this privilege to be proceeded against by bill when sued with a codefendant not privileged.

Rastrick v. Beckwith, 2 Dowl. & L. 624, Mann. & G. 905; *Robarts v. Mason*, 1 Taunt. 254; 2 Tidd. Pr. 2, 77.

An attorney appearing by another lost this privilege.

Harrington v. Page, 2 Dowl. P. C. 164; *Dowless v. Timms*, 3 Dowl. P. C. 707.

When an attorney was a defendant he had no privilege with respect to the venue whatever.

Yeardley v. Roe, 3 T. R. 573; *Tope v. Redfearne*, 4 Burr. 2027.

NOTE.—As to exemption of persons from process while going to, attending, or returning from court, see also *Mulhern v. Press Pub. Co.* (N. J. L.) 11 L. R. A. 101; *Parker v. Maroo* (N. Y.) 20 L. R. A. 45; *Wilson v. Donaldson* (Ind.) 3 L. R. A. 296, and note.

The practice under the bill of privilege, and its attendant privileges to lawyers, became obsolete in New York on or prior to the adoption of the Revised Statutes of 1828, and it is a fair inference that the statutes produced the result.

Graham, Pr. 2d ed. 87, 88; 2 Burrill, Pr. 109; *King v. Burr*, 20 Johns. 274; *Tiffany v. Driggs*, 18 Johns. 252; *Corey v. Russell*, 4 Wend. 204; *Cole v. McClellan*, 4 Hill, 59.

While an attorney is engaged in the trial of a cause, and in attendance upon the court for that purpose, and while going to and returning from the trial, he is exempt from arrest on civil process. And since arrest on civil process is now almost universally abolished in this country, this privilege is of slight importance.

3 Am. & Eng. Enc. Law, 2d ed. pp. 293, 294.

The Michigan statutes do not extend to other proceedings than the trial or hearings of pending causes.

Case v. Rorabacher, 15 Mich. 537; *People, Watson, v. Detroit Super. Ct. Judge*, 40 Mich. 729; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541.

Montgomery, J., delivered the opinion of the court:

Relator is an attorney at law, and at the October term of this court appeared and argued a cause in this court, and, while on his return to his home at St. Ignace, was served with a summons at the suit of John Godkin, a party to the case pending in this court. He moved to dismiss the proceeding on the ground that he was privileged from the service of process while attending upon the court, and while going to and returning from the court to the county of his residence. The circuit judge denied the motion, and the question is before us for review on mandamus.

The only statute of this state bearing upon the subject is § 7253, How. Ann Stat., which reads: "All officers of the several courts of record shall be liable to arrest, and may be held to bail in the same manner as other persons, except during the actual sitting of any court of which they are officers; and when sued with any other person, such officers shall be liable to arrest, and may be held to bail as any other persons, during the sittings of the court of which they are officers; but no attorney, solicitor, or counselor shall be exempt from arrest during the sitting of the court of which he is an officer, unless he shall be employed in some cause pending and then to be heard in such court." It is said by respondent's counsel that this statute should be held to exclude all other privileges, and that this only relates to arrest on civil process, and does not apply to the service of summons. We think the statute should not be so construed, but that if, at the common law, the attorney was privileged from the service of process while attending upon court, that privilege has not been removed by the statute in question.

88 L. R. A.

In Taylor Ev. p. 1126, the common law rule is stated: "In order to encourage witnesses to come forward voluntarily, they are not only protected from any action for defamation with respect to such statements as they may make in the course of the judicial proceeding, but in common with parties, barristers, solicitors, and, in short, all persons who have that relation to a suit which calls for their attendance, they are protected from arrest upon any civil process, while going to the place of trial, while attending there for the purposes of the cause, and while returning home." In the case of *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, it was held by this court that as to parties the privilege extends to the service of summons, as well as to suit commenced by arrest. It was said that "public policy, the due administration of justice, and protection to parties and witnesses alike demand it." In *Cofrode v. Gartner*, 79 Mich., at page 349, 7 L. R. A. 511, Mr. Justice Campbell, referring to *Jacobson v. Hosmer*, 76 Mich. 284, said: "It has been settled that service cannot be made within the original county on anyone who is there as a witness, or on any other legal errand, which exempts him from process while away from his residence." In *Mattheus v. Tufts*, 87 N. Y. 568, the defendant attended a meeting of creditors of a bankrupt, for the purpose of proving claim in his own behalf and in behalf of others whom he represented. The court, after reviewing the authorities, says: "The plaintiff claims that the defendant was not attending as a witness, but only as a creditor. . . . Conceding that the defendant was in attendance only as a party, and as attorney of other parties, we think he was privileged from service of process or summons while so attending." It was further said: "This immunity does not depend upon statutory provisions, but is deemed necessary to the due administration of justice." In *Central Trust Co. v. Milwaukee Street R. Co.* 74 Fed. Rep. 442, a subpoena was served upon a nonresident attorney while attending upon the court in another county. Upon a review of the authorities, the court held that this was a violation of privilege. In *Sherman v. Gundlach*, 37 Minn. 118, it was said: "The same reasons for exempting a nonresident witness from arrest exist in favor of exempting him from the service of a summons in a civil action." In *Massey v. Colville*, 45 N. J. L. 119, 46 Am. Rep. 754, it was said: "The foundation of the rule is the impolicy of permitting an act which will deter suitors or witnesses from attending courts." This consideration applies with equal force to an attorney. See also *Gilbert v. Vanderpool*, 15 Johns. 242; *Van Alstyne v. Dearborn*, 2 Wend. 536; *Hurst's Case*, 4 U. S. 4 Dall. 387, 1 L. ed. 878; *Lyell v. Goodwin*, 4 McLean, 39.

The writ will be granted.

The other Justices concur.

Frank D. KINNEY, Admr., etc., of George B. Daniels,
v.

John ONSTED, Plff. in Err.

(.....Mich.....)

Defects in the railing of a platform connected with a grain elevator do not render the owner of the premises liable to a person who was injured by the fall of the railing while he was leaning against it, thus putting it to a use for which it was not intended.

(May 25, 1897.)

ERROR to the Circuit Court for Lenawee County to review a judgment in favor of plaintiff in an action to recover damages for injuries alleged to have been caused by the defective condition of defendant's premises.
Reversed.

The facts are stated in the opinion.

Messrs. Salsbury & O'Mealey for plaintiff in error.

Messrs. Watts, Bean, & Smith, for defendant in error:

Defendant was under obligation not to create or knowingly permit such a snare or trap, as the one in question, to be upon any part of the premises appropriated by him for the use of persons having occasion to come upon them to do business with him.

Cooley, Torts, p. 605; *Breeze v. Powers*, 80 Mich. 177; *Emery v. Minneapolis Industrial Exposition*, 56 Minn. 460.

The owner of lands is liable in damages to those coming thereon, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the premises, which is known to him and not to them, and which he has suffered negligently to exist, and of which they have received no notice.

Donaldson v. Wilson, 60 Mich. 90.

Montgomery, J., delivered the opinion of the court:

This action was instituted by George B. Daniels in his lifetime, to recover damages sustained by reason of the alleged defective condition of the defendant's premises. The material facts in the case, as disclosed by the evidence, are that the defendant was the proprietor of a grain elevator, which consisted of a building 22 feet wide and 40 feet in length. On the south side of this building there is a bridge 12 feet in width, with an approach leading up to it at either end, of the same width. A pair of rolling doors, 7½ feet wide, open from about the center of the building onto this bridge or elevated platform. One means of approach to the office, which is in the elevated building, is to follow the driveway up to the platform, and across it, through these doors. Near the edge of this platform is a railing fastened to posts spiked to the sills of the bridge or platform. The posts are 4 by 4, with 2 by 6 pieces

spiked lengthways on top. The railing is 8 feet high. In front of the rolling doors a space of 10 feet wide is left, where there is no railing, having been left out to facilitate the loading of heavy articles into farmers' wagons. The portion of the railing east of this opening is 20 feet long before the grade portion of the bridge is reached. On the west of the opening there is a railing 10 feet long, on the level part of the bridge, and another railing on the west grade, 8 feet in length. Farmers, in delivering grain to the elevator, drove onto the bridge, and, by means of a spout attached to the wagon, ran the grain into the hopper. The testimony tends to show that, a few days prior to the injury to the plaintiff, there had been a runaway, and the railing had been damaged, the top piece being torn off from the posts, and the posts also weakened; that the railing had been straightened up in such manner that its appearance did not indicate its weakness to the casual observer. The plaintiff, on the day in question, started to go to the elevator to buy a load of corn of the defendant. He went onto the bridge from the west part, well to the south side of the railing, and was passing in a northeasterly direction, to go through the rolling doors into the elevator building. If he had kept on in that direction, it would have brought him on the inside of the elevator, where his business with the proprietor was to be transacted; but it appears that at this time his son, Willis Daniels, and William Knapp were on the bridge unloading a load of wheat, and his son called to him, saying that he had some money for him. At that plaintiff turned southeast, came up to the south side of the wagon, near the center, a distance of 15 or 16 feet, where his son was, and got the money. After he got it, he was talking with these two men a few minutes about the horses, and, while so talking leaned against the railing and it gave way, and he fell to the ground, and was injured. Upon this state of facts the plaintiff recovered, and the defendant brings error, and contends that there is no case shown by the plaintiff's testimony entitling him to recover, and that the defendant was under no obligation to build a railing, or keep it in repair, for the plaintiff to lounge or sit upon or lean against. The plaintiff, on the other hand, contends that the case falls within the rule that where a party, expressly or by implication, invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.

This case is certainly near the dividing line. The rule is well settled that the owner or occupant of land is liable to those coming to it at his invitation, express or implied, on any business to be transacted or permitted by him, for an injury occasioned by the unsafe condition of the land or the access to it, which is known to him, and not to them, and which he has

NOTE.—As to injuries to employees caused by the use of machinery for a purpose not contemplated, see *Kauffman v. Maier* (Cal.) 18 L. R. A. 124, and note.

As to the breaking of a guard rail on a highway 38 L. R. A.

by a person who is running a race, see *Singlinger v. Kansas City* (Mo) 26 L. R. A. 723.

For injury by breaking through a platform in front of a house, see *Baddeley v. Shea* (Cal.) 23 L. R. A. 747.

negligently suffered to exist. But this duty, it is held, does not extend so far as to make such an occupant responsible for the unsafe condition of those parts of his premises not intended for the reception of visitors or customers, and where they are not expected to go. See 1 Thomp. Neg. p. 808. Applying these rules to this case, it is clear that, if the plaintiff had suffered an injury from a defect in the floor-way of the platform or bridge, or, possibly, if, by misadventure, he had stumbled and fallen against this defective railing, there would be ground for holding that the defendant is responsible for the injury. But the weakness of the plaintiff's case is that the defendant never invited him to enter upon his premises, and put the railing to the test of supporting his weight, by leaning or lounging against it. The only cases in which a similar question has arisen, which have been called to our attention, are those of *Stickney v. Salem*, 8 Allen, 874, and *Orcutt v. Kittery Point Bridge Co.* 53 Me. 500. In *Stickney v. Salem* the action was against the city for injuries resulting to deceased caused by leaning against a fence or railing which marked the terminus of the street, and was built upon the top of a sea wall. The plaintiff, in company with a friend, had walked to this point to view the sea, had turned his back to and leaned against this railing, which gave way, because of defects, and he received serious injuries. The court says: "The fact that the railing was defective and would have proved an insufficient barrier in case it became necessary for a traveler to use it for a legitimate object is wholly immaterial. It is a sufficient answer to the plaintiff's case that the defendants were not bound to keep the railing in repair for the purpose for which it was used by the deceased at the time of the accident." The case of *Orcutt v. Kittery Point Bridge Co.* is precisely analogous to that of *Stickney v. Salem*.

It is urged by plaintiff's counsel that a distinction exists between private premises and a public highway in this regard, and that the rule of the care required of the highway authorities is based upon a different principle from that of private parties inviting persons upon their premises. We think, however, that this distinction cannot avail the plaintiff in this case. The invitation to the plaintiff was to do business in the elevator. The approach to the place of business was an elevated private way. It could not be expected any more by this defendant than by the city authorities of Salem in the case cited that this private way would be put to any other than the uses to which it was apparently adapted. Undoubtedly, in the case of a municipality or an individual maintaining a way, an injury resulting from a defect in the way itself, to one who stops to transact business, may be recovered for. But the weakness of the plaintiff's case arises from the fact that this railing was put to a use for which it was not intended, any more, in the present case, than were the railings in cases cited from Massachusetts and Maine. Plaintiff's counsel concede that the defendant was under no obligation to build or keep the railing in repair for plaintiff to lounge or sit upon or lean against, but they contend that the defendant's liability arises out of his

knowingly permitting a snare or trap, by leaving the railing in good apparent order, but in fact so defective that one was liable to receive injury from it. But, before it could become a snare or trap, it must be assumed that its apparent good condition was an invitation to make such a use of it as the plaintiff attempted. As we have seen, its presence was not an invitation to make that use of it.

We think there was no case for the jury, and that the judgment should be reversed, and no new trial ordered.

The other Justices concurred.

William A. RANDALL

v.

CHICAGO & GRAND TRUNK RAILWAY COMPANY, *Pf. in Err.*

(.....Mich.....)

Authority of a brakeman on a freight train to eject a passenger cannot be implied, so as to render the employer liable for his acts in this respect, from rules of the company providing that such trains shall not carry passengers, and also that the brakemen must familiarize themselves with the rules, but also providing that brakemen are subject at all times to the orders of the conductors.

(*Montgomery, J., dissents.*)

(May 28, 1897.)

ERROR to the Circuit Court for Eaton County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.* The facts are stated in the opinion.

Mr. E. W. Meddaugh, with Messrs. Geer & Williams, for plaintiff in error:

If a passenger to whom the railroad company owes a duty jump off a fast moving train, the company is not liable.

Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470; Burden v. Lake Shore & M. S. R. Co. 104 Mich. 101.

At the time plaintiff was injured he was riding on defendant's freight train in violation of the statute which forbids stealing a ride on a freight train, and was riding without the permission of defendant.

Plaintiff at the time he was injured, was not in a position where the defendant owed him any duty except not to do him any wanton or wilful injury.

2 Wood, Railroads, Minor's ed. § 816.

It became necessary that plaintiff should prove, in order to entitle him to recover, not only that he was injured because of the wrongful act of the brakeman, but also that the brakeman was acting within the scope of his employment and line of his duty in causing him to get off the freight train.

NOTE.—For cases somewhat similar to the above, see *Planz v. Boston & A. R. Co. (Mass.) 17 L. R. A. 835; Farber v. Missouri P. R. Co. (Mo.) 20 L. R. A. 350; Smith v. Louisville & N. R. Co. (Ky.) 22 L. R. A. 72; and Pittsburgh, C. C. & St. L. R. Co. v. Redding (Ind.) 34 L. R. A. 767.*

Corcoran v. Concord & M. R. Co. 5 U. S. App. 453, 56 Fed. Rep. 1015, 6 C. C. A. 231; *Pennsylvania Co. v. Dean*, 92 Ind. 459; *Towanda Coal Co. v. Heeman*, 86 Pa. 418; *International & G. N. R. Co. v. Anderson*, 82 Tex. 560; *Texas & P. R. Co. v. Moody* (Tex. Civ. App.) 23 S. W. 41; *Bess v. Chesapeake & O. R. Co.* 35 W. Va. 492; *Lake Shore & M. S. R. Co. v. Peterson*, 144 Ind. 214; *Farber v. Missouri P. R. Co.* 116 Mo. 81, 20 L. R. A. 350; *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513.

Plaintiff has the burden of proof both as to the person whose wrongful act caused the injury and whether at the time he was acting within the scope of his employment.

International & G. N. R. Co. v. Anderson, 82 Tex. 516; *Texas & P. R. Co. v. Moody* (Tex. Civ. App.) 23 S. W. 41; *Corcoran v. Concord & M. R. Co.* 5 U. S. App. 453, 56 Fed. Rep. 1014, 6 C. C. A. 231.

As bearing upon the question as to whether the acts of the brakeman in this case were within the apparent scope of his employment,—

See *Driscoll v. Stanton*, 165 Mass. 348; *Bowler v. O'Connell*, 162 Mass. 319, 27 L. R. A. 173; *Powers v. Boston & M. R. Co.* 158 Mass. 188; *William v. Twist* [1895] 2 Q. B. 84; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *Houston, C. A. & N. R. Co. v. Bolling*, 59 Ark. 295, 27 L. R. A. 190.

Messrs. Powers & Stine, for defendant in error:

It was the duty of the brakemen of defendant company to make themselves thoroughly familiar with all its rules.

Rule 170.

The brakeman in the present case, therefore, must have known, or it was his duty to know, that he had no right to permit plaintiff to ride, and therefore as one of the train crew it was his duty to put him off.

2 Wood, Railroads, pp. 1398, 1399; *Smith v. Louisville & N. R. Co.* 95 Ky. 11, 22 L. R. A. 72.

A brakeman by virtue of his employment has implied authority to remove or eject trespassers.

Kansas City, Ft. S. & G. R. Co. v. Kelly, 86 Kan. 655, 59 Am. Rep. 596; *Smith v. Louisville & N. R. Co.* 95 Ky. 11, 22 L. R. A. 72; *Hoffman v. New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 387; *Freitag v. Chicago, St. P. M. & O. R. Co.* 64 Minn. 168; *Jackson v. Second Ave. R. Co.* 47 N. Y. 274, 7 Am. Rep. 448; *Shea v. Sixth Ave. R. Co.* 62 N. Y. 180, 20 Am. Rep. 480; *Roude v. Delaware, L. & W. R. Co.* 64 N. Y. 133, 21 Am. Rep. 597; *Higgins v. Waterkiet Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Lorett v. Salem & S. D. R. Co.* 91 Mass. 557; *Erans v. Davidson*, 53 Md. 245; *Mechem, Agency*, p. 583, cases cited.

Prima facie, where the act is one which the master himself might have done, it will be presumed that it was an act within the scope of the servant's authority, and the burden of proving want of authority rests upon the defendant.

2 Wood, Railroads, pp. 1398, 1399, note 38 L. R. A.

3; *Peck v. New York C. & H. R. R. Co.* 70 N. Y. 587.

The test of the master's responsibility for the act of his servant is, whether the act was done in the prosecution of the master's business, not whether it was done in accordance with the instructions of the master.

Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; *Peck v. New York C. & H. R. R. Co.* 8 Hun, 286; *Mechem, Agency*, §§ 737, 741, p. 581.

Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from his negligence or from his wilfulness and wantonness.

2 Wood, Railroads, p. 1404; *Bouwmeester v. Grand Rapids & I. R. Co.* 63 Mich. 557; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 133, 21 Am. Rep. 597; *Higgins v. Waterkiet Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Mechem, Agency*, §§ 740, 741.

The doctrine of contributory negligence cannot be relied upon as a defense in any case where the action of defendant is wanton, wilful, or reckless in the premises, and injury ensues as the result.

Bouwmeester v. Grand Rapids & I. R. Co. 63 Mich. 557; *Cooley, Torts*, p. 674; *Shearm. & Redf. Neg.* § 25; *Thomp. Neg.* p. 1157; *Davies v. Mann*, cited in 10 Mees. & W. 545; *Thomp. Neg.* p. 1105; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385; *Battishill v. Humphrey*, 64 Mich. 514; *Montgomery v. Lansing City Electric R. Co.* 103 Mich. 46, 29 L. R. A. 287.

Long, Ch. J., delivered the opinion of the court:

This action was brought to recover damages for injuries claimed to have been sustained by plaintiff by being compelled by a brakeman to jump from a freight train, while in motion, belonging to defendant. The injury occurred March 19, 1894. The plaintiff, without permission of the defendant, got upon one of defendant's freight trains at Charlotte, this state. When the train arrived near Olivet Hill, plaintiff was discovered by one of defendant's brakemen between two cars, holding onto the projecting iron at the end of the car. Plaintiff claims that, while the train was running at a high rate of speed, he saw the brakeman, and climbed around upon the side of the car, taking hold of the ladder which is used to climb on the car. The brakeman then commenced pouring black oil upon him, and said, "Are you going to get off from here?" That his hands got so slippery from the oil that he could not hold on longer, when he jumped off and was severely injured. On the trial the court instructed the jury: "If you believe from the evidence that the brakeman of the defendant's train commenced pouring oil upon him until his hands became so slippery from the oil that he could not hold on longer with safety, and that it was safer for him to jump than it would be to remain hanging to the train, and he did jump and was injured thereby, your verdict must be for the plaintiff." There were verdict and judgment for plaintiff. It appeared upon the trial that this was a through freight train, not authorized to carry passen-

gers without special permit from the officers of the company. The company had printed rules. Certain of those rules were printed upon cards and hung in the way stations. Upon one in the station at Charlotte the following rule was printed: "Passengers will not be carried under any circumstances upon any freight train, except such as are designated, and between points named upon the time table; nor will they be carried upon such freight trains unless provided with freight-train permits." This was not one of the trains named upon the time-table, and the plaintiff had no permit to ride thereon. He was a trespasser in getting upon the train. He had no right there. By rule 172 of the company it is provided, "Brakemen are under the orders of the conductor;" and by rule 170 it is also provided, "Brakemen must make themselves thoroughly acquainted with the whole code of signals, and the instructions referred to in these rules, as well as those embodied in the said time tables." At the close of the testimony, counsel for defendant requested the court to charge the jury that their verdict must be for the defendant. This was refused and the question was submitted to the jury for their determination as one of fact.

Counsel for plaintiff contends that the record shows that the brakeman had the authority to remove the plaintiff from the train, and having exercised that authority in a cruel and unjustifiable manner, by means of which the plaintiff was injured, a right of action exists against the defendant company. This contention is based upon the rules of the company, which were out in evidence. The claim is made that inasmuch as the rules provided that this class of trains should not carry passengers, and that the brakemen of the defendant company were required to familiarize themselves with those rules, the brakeman must have known that it was his duty, and that he was authorized by the company to eject the plaintiff from this train, and that in ejecting him he was in the discharge of a duty which the company had imposed upon him. On the other hand, it is contended by counsel for defendant that, under rule 172, brakemen of freight trains are subject at all times to the orders of the conductors of the trains; that the rules nowhere imply that a brakeman has authority to eject, or that the company has placed upon the brakeman the duty of ejecting, even trespassers from freight trains, but that they are subject to the orders of the conductors of such trains; and that in the present case the brakeman is not shown to have received any such orders, and that, therefore, his act in ejecting the plaintiff was not the act of the defendant company; that it became necessary, in order to entitle plaintiff to recover, that he should prove, not only that he was injured because of the wrongful act of the brakeman, but also that the brakeman was acting within the scope of his employment, and in the line of his duty, in causing plaintiff to jump off. In other words, that he must show that the brakeman inflicting the injury possessed the authority to do the act which resulted in the injury. It is conceded that there is no proof in that regard, unless the rules of the company are to be construed as contended by counsel for

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plaintiff. We think the rules cannot be so construed. It is true that passengers are not permitted to ride upon this class of freight trains, and that brakemen are required to familiarize themselves with these rules, but under rule 172 the brakemen must take their orders from the conductor. There is consequently no proof in the case that the brakeman here had authority from the company to do the act complained of. The burden was upon the plaintiff to show such authority. In *Corcoran v. Concord & M. R. Co.* 5 U. S. App. 458, 6 C. A. 231, 56 Fed. Rep. 1015, it appeared that plaintiff was riding upon the top of the freight car without having paid his fare; that he was ordered off by a person whom he assumed to be a brakeman; that the brakeman seized him and threw him off while the train was in rapid motion, whereby he was injured. The court directed a verdict in favor of defendant, and the court of appeals affirmed the ruling, saying: "The court is of the opinion that the plaintiff should have offered some evidence showing the scope of the alleged brakeman's authority. He failed to do so, and for that reason it is ordered that the judgment be affirmed." In *Pennsylvania Co. v. Dean*, 98 Ind. 459, it was said: "But if the appellee was on the train without right, being a mere trespasser, the fact that the injury was occasioned by the negligent or unlawful acts of the appellant's employees would not make the appellant liable unless it further appeared that the acts complained of occurred within the scope of the servant's employment." In *Towanda Coal Co. v. Heeman*, 86 Pa. 418, the plaintiff, a small boy, climbed upon the cars of defendant after the train had started. He was seen by one of the brakemen, who threw some pieces of coal, which struck the boy in the face, in consequence of which he slipped and fell in trying to get off the car. There was no evidence given of the authority of the brakeman to eject the trespasser from the train, and the defendant asked an instruction that a verdict be rendered in its favor on this ground. This the court refused, but submitted the question to the jury to determine whether the brakeman was acting within the scope of his employment. The case was appealed, and it was said by the appellate court: "A careful examination of all the testimony has shown that not a word contained in it tended to prove that the brakeman whose conduct is complained of, in the cruel and wanton assault he made on the plaintiff, was acting in pursuance of an authority conferred on him. The only affirmative proof was precisely in the opposite direction. . . . Upon the facts developed on the trial, although the plaintiff had no right to be on the cars, the jury would have been justified in finding, as they did, such reckless, gross, and culpable negligence as to render the defendant liable for damages, if the brakeman had been shown to have been acting in the line of his duty and within the scope of his employment. With no evidence that he was so acting, and with the testimony of the assistant superintendent to the contrary, it was a mistake to submit the question whether the wrongful act was or was not done in the exercise of a duly delegated authority." The following cases sustain this rule: *International & G. N.*

R. Co. v. Anderson, 86 Tex. 516; *Texas & P. R. Co. v. Moody* (Tex. Civ. App.) 23 S. W. 41; *Bess v. Chesapeake & O. R. Co.* 95 W. Va. 492; *Lake Shore & M. S. R. Co. v. Peterson*, 144 Ind. 214; *Farber v. Missouri P. R. Co.* 116 Mo. 81, 20 L. R. A. 350. Under the rules laid down in these cases, the defendant was entitled to have its request given that a verdict be rendered in its favor.

The judgment must be reversed.

No new trial will be ordered.

Grant and Moore, JJ., concurred with **Long, Ch. J.**

Montgomery, J., dissenting:

There is a conflict in the authorities upon the question presented in this case, namely, whether a brakeman on a freight train has implied authority to eject a trespasser. On principle, I am of opinion that such authority is to be implied from the nature of his employment. In the present case it was shown that the rules of the company prohibited the carrying of passengers upon the train in question, and it was shown that it was by another rule provided that it was the duty of the brakemen of the company to familiarize themselves with all its rules. In *Patterson, Railway Accident Law*, § 111, it is said to be the doctrine of most of the cases that when a railway servant is put in charge of any of the property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is therefore, for that purpose, vested with an implied authority to remove trespassers therefrom. This

doctrine is approved in *Brevig v. Chicago, St. P. M. & O. R. Co.* 64 Minn. 163, where it is said that the "duties [of a freight-train brakeman] do not consist merely of turning the brakes. By universal custom he has police duties as to the cars immediately under his charge." It was said in *Hoffman v. New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337, speaking of the brakeman: "His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train concerned in its management, and fully cognizant of the obvious fact that intruders, who jump upon the trains for a ride, without intention of becoming passengers, are wrongfully there." See also *St. Louis, A. & T. H. R. Co. v. Reagan*, 52 Ill. App. 488; *Vertrees v. Newport & M. V. R. Co.* 95 Ky. 314; *Houston, C. A. & N. R. Co. v. Dolling*, 50 Ark. 395, 27 L. R. A. 190; *Chicago, K. & N. R. Co. v. Parkinson*, 56 Kan. 655; *Smith v. Louisville & N. R. Co.* 95 Ky. 11, 22 L. R. A. 72.

A distinction was attempted to be drawn on the argument between a freight train and a passenger train, favorable to the defendant's contention. In my opinion, the authority of the freight brakeman is quite as clear as would be that of a passenger brakeman. It may be said with some force that, before the brakeman would have implied authority to eject an apparent trespasser from a passenger train, the conductor should be consulted, for the reason that it is the conductor who is to determine who are authorized to ride upon the train, while in the case of a freight train not carrying passengers it is at once apparent to the brakeman that a stranger boarding the train is a trespasser.

MINNESOTA SUPREME COURT.

John W. LANE *et al.*, Exrs., etc., of George Eaton, Deceased,

v.

Charles EATON *et al.*

(..... Minn.)

***1. The testator devised a certain part of his property** (consisting mostly of real estate) to certain named trustees in trust to be disposed of for the use of the branch of the Salvation Army located in St. Paul, Minnesota, said proceeds "to be permanently invested in the purchase of a lot, and the erection thereon of a place of worship where said Salvation Army may hold meetings," and, if said branch "should become legally organized so it may take and hold the title to property," the trustees were directed to transfer to it all the property, or the proceeds thereof. The Salvation Army is an unincorporated religious society having its headquarters in England, and, while its officers have military titles, their

*Headnotes by CANTY, J.

NOTE.—For validity of gift to unincorporated charity, see *Hadden v. Methodist Soc. of Ireland* (N. J.) 22 L. R. A. 623.

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duties correspond to those of the bishops, elders, and pastors of other churches. Said St. Paul branch was then in existence. *He'd.* under the provisions of chapter 43, Gen. Stat. 1894, the beneficiary of the trust must be certain, or capable of being rendered certain, and no such unincorporated voluntary association, or branch thereof, whose membership is fluctuating and uncertain can be such beneficiary. But *held*, under the provisions of title 4, chap. 34, such branch may incorporate, and, if it does so within a reasonable time, the devise will, under the provisions of §§ 3027 and 3048, vest in such corporation. *Held*, further, § 3040 has abrogated the rule against perpetuities and the rule which prohibits restraint of alienation, so far as such rules apply to such a meeting house. Whether or not the policy of the Salvation Army is such that it will permit the St. Paul branch to incorporate as a separate entity is not for the courts to determine.

2. The will further provides: "The rest, residue, and remainder . . . I give and bequeath to the Central Park Methodist Episcopal Church of St. Paul, Minnesota, absolutely, to be used by said church in aiding the cause of home and foreign missions equally." The church was incorporated, and was authorized by statute to acquire property by gift for mission purposes, and

to accept any gift in trust for the purposes for which given. Held, the devise is an absolute gift to the church, and not a devise in trust, and is valid.

(Buck, J., dissents.)

(June 29, 1897.)

CROSS-APPEALS from orders of the District Court for Ramsey County denying motions for new trial after a judgment construing the will of George Eaton, deceased; the defendants questioning the correctness of the ruling which upheld certain devises; and the plaintiffs questioning so much as declared certain devises void. *Affirmed on defendants' motion. Reversed on plaintiffs' motion.*

The facts are stated in the opinion.

Messrs. Ambrose Tighe and F. G. B. Woodruff, for defendants heirs of George Eaton:

The test as to whether an equitable conversion is had is not to be found by inquiring whether the executors may sell, but whether they must.

Haward v. Pearey, 128 Ill. 430.

Property left by a testator will be taken by the courts to be of that character in which the testator intended it should be finally and ultimately fixed and reposed.

2 Jarman, Wills, 5th Am. ed. p. 173; *Sperling v. Toll*, 1 Ves. Sr. 70; *Pearson v. Lane*, 17 Ves. Jr. 101; *Ford v. Ford*, 80 Mich. 42; 6 Am. & Eng. Enc. Law, p. 667, note, title *Equitable Conversion*; *White v. Howard*, 46 N. Y. 144.

Neither the St. Paul branch of the Salvation Army nor the cause of "home and foreign missions" is an entity which can hold real property, in its own name, or be made the beneficiary of a trust of real property, and therefore the bequest to the plaintiffs in trust for the Salvation Army is void, as is also the bequest to the church for the cause of "home and foreign missions."

German Land Assn. v. Scholler, 10 Minn. 331; *Philadelphia Baptist Assn. v. Hurt*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499; *Adams v. Perry*, 63 N. Y. 487; *Cottman v. Grace*, 112 N. Y. 299, 3 L. R. A. 145.

The law insists that for every trust there shall exist a beneficiary, capable of enforcing the trust, in case the trustee should prove false to the confidence imposed in him.

Holland v. Alcock, 108 N. Y. 312; *Little v. Willford*, 31 Minn. 173; Pom. Eq. Jur. §1029.

The corporate purposes of the Central Park Church are not defined in the general law under which it was organized, nor in either of the amendatory acts which were introduced in evidence.

A religious society is a voluntary association of individuals or families united for the purpose of having a common place of worship and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of religion (baptism, etc.).

20 Am. & Eng. Enc. Law, p. 773; 1 Waterman, Corp. p. 76; *Silsby v. Barlow*, 16 Gray, 329.

There is nothing which even hints that the maintenance of home and foreign missions is a part of the regular business of religious corporations in general, and nothing which will 88 L. R. A.

justify the court in assuming, as a matter of law, in the absence of evidence, that such work is a part of the regular business of the Central Park Methodist Episcopal Church.

An outside entity, like the Missionary Society in New York, using its own judgment and employing its own machinery, is not an agent of the church in the cause of home and foreign missions, but rather the beneficiary of its bounty.

Fosdick v. Hempstead, 125 N. Y. 581, 11 L. R. A. 715; *Bird v. Merkle*, 144 N. Y. 544, 27 L. R. A. 423; *Eutaw Place Baptist Church v. Shively*, 67 Md. 493; *Church Extension of M. E. Church v. Smith*, 56 Md. 362; *Kinney v. Kinney*, 86 Ky. 610.

Mr. George E. Budd, for defendant Central Park M. E. Church:

The devise to the church is an absolute gift. *Bird v. Merkle*, 144 N. Y. 544, 27 L. R. A. 423; *Atwater v. Russell*, 49 Minn. 57.

A bequest of a certain sum to an incorporated missionary society with a direction to apply it to domestic missions does not constitute a trust, but the society takes the money absolutely.

Domestic & Foreign Miss. Soc. of Protestant Episcopal Church v. Gaiher, 62 Fed. Rep. 422; *Halsey v. Convention of Protestant Episcopal Church*, 75 Md. 275.

Messrs. H. J. Horn and A. E. Horn for plaintiffs.

Canty, J., delivered the opinion of the court:

This action was brought by the executors for the construction of the will of George Eaton, deceased.

1. The will contains the following provision: "I give, devise, and bequeath one other equal share or third part, to be first selected and set apart by my executors or the survivor of them, to John W. Lane and John C. Quinby, or the survivor of them, in trust, to keep the same carefully invested, and to receive the rents, profits, and income thereof, and to pay and apply the same, together with the principal sum, or third part, to and for the use of the branch of the Salvation Army, so called, located in the said city of St. Paul; said principal and interest accruing thereon to be permanently invested in the purchase of a lot and the erection thereon of a place of worship where said Salvation Army may hold its meetings; said share or third part and the interest thereon never to be used or invested outside of said city, but is given solely for the purpose heretofore mentioned. If said branch of the Salvation Army in said city is or should become legally organized so it may take and hold the title to property, then I direct the said trustees, or the survivor of them, to transfer said third part or share, and all the rents, income, and profit of the same, together with any other property which may come to them under any of the provisions of this will, to said organization as soon after the settlement of my estate as practicable." On the trial it appeared from the evidence that the Salvation Army is an unincorporated religious society having its headquarters in London, England. The officers of the organization have military titles. The head officer in England is called "general;"

the subordinate officer who is head of the organization in the United States is called "commander;" a "major" has charge of a division of the country, and a "captain," of a local post or "barracks." While these officers have military titles, they perform duties similar to those of the officers in other religious denominations. Thus a commander corresponds to a bishop, a major to a presiding elder, and a captain to a minister or pastor. The barracks is the church. The property of the society in a country is held in the name of the commander in that country, and he is appointed by the general in England. The government of the society seems to be very much centralized, but not more so, perhaps, than in the case of some other religious societies or sects. The court below held this devise void. Nearly all of the testator's property consisted of land, and as, by the terms of the will, the part of this land so devised was to be sold, and the proceeds reinvested in other land, the bequest, notwithstanding this double conversion, continued to be real estate. 8 Pom. Eq. Jur. § 1178. Then the bequest is void, unless valid as a bequest of real estate. Section 4274, chap. 43, Gen. Stat. 1894, provides that uses and trusts are abolished, except as authorized by that chapter. It is well settled in the states from which we derived this statute that it has abolished the great body of the English law of charitable uses and trusts and the doctrine of *cy pres* as administered in England. See 2 Pom. Eq. Jur. §§ 1018-1029. Under this statute the beneficiary of the trust must be certain, or capable of being rendered certain. Therefore no unincorporated, voluntary association, whose membership is fluctuating and uncertain, can be the *cestui que trust*. *Downing v. Marshall*, 23 N. Y. 368, 80 Am. Dec. 290; *First Society of M. E. Church v. Clark*, 41 Mich. 730; *Ruth v. Oberbrunner*, 40 Wis. 238. See also 2 Pom. Eq. Jur. § 1029, and cases cited in *Holland v. Alcock*, 108 N. Y. 312. See also *German Land Assn. v. Scholler*, 10 Minn. 331 (Gil. 260). But there is another statute which is *in pari materia* with chap. 43, and which must be construed with it in disposing of the question here presented. Title 4, chap. 84, Gen. Stat. 1894, provides for organizing unincorporated churches into corporations. Section 3022 of this title provides: "It shall be lawful for all persons of full age, belonging to any church, congregation or religious society, not already incorporated, to assemble at the church or meeting-house, or other place where they statedly attend for divine worship, and, by a plurality vote, elect any number of discreet persons of their church, congregation, or society, not less than three nor more than nine in number, as trustees to take charge of the estate and property belonging thereto, and transact all affairs relative to the temporalities thereof." The next four sections provide the manner of giving notice of the time and place of election, the manner of conducting the election, and the manner of executing and recording the certificate of election, which, when executed and recorded, shall incorporate the congregation or society. Section 3027 then provides: "Such trustees may have a common seal, and alter the same at pleasure; they may take into their possession and custody all the tempo-

ralities of such church, congregation, or society, whether the same consists of real or personal estate, and have been given, granted, or devised directly or indirectly to such church, congregation, or society, or to any other person for their use." Section 3048 further provides: "Whenever any church or religious society now organized, or which may hereafter be organized, as a church or congregation, but not incorporated in pursuance of law, shall comply with the provisions of this title, and thereby become a body corporate, all the estate, real and personal, which has been lawfully conveyed to the said church or religious society, or to the trustees or vestry thereof in trust for the use of such church or society, whether by devise, gift, grant, purchase, or otherwise, and not lawfully disposed of, shall thereupon vest in said corporation as fully and amply as if the said church had been legally incorporated from the date of its religious organization; provided, that the name or title publicly assumed or borne by such church or society from the date of its organization as such, and none other, shall be the title by which it shall forever be known in law and as a body politic and corporate." If the St. Paul branch of the Salvation Army sees fit to and does incorporate within a reasonable time, why will these sections not apply so as to vest the devise aforesaid in the corporation? We see no reason why. It was so held under a statute similar in its provisions to § 3037 aforesaid. See *Reformed Prot. Dutch Church v. Veeder*, 4 Wend. 494, and *First Society of M. E. Church v. Clark*, 41 Mich. 730. We are of the opinion that the devise is void only on condition that the said branch of the Salvation Army fails to incorporate within a reasonable time, which, however, will not extend beyond the time of the hearing of the application for the decree of distribution. It therefore follows that the court below erred in declaring the devise absolutely void. In arriving at this result, we have not overlooked § 3040, which reads as follows: "All lands, tenements, and hereditaments, lawfully conveyed by devise, grant, purchase, or otherwise, to any persons as trustees, in trust for the use of any religious society organized, or which may hereafter be organized within this state, either for a meeting-house, burying ground, or for the residence of a preacher, shall descend with the improvements in perpetual succession to, and shall be held by, such trustees in trust for such society." We agree with the learned judge of the court below that the trustees here referred to are the trustees of the church itself, and not other persons selected by the testator as trustees of the property devised or bequeathed by him. We are also of the opinion that one of the purposes of this section was to abrogate the rule against perpetuities and the rule which prohibits restraint of alienation, so far as these rules might apply to property conveyed, devised, or bequeathed for any of the three purposes therein specified, to wit, "for a meeting-house, burying-ground, or for the residence of a preacher," and that when so vested in the corporation for any of these purposes the property may be held in "perpetual succession." This obviates the ground on which the grant was held void in *First Society of M. E. Church v. Clark*, 41

Mich. 780, and is a sufficient answer to the claim of the defendant heirs that the devise is void because it contravenes the rule against perpetuities. Neither is the result at which we have arrived in conflict with *Little v. Willford*, 31 Minn. 173. In that case the conveyance was to certain named persons, "trustees of M. E. Church [of the County of Olmsted and state of Minnesota], . . . in trust that said premises shall be used, maintained, and disposed of as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church in the United States [of America]." The conveyance was not to or for the benefit of any particular congregation or religious society, or any local subdivision of any religious society which could incorporate under the laws of this state, but was in trust for the use of the whole membership of a certain denomination in the United States. Whether or not the policy of the Salvation Army is such that it will permit the St. Paul branch to incorporate as a separate entity, and thereby receive this bequest, is a matter which neither the court nor anyone else but the Salvation Army itself can determine. Under the statute the opportunity must be given to it to do so if it sees fit.

2. After making various other bequests, the will provides: "All the rest, residue, and remainder . . . I give, devise, and bequeath to the Central Park Methodist Episcopal Church of St. Paul, Minnesota, absolutely, to be used by said church or its trustees in aiding the cause of home and foreign missions, equally." The church is duly incorporated. The court below held this devise valid. If this devise is an absolute gift to the church it is valid, but if it is a devise in trust it is not valid, as there is no ascertained beneficiary. We are of the opinion that it is an absolute gift to the church. Sections 2, 3, chap. 878, Special Laws 1887, provide as to this church as follows:

"Sec. 2. That the trustees of the society as aforesaid in addition to the authority and power already granted by the rules and regulations of said church and the statutes, are hereby further authorized to acquire by gift or purchase any real property in the city of Saint Paul necessary for mission purposes, and to sell the same when in their opinion it is for the best interest of said church.

"Sec. 3. That the said trustees aforesaid are further authorized to accept any gift, conveyance of real [estate] or other property, and to hold the same in trust for the purposes for which given, and to sell or convey the same from time to time, and to invest and dispose of the proceeds in accordance with the power and authority of the gift or trust."

A part of the general purposes for which this church is organized is missionary work, and funds given to it to be used in that work are not given in trust in the technical sense of that word. Thus, in *Atwater v. Russell*, 49 Minn. 57, 82, and 86, lands were conveyed with directions that the proceeds be used by a certain incorporated hospital "for the support of charity patients in the same." This kind of charity work was a part of the purposes for which the hospital was incorporated, and the gift was held to be absolute, and not in trust. See also 38 L. R. A.

Bird v. Merkle, 144 N. Y. 544, 37 L. R. A. 423; *Domestic & Foreign Missionary Soc. of Protestant Episcopal Church v. Gaither*, 62 Fed. Rep. 422.

This disposes of the case. *The order denying defendant's motion for a new trial is affirmed, the order denying plaintiff's motion for a new trial is reversed, and the case is remanded to the court below, with directions to change its conclusions of law and order for judgment so that the same shall be in conformity with this opinion.*

Buck, J., dissenting:

I dissent from that part of the foregoing opinion which holds that a branch of the Salvation Army might hereafter incorporate within a reasonable time, and that, if it did so, the attempted devise would vest in such corporation. A devise surrounded with such uncertainty and complexity ought not to be permitted to stand. What is a reasonable time will doubtless be another matter of litigation, and the decision rather encourages than ends litigation. That which was already uncertain is thus made more so,—a rule which should find no place in the construction of wills.

STATE OF Minnesota

v.
**CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY,
and Three Other Cases.**

(.....Minn.....)

"The proviso in § 11, Gen. Laws 1895, chap. 149, requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within twenty days after notice of its arrival, is unconstitutional and void, not being a lawful exercise of the police power of the state.

(May 27, 1897).

CERTIFICATION by the District Court for Ramsey County for the opinion of the Supreme Court after overruling demurrers thereto of indictments charging defendants with violation of a statute requiring carriers to turn over the property carried to a public warehouseman. *Reversed.*

The facts are stated in the opinion.

Mr. W. H. Norris, for defendant, the Chicago, Milwaukee, & St. Paul Railway Company:

The state has no legislative power to dictate the disposition of the goods or to divest the possession of the carrier.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700. 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 8 Inters. Com. Rep. 36.

The indiscriminate imposition of a burden upon all commerce of a particular kind begun or ended within a state, upon domestic equally

*Headnote by MITCHELL, J.

NOTE.—For some authorities on the business of warehousemen in general, see note to *Hall v. Pillsbury* (Minn.) 7 L. R. A. 529.

with interstate, will not save a law which burdens interstate commerce.

Western U. Tele. Co. v. Texas, 105 U. S. 400, 26 L. ed. 1067; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 80 L. ed. 694; *Crutcher v. Kentucky*, 141 U. S. 47, 85 L. ed. 649.

The act is void as laying imposts upon imports.

Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676.

This act abridges the privileges and immunities of citizens of the United States.

Ex parte Kuback, 85 Cal. 274, 9 L. R. A. 492; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 709; *Ritchie v. People*, 153 Ill. 98, 29 L. R. A. 79; *Printing & N. Registering Co. v. Simpson*, L. R. 19 Eq. 465.

This act deprives of liberty and property without due process of law.

Eaton v. Baton, C. & M. R. Co. 51 N. H. 511, 12 Am. Rep. 147; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 18 Wall. 166, 20 L. ed. 557; *Mills, Em. Dom.* §§ 80, 81; *Kennard v. Louisiana, Morgan*, 92 U. S. 480, 23 L. ed. 478; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Baker v. Kelley*, 11 Minn. 480; *Wynehamer v. People*, 13 N. Y. 892; *State, Warfield, v. Becht*, 23 Minn. 411; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140; *Soon Hing v. Crowley*, 113 U. S. 703, 23 L. ed. 1145; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164, 5 Am. Rep. 830; *Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

This act denies to defendant and others within the jurisdiction of Minnesota the equal protection of the laws.

Yick Wo v. Hopkins, 118 U. S. 353, 369, 30 L. ed. 220, 226; *Goddard v. Chuffee*, 2 Allen. 335, 79 Am. Dec. 796; *Baker v. Willis*, 128 Mass. 194, 25 Am. Rep. 61; *Moore v. State*, 16 Ala. 418.

Police power originates in the law of necessity.

Prentice, Pol. Powers, 4; 4 Bl. Com. p. 80; 2 Kent, Com. 838.

In connection with regulation of commerce it is said, concerning state laws excluding diverse classes of objectionable persons, that such right can only arise from a vital necessity for its exercise, and cannot be carried beyond that necessity.

Prentice, Pol. Powers, 10, 11; *Henderson v. Wickham*, 92 U. S. 274, 23 L. ed. 549; *Chy Jung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383.

It is said of laws requiring drainage of lands, that this compulsory right of interference with private property by statute belongs to the police power, and must be exercised for a public object.

Prentice, Pol. Powers, 55; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Cooley, Const. Lim.* § 577; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 285; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71; *State v. Noyes*, 47 Me. 189; *Tiedeman, Pol. Power*, p. 4; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 498, 80 L. ed. 696.

This is not merely a taking of private property, but a taking of it for a use altogether private and without compensation.

Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co. 17 W. Va. 812; *Smeaton v. Martin*, 57 Wis. 364; *Citizens' Sav. & L. Asso. v. Topeka City* ("Loan Association v. Topeka"), 87 U. S. 20 Wall. 655, 664, 23 L. ed. 455, 461; *Cocley, Const. Lim.* 5th ed. 658, 659; *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 81 Am. Dec. 813; *Cole v. La Grange*, 113 U. S. 6, 28 L. ed. 898; *Merriman v. Great Northern Exp. Co.* 63 Minn. 543; *Missouri P. R. Co. v. Nebraska Board of Transportation*, 164 U. S. 403, 41 L. ed. 499; *State v. Chicago, M. & St. P. R. Co.* 36 Minn. 402.

The act is unconstitutional and void as partial, unequal, and class legislation, based upon classification wholly arbitrary, without natural reason, and unjust.

Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; *Cooley, Const. Lim.* 6th ed. 483, 484; *St. Louis v. Webber*, 44 Mo. 547; *Eden v. People*, 161 Ill. 296, 82 L. R. A. 659; *Nichols v. Walter*, 37 Minn. 264.

Messrs. M. D. Grover and C. Welling-ton for defendant Great Northern Ry. Co.

Messrs. Dan W. Lawler and F. B. Kellogg for defendant Chicago Great Western Ry. Co.

Mr. M. D. Munn for defendant Minneapolis, St. P. & S. Ste. M. Ry. Co.

Mr. M. L. Countryman for the State.

Mitchell, J., delivered the opinion of the court:

The defendants in these actions were severally indicted for a refusal to turn over to a public warehouseman certain goods, which had not been called for by the consignee, pursuant to the provisions of § 11 of chapter 149, Gen. Laws 1895, entitled "An Act to License and Regulate the Business of Storage Companies and Public Warehousemen (Other Than Warehousemen of Grain in Bulk), and to Provide a Penalty for Violation of the Same." Section 1 of the act provides that "the governor may license any suitable person, persons, or corporations established under the laws of this state, and having their place or places of business within this state, to carry on the business of storage companies or public warehousemen, who may keep and maintain public warehouses for the storage of goods, wares, and merchandise, etc., excepting grain in bulk. Said license must be obtained within thirty days from and after the passage of this bill, upon the payment into the treasury of the state of the sum of \$10, and annually thereafter, by the payment of a like sum, to be credited to the school fund of the state." Section 9 makes it unlawful for anyone not duly licensed under the provisions of the act to conduct or carry on the business of a storage company or warehouseman in this state. Section 10 makes a violation of the provisions of §§ 9 and 11 a misdemeanor punishable by fine. Section 11, under which the indictments were drawn, reads as follows: "Sec. 11. This act shall not be construed to apply to any railroad or transportation company who holds goods, wares, or merchandise in cars, freight houses, or warehouses for a period not exceeding twenty days after receipt. Provided, such railroad or trans-

portation company shall, within forty-eight hours after the receipt of such goods, wares, and merchandise, notify the consignee of the arrival thereof in writing, and in case such consignee, or his assigns, fails and neglects to call for or receive said goods, wares, or merchandise within twenty days after such receipt of same by any railroad or transportation company as aforesaid, said railroad or transportation company must then turn over said goods, wares, or merchandise to a storage company or public warehouseman, licensed as in this act provided, upon the payment of the charges of said carrier thereon, which charges thus paid by said storage company or warehouseman to said carrier shall be a lien on said goods, wares, or merchandise, and enforceable in accordance with §§ 1, 2, 3, and 4, chapter 202 of the General [Laws] of 1885."

Among other objections to the sufficiency of these indictments, it is urged that the act in question is unconstitutional. The act is certainly a remarkable one. Its provisions contain strong intrinsic evidence that the real purpose of it was not the protection of the public by regulating public warehousemen or by adopting reasonable regulations for the preservation of unclaimed property in the hands of common carriers, but to subvert the interests of a certain class of warehousemen. We have no doubt that the public storage and warehouse business is one that is subject to the police power of the state to adopt such reasonable regulations as the legislature may deem necessary for the protection of the public who intrust their property to those carrying on such a business. We may also admit that it is within the police power of the state to adopt any reasonable regulations for the preservation and protection of property which has been transported to the place of its consignment by a common carrier, and is abandoned, or not claimed within a reasonable time by the consignee or owner. It is also true that, where a business is a proper subject of police regulation, the legislature may, in the exercise of that power, adopt any measures they see fit, provided, only, that they adopt such as have some relation to and have some tendency to accomplish the desired end; and if the measures adopted have such relation or tendency, and do not violate some provision of the Constitution, the courts will not assume to determine whether they are wise or the best thing that might have been adopted. But, while the police power of the state is a very extensive one, it is not without limits. A law enacted in the exercise of the police power must be a police regulation in fact. If it will not conduce to any legitimate police purpose, or if it amounts to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful business, the courts have a right, and it is their duty, to declare the law unconstitutional. The business of a common carrier and the storage and warehouse business are both lawful without any license or authority from the state. Everyone has a right to engage in them, subject only to such regulations and restrictions as are necessary to promote the general welfare. Neither of them is a business which the state has any right to prohibit altogether or to limit to a favored few

by giving them a monopoly of it. Therefore the police power must, when exercised over them, be confined to such restrictions and burdens as are necessary to promote the public welfare, or, in other words, to prevent the infliction of a public injury.

If the 1st section of this act is to be construed literally as it reads, it would give a monopoly of the public storage and warehouse business to those to whom the governor granted licenses "within thirty days from and after the passage of the act." Under such a construction, the act would be clearly unconstitutional. Again, while the act requires every storage company or warehouseman to receive and store all property offered for such purposes by any person, without discrimination, it nowhere, at least in express terms, requires them to advance the charges of the carrier. If they may consent or decline, at their option, to advance these charges, the law would have no reasonable tendency to protect and preserve unclaimed property. It would permit the storage company or warehouseman to accept from the carrier only such business as he might deem to his own personal advantage, and reject the balance. Further, if the proviso to § 11 is to be construed as it seems to read, it would absolutely compel every common carrier in every instance to notify the consignee of the arrival of the goods within forty-eight hours, and, in case he did not call for or receive the goods within twenty days, to turn them over to a warehouseman, without regard to what agreement or arrangement to the contrary there might be between the carrier and the consignor or consignee, as, for example, that the goods should be shipped or held by the carrier for future delivery. If this is the proper construction of the act, it is clearly unconstitutional, as being an arbitrary and unwarranted interference with the right of parties to contract with reference to the disposition of their own property.

But we shall assume that the law might be cut down by judicial construction so as to obviate all these objections, and that we would be justified in holding that the storage and warehouse business is not limited to those who obtained license, within thirty days after the act was passed; that public warehousemen are required to advance the charges and receive all unclaimed property tendered them by a common carrier, regardless of the amount of the charges or the value of the property (a construction which we apprehend warehousemen would be loth to assent to); and that the only property which carriers are required to turn over to a warehouseman is property shipped for immediate delivery, and which remains unclaimed for twenty days, in the absence of any agreement between the carrier and consignee that the former should continue to hold it for the latter. There is still an objection to the law which is fatal to it. There are, and necessarily will be, many places in the state where there is no storage company or public warehouseman who has complied with the provisions of this act. We are justified in stating, by way of illustration, the fact that there are only three places in the state (St. Paul, Minneapolis, and Duluth) where anyone has complied with the provisions of this act and

taken out a license. But under this law wherever the place of consignment may be, even if at the extreme northwestern or southwestern corner of the state, the carrier would be required to transport the goods, or procure them to be transported thence, to a place where there is a public warehouse, and then turn them over. Indeed, it would seem, from the language of the act, that it would be incumbent on the carrier to procure drays or wagons to transport the goods from the depot or landing to the warehouse, and there tender the property to the warehouseman. Such a law, so far from preserving unclaimed property for whom it may concern, would furnish a most effectual way to absorb it with unnecessary costs and charges. It would have no tendency to subserve any public interest, and would impose a most unreasonable burden upon carriers. On this ground we hold that, even if all the other provisions of the act are valid, the proviso in § 11, in so far as it requires common carriers to turn over property to a public warehouse, is unconstitutional.

The orders overruling the demurrers are therefore reversed, and the causes remanded, with directions to the court below to dismiss the indictments.

STATE of Minnesota, *ex rel.* Michael J. MORIARTY, *Appt.*,

v.

Thomas McMAHON, *Respnt.*

(.....Minn.....)

*1. Upon habeas corpus cognizance can be taken only of defects of a jurisdictional character, which render the proceedings under which the relator is imprisoned, not merely erroneous, but absolutely void.

2. Under the general grant of power to make all regulations and to ordain all ordinances which may be expedient or necessary for the preservation of health, the suppression of disease, and to prevent the introduction of contagious diseases, the common council of St. Paul had authority to pass an ordinance requiring those carrying on the business of scavenger, as therein defined, cleaning out and removing the contents of privy vaults, cess pools, sinks, and private drains, to first obtain a license, and requiring the licensee to obtain a permit from the commissioner of health before removing the contents of any privy vault, cess pool, etc.

(July 9, 1897.)

A PPEAL by relator from an order of the District Court for Ramsey County refusing to discharge him from custody to which he had been committed for violation of an ordinance prohibiting the doing of the work of a scavenger without a permit. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by MITCHELL, J.

NOTE.—For ordinances relating to vaults, cess pools, etc., as nuisances, see note to *Harrington v. Providence* (R. I.) *ante*, 305.

As to license for transportation of garbage, etc., see also *State v. Orr*, (Conn.) 34 L. R. A. 279.

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Mr. Walter L. Chapin, for appellant:

There is no authority in the St. Paul charter for licensing those engaged in the scavenger business.

The health commissioner has no authority or control (at other than in times of epidemic) except to enforce regulations for the health of the city previously prescribed by ordinance duly passed by the council. His duty is confined to putting into force rules so made and no others. The making of such regulations cannot be delegated by the council to any other person or body.

Re Wilson, 32 Minn. 145; *State, Mansfield, v. St. Paul*, 34 Minn. 250; *State v. Pamperin*, 43 Minn. 820; *Minneapolis Gaslight Co. v. Minneapolis*, 36 Minn. 159.

The power to license must be clearly given or it cannot be exercised, and where specific pursuits are specified as licensable, it is an implied denial of the power to require a license for other kinds of business.

St. Paul v. Traeger, 25 Minn. 248, 38 Am. Rep. 462; *St. Paul v. Stoltz*, 33 Minn. 233; *Dill. Mun. Corp.* § 361 (295).

If the power be in the council to compel scavengers to take out licenses, the ordinance in question specifies no general rules or conditions with which all may comply. It reserves to the council the power to issue or not issue licenses at its own caprice, to grant a monopoly, or to favor one person or another. It makes no provision for equal rights to all.

The provisions of the 14th Amendment to the United States Constitution guaranteeing equal protection of the laws has been held to require ordinances to provide uniform conditions of general application in regulating the pursuit of any occupation or right; otherwise such ordinance is void.

State, Garabad, v. Dering, 34 Wis. 585, 19 L. R. A. 858; *Richmond v. Dudley*, 129 Ind. 112, 18 L. R. A. 587; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Baltimore v. Radeske*, 49 Md. 217, 33 Am. Rep. 239; *Newton v. Belger*, 143 Mass. 598; *Re Fraese*, 63 Mich. 396; *Chicago v. Trotter*, 136 Ill. 430; *State v. Mahner*, 43 La. Ann. 496; *Horr & Bemis*, Mun. Pol. Ord. §§ 13, 263.

Messrs. James E. Markham, H. W. Phillips, and Carl Taylor for respondent.

Mitchell, J., delivered the opinion of the court:

The charter grants to the common council the following powers, among others: "To do all acts and make all regulations which may be necessary or expedient for the preservation of health and the suppression of disease, and make regulations to prevent the introduction of contagious diseases into the city." *St. Paul Mun. Code* 1893, § 40, cl. 33. "The common council of the city of St. Paul, in addition to its other powers, is hereby authorized to ordain such other and further ordinances, not inconsistent with the laws of the state, which shall be deemed expedient for the good government of the city, the protection of its property, the preservation of peace and good order, the suppression of vice, the benefit of trade and commerce, the preservation of health, etc." *Id.* § 53. Under this grant of power, the common council passed ordinance No. 1835, found in

Paper Book, pages 1 to 15, entitled "An Ordinance to Provide for the Licensing of Scavengers and the Removal of Night Soil." Having been convicted in the municipal court of St. Paul of violating § 4 of this ordinance, by removing the contents of a cess pool without having obtained a permit so to do from the commissioner of health, and upon such conviction sentenced for imprisonment for ten days in the St. Paul workhouse, of which the respondent is the keeper and custodian, the relator having alleged that his confinement was illegal, petitioned for, and was granted, a writ of habeas corpus to test the legality of his imprisonment.

The grounds upon which relator's counsel claims that his imprisonment is illegal may be divided into two, *viz.*: (1) That the ordinance is void; and (2) that, even if the ordinance is valid, the complaint upon which he was convicted was insufficient. After judgment the sufficiency of the complaint cannot be reviewed or considered on habeas corpus, but only on appeal. Habeas corpus takes cognizance only of defects of a jurisdictional character, which render a proceeding, not merely voidable, but absolutely void. *State, Noonan, v. Hennepin County Sheriff*, 24 Minn. 87. If the court had jurisdiction, and the ordinance is valid, so that a good complaint could have been made under it, then the judgment of the court was not void, but merely voidable, although the complaint may have imperfectly stated the facts constituting the offense charged. It is urged that the ordinance is invalid, for the reason that the city charter gives the common council no authority to require licenses of those engaged in the scavenger business; that there is no express or specific grant of any such power; that the general grant of powers above enumerated merely gives the council authority to regulate such a business; but that power to regulate does not include power to license. As § 4, under which relator was convicted, applies only to licensed persons, it is undoubtedly true that if the sections of the ordinance relating to licensing are invalid, § 4 would fall with them. In determining whether the general powers thus granted include the power to license, it is important to consider, first, the definition of "scavengers" contained in the ordinance, and, second, the relation which the scavenger's business, as thus defined, bears to the public health and comfort. The business of scavenger, as defined in the ordinance, and the only business which it assumes to deal with, is the cleaning and removing the contents of privy vaults, cess pools, sinks, and private drains. The subject-matter dealt with is one requiring the adoption of very stringent rules and regulations. The public health and comfort imperatively require that this kind of work should be performed only by competent persons, supplied with the proper outfit to do it with despatch, and in such a way as not to spread disease, or to prove offensive to the inhabitants of the city. It is also necessary, in order that the public officials may be enabled to supervise the work, so as to see that it is done properly, and in accordance with such rules and regulations, that they shall know in advance, not only when and where it is to be done, but also by whom it is to be done, in order that they

may ascertain that he has at hand the proper outfit with which to do the work.

It is undoubtedly the law that the right to license must be plainly conferred, or it will be held not to exist. The power to make by-laws relative to specified lawful occupations, or the general power to pass prudential by-laws in reference to them, would not, as a general rule, authorize the municipal corporation to exact a license from those carrying on such business. But, in view of the very important bearing which the scavenger business has upon the public health, and the imperative necessity, from sanitary considerations, that such work should be intrusted only to those who are competent and properly equipped to perform it, we are of the opinion that the grant of power to make such regulations and to ordain such ordinances as may be necessary or expedient for the preservation of health, and to prevent the introduction of contagious diseases, conferred authority on the common council, as one means of regulating the scavenger business, to require a license from those carrying it on, and to prohibit anyone from doing so without a license. *Boehm v. Baltimore*, 61 Md. 259; *Chicago Packing & P. Co. v. Chicago*, 83 Ill. 221, 30 Am. Rep. 545; *Kinsley v. Chicago*, 124 Ill. 359.

It must be remembered, however, that the power to exact a license from scavengers cannot be exercised arbitrarily, so as to give any person or persons an exclusive right or monopoly of the business. The council should exercise their judgment and discretion honestly and intelligently, for the purpose of ascertaining whether the applicant is a competent person, and has the adequate outfit and other means with which to properly do the work, and then grant or refuse the license, in accordance with the result of such investigation. The provisions of the ordinance in question are entirely consistent with the equal enjoyment of its privileges by all citizens who are competent to perform this kind of work in a manner consistent with the public welfare. There is nothing in it requiring or contemplating any arbitrary exercise of power, and the presumption is that the power will be properly exercised.

No objection is made to § 3, providing for the payment of a license fee of \$25, and therefore we have not considered it. Much of what has been said in regard to the power of the council to require a license is applicable to the provisions of § 4, requiring the licensee to obtain a "permit" from the commissioner of health before removing the contents of any privy vault, etc. This does not and was not intended to give that officer a veto power over the action of the common council in granting a license. Nor does it give him any arbitrary discretion by which to withhold a permit from a suitable person properly equipped to do the work. *St. Paul v. Lawton*, 61 Minn. 537. This provision is not materially different, either in substance or purpose, from those found in many ordinances on other subjects; for example, requiring a permit from some officer, such as building inspector or city engineer, before doing certain work, such as erecting or repairing a building, doing a job of plumbing, making connection with a sewer, and the like. We are not aware that the validity of

such provisions has ever been successfully disputed.

The object in requiring a permit from the commissioner of health is to insure that the scavenger is properly equipped to do the particular job in hand; that it will be done at a proper time; and, what is perhaps more important than anything else, that the commissioner of health may know when and where the work is to be done, so that he may supervise it, and see that it is performed in accordance with the rules and regulations on the subject. It is suggested that the commissioner of health might arbitrarily refuse a permit, in which case the applicant's only remedy would be by mandamus, to compel him to issue it, which would, under ordinary circumstances, be so inadequate as to amount to no remedy at all. This might be true in many other cases where a public officer refuses to do his duty, but this is no reason for holding a law or ordinance invalid. The subject, involving, as it does, the public health, is one which necessarily requires very stringent, and even somewhat drastic, rules and regulations. Moreover, the presumption is that every public officer will perform his duty.

Our conclusion is that none of the objections urged against the validity of the ordinance are well taken, and that the decision of the District Court must be affirmed, and the relator remanded to the custody of the respondent.

So ordered.

STATE of Minnesota, *ex rel.* Petter LURIA,
v.

John WAGENER.

(.....Minn.....)

***Chapter 107, Laws 1897, purporting to license and regulate hawkers and peddlers** throughout the state, provides that the act shall not "be construed to prevent any manufacturer, mechanic, nurseryman, farmer, butcher, . . . selling, as the case may be, his manufactured articles, or products of his nursery or farm, or his wares, . . . as butcher, either by himself or employee." *Held*, the business of hawker or peddler is so far a legitimate and moral business that the legislature can regulate it only for the purpose of preventing it from becoming a nuisance; and, for that purpose, the distinctions attempted to be made between peddling by the manufacturer, mechanic, nurseryman, farmer, and butcher, as aforesaid, and the peddling of the same articles by the purchaser from these parties, constitute no proper basis for classification, but the classification so attempted is founded on no proper or natural distinction, but is arbitrary, and contravenes §§ 33 and 34 of article 4 of the Constitution.

(July 8, 1897.)

APPPLICATION for a writ of habeas corpus to obtain relator's discharge from custody to which he had been committed for violating

*Headnote by CANTY, J.

NOTE.—For police power over business of peddling, see also *State v. Harrington* (Vt.) 34 L. R. A. 100.

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an ordinance against peddling without a license.
Discharge granted.

The facts are stated in the opinion.

Meurs. Stevens, O'Brien, Cole, & Albrecht, for relator:

No arbitrary distinction between different kinds or classes of business can be sustained; the conditions being otherwise similar.

State, McCue, v. Ramsey County Sheriff, 48 Minn. 239.

The leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale, and sells them, in a fixed place of business.

Stuart v. Cunningham, 88 Iowa, 191, 20 L. R. A. 430.

It is the manner of sale that makes a peddler.

Com. v. Gardner, 183 Pa. 284, 7 L. R. A. 666.

Licenses are imposed for revenue, or for regulation, or to give monopolies, or for prohibition.

Cooley, Taxn. 592.

The legislature has the right to confer upon a town, "the power of regulating any business which may act prejudicially upon the health, morals, or peace of the inhabitants."

St. Paul v. Troyer, 8 Minn. 295.

In itself peddling is a moral and lawful pursuit.

Duluth v. Krupp, 46 Minn. 438.

Being a moral and lawful pursuit the ground upon which a large license fee could be sustained is that the business "in cities" might become a nuisance unless the number of peddlers be restrained.

Duluth v. Krupp, 46 Minn. 438.

It certainly must be the manner of selling, not the nature of the thing sold or the individuality of the producer, that makes peddling such a nuisance that the number of peddlers must be restrained.

If the alleged license is not for revenue and does not regulate the occupation of peddling, it must be a license for giving a monopoly, or for prohibition, or for both.

Temple v. Sumner, 51 Miss. 18, 24 Am. Rep. 615.

Such a law is the result of an arbitrary and unreasonable exercise of class legislation.

Chaddock v. Day, 75 Mich. 527, 4 L. R. A. 809.

The right to buy, sell, barter, and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself.

Carrollton v. Bazzette, 159 Ill. 284, 31 L. R. A. 522.

It would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so; ordinances which have this effect cannot be sustained.

Dill. Mun. Corp. ¶ 323; *Tugman v. Chicago*, 78 Ill. 407.

Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves.

Welton v. Missouri, 91 U. S. 279, 23 L. ed. 849.

If it is to be regarded as a tax upon goods it is unequal taxation.

Cooley, Taxn. 169; Desty, Taxn. 1888.

The general public is by this law deprived of its equal right to buy of a peddler, and a monopoly is established against both in favor of the town merchant.

Peoria v. Guenheim, 61 Ill. App. 878.

Messrs. H. W. Childs, George B. Edgerton, and S. A. Anderson for respondent.

Canty, J., delivered the opinion of the court:

Relator was by a justice of the peace convicted of peddling goods without a license in the town of Rose, in Ramsey county, contrary to chap. 107, Laws 1897, which provides:

"Sec. 1. No person shall hereafter be allowed to sell or expose for sale any personal property within any organized township within the state of Minnesota, as a peddler or hawker, without first obtaining a license therefor from the proper authorities of said organized township, in the manner hereinafter prescribed.

"Sec. 2. The township supervisors of every organized township in the state of Minnesota are hereby authorized and empowered to establish rates and prescribe rules for the issuing of licenses to hawkers and peddlers within the limits respectively of such organized township. The fee for such license in any organized township shall not exceed \$30 per annum."

Section 8 provides that the town clerk may issue the license, and § 4 provides that, on conviction of peddling without a license issued as provided by the act, a fine of not less than \$10 or more than \$100, or imprisonment not exceeding ninety days, may be imposed.

Section 5 reads as follows: "Sec. 5. This act shall not be construed to apply to any persons traveling from place to place, soliciting orders for goods, wares, or merchandise, with or without samples, where such goods, wares, or merchandise are to be delivered by or through a person or corporation other than the one soliciting such orders; neither shall it be construed to prevent the sale accompanied by delivery of goods, wares, or merchandise to retail dealers; nor shall it be construed to apply to train boys; nor shall it be construed to prevent any manufacturer, mechanic, nurseryman, farmer, butcher, fish or milk dealer, selling, as the case may be, his manufactured articles, or products of his nursery or farm, or his wares, as a fish or milk dealer or butcher, either by himself or employee."

Relator was sentenced to imprisonment on such conviction, and sued out a writ of habeas corpus, claiming that this act is unconstitutional and void for two reasons: (1) It contravenes §§ 33 and 34 of article 4 of the Constitution, prohibiting partial class legislation; and (2) it permits an excessive and unreasonable amount of money to be demanded as a license fee. We will consider only the first ground. We are of the opinion that the act is unconstitutional on the first ground. Section 33, aforesaid, provides: "In all cases where a general law can be made applicable, no special law shall be enacted; and whether a general law could have been made applicable in any case,

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is hereby declared a judicial question, and, as such, shall be judicially determined without regard to any legislative assertion on that subject." Section 34 provides: "The legislature shall provide general laws for the transaction of any business that may be prohibited by § 1 [§ 33] of this amendment, and all such laws shall be uniform in their operation throughout the state." This court has often held that, under these sections, the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class. And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes. We are of the opinion that these rules have not been complied with in the framing of this statute. It was proper to leave out of the class of persons to whom the act should apply several of the classes of the persons excepted by § 5 thereof. But other persons are excepted by § 5, who cannot be left out of the class covered by the act on any natural or proper distinction or principle. Thus, the manufacturer is allowed, by himself, and his employee, to peddle without license the wares of his own manufacture. The legislature can regulate the business of hawker or peddler only for the purpose of preventing it from becoming a nuisance. The business is inherently moral and legitimate in itself, but there is in it a tendency to abuse, as many irresponsible, clamorous, and intrusive persons engage in it. It cannot be held, on any sound principle, that peddling may not become a nuisance as well when the peddler or his employer has manufactured the wares he peddles as when someone else has manufactured them. This act allows the manufacturer of brooms, tinware, patent medicine, or any other articles, whether manufactured in this state or elsewhere, to employ the most obnoxious and irrepressible peddlers to hawk his wares for him without license, while no peddler can buy the same goods from the manufacturer, and peddle them on his own account, without a license. For the purposes of a law to prevent peddling from becoming a nuisance, we cannot, on any proper basis of classification, distinguish between the peddling of goods by the manufacturer and his servant, and the peddling of the same goods by the purchaser from the manufacturer. Thus, when the object of a law was to prohibit the nuisance arising from the emitting of dense smoke from chimneys, the law was held unconstitutional because it excepted from the operation of the act the chimneys of manufacturing establishments. *State, McCue, v. Ramsey County Sheriff*, 48 Minn. 289. The distinction was held to be arbitrary, and the classification improper. In the same manner as the act here in question attempts to distinguish between peddling by the manufacturer and his servant and peddling by the purchaser from such manufacturer, it attempts to distinguish between peddling by the farmer or nurseryman and peddling by the purchaser from such farmer or nurseryman; between peddling by the butcher and peddling by the purchaser from such butcher. These distinctions are arbitrary and no proper basis for classification. This disposes of the case.

The act in question is unconstitutional, and the conviction under it is illegal and void.

It is ordered that the relator be, and he hereby is, discharged from custody. Let judgment be entered accordingly.

Mitchell, J.:

While I concur in the result I do not wish to place the decision of the case exclusively

upon §§ 83 and 84, art. 4, of the Constitution. I am of opinion that, even if these sections had never been adopted, the act in question would have been invalid as "class legislation," because repugnant to § 2, art. 1, of the Constitution, which declares that "no member of the state shall be . . . deprived of any of the rights or privileges secured to any other citizen thereof unless by the law of the land."

TENNESSEE SUPREME COURT.

T. J. BIGLEY *et al.*, *Appls.*,

v.

W. S. WATSON *et al.*

(98 Tenn. 353.)

1. The rule that a decree which is not confined to matters presented in the pleadings is subject to avoidance does not apply to a consent decree when the court had jurisdiction of the parties and of the subject-matter.
2. The disability of coverture of a party to a consent decree who does not avoid it in her lifetime will not prevent the decree from being binding on those claiming under her after her death.
3. An estate by curtesy cannot attach to a mere life estate.
4. A remainder will be regarded as vested rather than contingent if the disposition is so obviously upon the border as to be inherently doubtful between the two.
5. A remainder to the children of a woman who has an estate for life is not extinguished until her death, although she may be very old and childless, as the law does not assume that there is an impossibility of issue at any age, however great.
6. The fee is not in abeyance while a remainder is contingent under a consent decree in partition giving one party a life estate with remainder at her death to her children then living or the issue of such as may be dead, but the fee abides with her during such contingency, and if the line of remaindermen is extinct at her death her title is freed from the remainder and subject to disposal by her will.
7. The statute abrogating the rule in *Shelley's Case* (Acts 1851 and 1852, chap. 91, § 1) by providing that, on the termination of a life estate with remainders to heirs or heirs of the body of the life tenant, such heirs shall take as purchasers by virtue of the remainder so limited to them, gives no right to "heirs" to whom no remainder was limited as against devisees of one who was not only a life tenant but in whom the fee abode subject to a contingent remainder to her surviving children or issue of children, when by the extinction of the line of her descendants during her life the remainder failed and her title at the moment of her death became absolute.

(March 19, 1897.)

NOTE.—Since the court adopts the view of "the minority with the better reason," and concedes that the majority of the authorities may be against it, no attempt will be made here to marshal the authorities for and against the position.

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APPEAL by complainants from a decree of the Court of Chancery Appeals affirming the decree of the Chancery Court for Davidson County which dismissed a bill filed to establish title by inheritance to certain real estate and to remove clouds therefrom. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stokes & Stokes for appellants.

Mr. Morton B. Howell for appellees.

Mr. W. O. Vertrees guardian *ad litem*.

Caldwell, J., delivered the opinion of the court:

This is a proceeding in equity to set up title by inheritance to certain real estate, to remove clouds from that title, and to have an account of rents and profits. The chancellor, hearing the cause on its merits, dismissed the bill, and the court of chancery appeals affirmed his decree.

George W. Boyd died, testate, many years ago; and by his will, probated in 1880, gave considerable real estate to his widow and four children,—one son and three daughters. The widow dissented from the will, and procured an allotment of dower. In the course of time the widow died, and the property covered by her dower passed, under the will, to the four children. Subsequently one of the daughters died, intestate, unmarried, and without issue. Thereupon the other three children, all of whom were married, and the husbands of the two daughters, filed a joint *ex parte* petition in the chancery court of Davidson county to have the real estate previously covered by the dower and that owned by the deceased daughter partitioned among the three surviving children in equal parts. Steps appropriate to that end were taken under the direction of the chancellor; and final decree, devesting and vesting title, was passed in November, 1854. By this decree the title to a tract of 56 acres and to a town lot, assigned to Mrs. Sarah A. Watson, one of the surviving daughters, was vested in her "for her sole and separate use during her life, and at her death to her children then living, and the issue of such as may be dead." Mrs. Watson then had two children, but both of them died, without issue, in her lifetime. She herself died in 1893, and by her will devised the real estate just mentioned to her husband, W. S. Watson, the father of her children. He went into possession under the will, and, as a devisee of his wife, sold the 56 acres, and mortgaged a part of the

town lot. In 1895, the complainants in this cause, as heirs at law of Mrs. Watson, filed their bill against her husband and his conveyees to recover the whole of said property, to remove his conveyances as clouds upon their title, and to have an account for mesne profits.

The theory of the bill, briefly stated, is that Mrs. Watson, having only a life estate, could not effectively devise the remainder; and that, having left no children, nor the issue of children, the remainder did not become vested in them, but upon her death descended to her heirs at law. Answering, the defendants say, in substance: (1) That so much of the partition decree as undertook to cut down her interest in her own land to a life estate was *coram non judge*, and void; and (2) that, treating that decree as valid, she nevertheless had power to devise the remainder; because the contingency upon which it was to vest never happened; and (3) that, in any event, Watson is entitled to a life estate as tenant by the curtesy. It is undoubtedly true that the partition decree is somewhat broader than the pleading. The petition under which that decree was rendered sought only a division of the lands among the three claimants; while the decree went further, and divided the fee of Mrs. Watson into a life estate and remainder, giving the former to her, and the latter to her children and their issue living at her death. It is well settled that a decree should be confined to the matters presented in the pleadings, and that an adjudication of other matters is *coram non judge*, and, for that reason, subject to avoidance. *Gilreath v. Gilliland*, 95 Tenn. 888; *Rogers v. Breen*, 9 Heisk. 679; *Randolph v. Merchants' Nat. Bank*, 9 Lea, 68, and cases cited. This rule, however, does not extend to consent decrees rendered in causes where the court had jurisdiction of the parties and of the subject-matter. *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 982; *Nashville, C. & St. L. R. Co. v. United States*, 118 U. S. 261, 28 L. ed. 971; 5 Enc. Pl. & Pr. 962; *Boyce v. Stanton*, 15 Lea, 347. The decree here impeached by the defendants falls within this exception to the general rule, and must therefore be treated as operative in all its parts. Mrs. Watson was in the court of plenary jurisdiction upon her own petition, and with full knowledge of her rights she and her husband assented to, and, through their counsel, procured, the decree in question. It matters not, in this proceeding, that Mrs. Watson was a married woman at the time, for decrees entered by consent of persons under the disability of coverture or infancy are avoidable alone by original bill, and then only for good reasons shown. *Jones v. McKenna*, 4 Lea. 680; *Mugroove v. Luak*, 2 Tenn. Ch. 580; *Wall v. Bushby*, 1 Bro. Ch. 484; 2 Dan. Ch. Pl. & Pr. 5 Am. ed. *974. In any and every aspect of the question the decree was binding on Mrs. Watson so long as she elected to let it stand. She did not, in fact, avoid it in her lifetime; hence, it was in force at her death, and is now binding on those claiming under her. By the plain terms of the decree Mrs. Watson reserved to herself only a life estate. This being so, and nothing else appearing, her husband is entitled to nothing as tenant by the curtesy. Curtesy cannot attach to a mere life estate. *Beecher v.*

Hicks, 7 Lea, 207; *Alexander v. Miller*, 7 Heisk. 81; 2 Kent, Com. *184. That part of the decree which adjudged that the lands allotted to Mrs. Watson should pass 'at her death to her children then living, and the issue of such as may be dead' created a valid contingent remainder in fee. The interest given was a remainder in fee, because it comprised the whole residue of the estate (4 Kent, Com. *198; 2 Bl. Com. 164; 2 Washb. Real Prop. 5th ed. 585); and it was contingent, rather than vested, because limited to take effect in 'dubious and uncertain' persons, as under Blackstone's first class and Fearn's fourth class of contingent remainders. 2 Bl. Com. 169; 1 Fearn's, Contingent Remainders, 8-9; 4 Kent, Com. *206, 207; 2 Washb. Real Prop. 608, 614.

It is not amiss to remark in passing that "the lines of distinction between vested and contingent remainders are so nicely drawn that they are sometimes difficult to be traced" (4 Kent, Com. *204), and that in those instances where the disposition is so obviously upon the border as to be inherently doubtful between the two, the doubt will be resolved in favor of the former, for the reason that the general law favors the vesting of estates at the earliest practicable moment. This remainder failed, because the line of remaindermen became totally extinct before the happening of the event upon which alone it could possibly have vested. The only two children born to Mrs. Watson, the life tenant, died, without issue, years before her death; consequently she died without children 'then living,' and there was no one to take the remainder, as such.

This suit was brought, as before recited, to solve the problem of the present ownership of the property, complainants asserting their right to it as heirs at law of Mrs. Watson, and the defendants claiming it through her will to her husband. In deciding the question it is important to inquire first when the remainder fell. If it was extinguished immediately upon the death of the longer liver of her two children, or at any other time in advance of her own death, Mrs. Watson at that moment became the absolute owner of the whole estate and unquestionably had plenary power to dispose of it by will to her husband, or to anyone else, subject to his right as tenant by the curtesy. On the other hand, if the remainder ceased only at the very instant of her death, the controversy between the heirs and the devisee as to the better title becomes more interesting. It is not difficult to state a case in which a remainder would cease effectually anterior to the termination of the life estate. For instance, if land be given to A for life, with remainder in fee to B if living at A's death, and B dies first, the remainder is completely extinguished at the moment of B's death, and the donor may thereafter deal with the fee the same as if the remainder had never been created. Mrs. Watson was an old woman when she died, and it is suggested that on account of her advanced age she was entirely incapable of bearing other children for years after the death of the two born to her when younger, and therefore that the remainder came to an end, and she was again full owner of the land some time in advance of her own decease, and while she still survived. This suggestion, so far as involving a conclu-

sion of law, is unsound, because based upon an assumed impossibility of other issue to Mrs. Watson after she had grown old. Lord Coke says: "The law seeth no impossibility of having children" (Co. Litt. 28); and Blackstone says: "A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old." 2 Bl. Com. 125. This rule of law has been recognized and applied in several American cases. In *State v. Lash* the supreme court of New Jersey briefly remarked that "by the common law the possibility of issue is commensurate with life." 16 N. J. L. 888. In a comparatively recent case the supreme court of Pennsylvania used this emphatic language, namely: "The rule has stood the test of time, and received the sanction of ages. . . . Nature has fixed no certain age, by years, at which a child-bearing capacity shall begin and end. . . . The presumption of law is in favor of issue, notwithstanding advanced age." *List v. Rodney*, 88 Pa. 428. This court, in deciding the case of *Garner v. Dowling*, said: "It is stated in the bill that Mrs. Garner [the life tenant] is past the time of life when she may be reasonably expected to have any children, but her age is not shown, and if it were, in legal contemplation it is not impossible she may have children, and the contingency is not determined until her death." 11 Helsk. 52. See, to same effect, 2 Sharswood & B. Lead. Cas. Am. Law of Real Prop. 251-258, citing this case and others. So, then, this remainder was subsisting after Mrs. Watson's children died and she grew old, and was extinguished only at her decease. Her heir and her devisee both appear, claiming under her as of that time, and dispute with each other as to the better right. "Connected with the favor shown by the law to the heir is the rule that where a person who is heir of his ancestor is also made a devise, by that ancestor, of the exact estate which, had there been no will, he would have taken as heir, he shall be held to be in by descent as to the worthier title." 8 Sharswood & B. Lead. Cas. Am. Law of Real Prop. 450. "A devise to the heir at law is void, if it gives precisely the same estate that the heir would take by descent if the particular devise to him was omitted out of the will. The title by descent has, in that case, precedence to the title by devise." 4 Kent, Com. *506. "It is well settled that one who holds the same estate by devise, that the law casts on him by descent, is in by descent, and not by devise." *Hoover v. Gregory*, 20 Yerg. 451. Manifestly, this rule with respect to the worthier title is unavailing and inapplicable in this case, for the reason that the heir at law and the devisee are distinct persons; the devise is not to the person who would take by descent in the absence of the will.

Having ascertained that the remainder created in the decree was in fee, that it was contingent, that it never became vested, and that it terminated at the death of the life tenant, and not sooner, for the lack of someone to take it, the next pertinent inquiry is: Where did the inheritance have its abode in the meantime,—in the donor, Mrs. Watson, on the one hand, or in abeyance, *in nubibus*, *in gremio*

legis, on the other hand? Fearné says: "Where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor, and his heirs, or in the heirs of the testator, until the contingency happens to take it out of them." Fearné, *Contingent Remainders*, p. 351. Kent lays down the same rule in the language following: "If a contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance, in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descends to the heirs of the testator, to remain until the contingency happens. The general and equitable principle is of acknowledged authority." 4 Kent, Com. *257. It should be borne in mind, however, that these learned authors, in the language quoted from them respectively, refer alone to dispositions by way of use or by will, and not to all dispositions. They are not in harmony when they come to consider the residence of the inheritance pending the contingency if the remainder be created by common-law conveyance. As to this question there has been great contrariety of opinion from the Year Books down to the present time. Fearné would have the rule uniform, and have it apply alike to each of the three cases,—to dispositions by way of use, by way of devise, and by common-law conveyance,—leaving the inheritance in the last case with the grantor until it could vest in the grantee in remainder. By way of criticism of what others have said to the contrary, he observes: "These opinions are founded on an assumption that the remainder must pass out of the donor at the time of the livery, and, consequently, that no estate shall remain in him after such livery; and therefore in the case of a lease to one for life, remainder to right heirs of J. S.; the remainder, they tell us, is in abeyance, or *in nubibus*, or *in gremio legis*, though by way of some sort of compromise between common sense, and the supposition of an estate passing out of a man, where there is no person *in rerum natura*, no object besides hard and hardly intelligible words for the reception of it, at the time of the livery; they are compelled to admit such a species of interest to remain in the grantor, as upon the determination of the estate before the contingent remainder can take place, entitles the grantor or his heirs to enter and reassume the estate. . . .

It must be an object of no small curiosity, to understand how a remainder can pass from a donor until there exists some donee to receive it of him; if it passes at all, the conclusion rather seems to be, it passes to somebody; and whilst it does not pass to anybody, one might suppose it does not pass at all. And, however profound a solution of this difficulty may be discoverable by adepts in legal lore, under the expressions, 'in abeyance,' 'in nubibus' or 'in gremio legis,' I cannot but think it a more arduous undertaking to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to recouple to the principles, as well of common law as of common sense, a suspension of the complete or absolute opera-

tion of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence; in any case at least, where a present estate of freehold passes in the meantime, as the immediate and initiate subject of the operation of such conveyance. . . . To whom, then, could it ever have passed out of the grantor? And from whom could it ever return to him? Where is the sense in saying, a remainder must pass out of the grantor in a case where you deny it ever passed at all to the grantee or anybody else? Or that livery must have its immediate operation in a case where it is admitted to have left the estate in the same plight exactly as if it had never been made at all? Would there not be better sense in considering the disposition itself, in all these cases, as put in suspense, till the event or contingency referred to decides its effect? What is there to move the subsisting estate in the lands from the grantor, before the alienation of it takes effect? That alienation may, indeed, rest in abeyance or expectation till the contingency or future event gives it operation. And it is that, rather than the resipied inheritance, to which, during its mere potential undecided operation, the allusion of—*caput inter nubila condit*—seems most applicable." Fearné. Contingent Remainders, pp. 360-363. Kent expresses his view in narrower limits, when he says Fearné "treated with ridicule the notion that the fee was in abeyance, *or in nubibus*, or in mere expectation or remembrance, without any definite or tangible existence; and he considered it as an absurd and unintelligible fiction;" and then for himself remarks. "Of the existence of such a technical rule of the common law there can be no doubt. The principle was, perhaps, coeval with the common law, that during the pendency of a contingent remainder in fee upon a life estate, as in the case already stated, the inheritance was deemed to be in abeyance. . . . Though the good sense of the thing, and the weight of liberal doctrine, are strongly opposed to the ancient notion of abeyance, the technical rule is that livery of seisin takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion, he has only a potential ownership, subsisting in contemplation of law, or a possibility of reverter; and Mr. Preston insists that an estate of freehold depending on another estate of freehold, and limited in contingency, must be in abeyance, and not in the grantor. The fee passes out of the grantor, and a vested estate of freehold necessarily precedes the remainder, and the inheritance is in contingency as well against the grantor, who has no power over it, as against the person to whom the contingent remainder is limited. Mr. Preston confidently asserts that the argument of Mr. Fearné, however abstractly just and reasonable, is without authority, and contrary to all settled technical rules. Another able writer [Cornish] also contends that the doctrine of abeyance was never shaken or attacked until Mr. Fearné brought against it the weight of his eloquence and talents." 4 Kent, Com. **258-260. In a note following these pointed observations are found these words: "There can be no doubt, though good sense was with

Mr. Fearné, that the book authorities are against him. We cannot surmount the technical rule, if technical rules are binding in questions on property. The one in this case deduces its lineage from high antiquity. It is found in the Year Books, and is dispersed over Plowden and Coke. . . . The fee will take an occasional flight to the clouds, and cannot be stayed, for common sense is disabled, and pierced by the *longe fallente sagitta*." Id. 260, note. Blackstone employs this language: "The fee simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs; and after the determination of those years or lives the land reverts to the grantor or his heirs, who shall hold it again in fee simple. Yet sometimes the fee may be in abeyance,—that is (as the word signifies), in expectation, remembrance, and contemplation in law,—there being no person *in esse*, in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est heres viventis*; it remains therefore in waiting, or abeyance, during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in abeyance." 2 Bl. Com. 107. Without noting any distinction as to this question between conveyances by way of use and dispositions by will on the one side and common-law conveyances on the other, but seemingly treating them all as in the same plight in this matter before the law, a recent author speaks thus: "It was also involved in doubt, in early times, what became of the fee while the remainder continued to be contingent. Until the contingency happened, the contingent remainder was deemed a mere possibility,—a chance of getting an estate, rather than the estate itself. It was considered an executory interest, the title to which only vested when the contingency happened. Some of the older authorities held that the title to the fee remained, to use their quaint expressions, *in nubibus*, *in gremio legis*, etc. In other words, the title is kept in abeyance while the remainder is contingent. But the modern authorities are inclined to hold that it remains in the grantor, and that he is not divested of the title in remainder until the contingency arrives." Tiedeman, Real Prop. § 411. The cases cited to the proposition contained in the last sentence are *Shupleigh v. Pilsbury*, 1 Me. 280, and *Rice v. Osgood*, 9 Mass. 38. Each of them involved the construction of a grant to the ministry, and held that the title to the fee remained in the grantor until the happening of the event upon which it could vest; and to this extent there seems to be a departure in both cases from the rule announced by Blackstone in the last sentence quoted from him, *supra*. The latest pertinent case discovered by our research was before the supreme court of

Kentucky. In the course of the opinion and as the legal basis of the decision, the court said: "That an estate in fee may be made to pass out of the grantor so as to remain in abeyance, in the clouds, in no person, pending the existence of the particular estate, seems to be well settled, notwithstanding the able argument of Mr. Fearne to the contrary." *Bohon v. Bohon*, 78 Ky. 410. The instrument under which the litigation arose in that case was a common-law conveyance, and not a will, or a deed by way of use.

Such are the leading authorities on both sides of this vexed question. They preponderate in favor of the proposition that by a rule of the ancient common law the fee in the supposed case was left in abeyance, rather than in the grantor. But they, at the same time, show with greater preponderance that the reverse would have been far more just and reasonable; and it is truly a matter of no small wonder that this purely technical rule should have survived the assault of Fearne for a single day. All the authorities agree, as they must of necessity do, that something must be in abeyance between the time of the common-law conveyance and the happening of the event upon which the contingent remainder must either cease entirely or become vested. The disagreement is in relation to the identity of that creature. The majority of the writers say it is the fee in the land; while the minority, with the better reason, say it is the conveyance of that fee. The majority say the fee leaves the grantor when he makes the deed, and wanders, none know where, pending the contingency, and then vests or reverts as the case may be; and the minority say it remains in the grantor, and that the deed becomes effective to pass it from him only when there is someone entitled to receive it. The latter view is acknowledged and adopted by all when the instrument is a conveyance by way of use, or a disposition by way of devise; and the only impediment in the way of its application to a common law conveyance is an ancient technicality, whose existence some forcibly deny, and which is confessed by its supporters to be against "the good sense of the thing," and against "the weight of liberal doctrine" as well. Conceding the original existence of this technical rule, and its firm place in the ancient common law, it may well be asked whether or not it deserves perpetuation in these modern times, when many of the technicalities and fictions of the common law of real property have passed away, and when every tendency is justly towards simplification of legal rules and uniformity of construction and procedure; and we would answer in the negative.

It must be remembered that the instrument here involved is not a deed in use, or a will, or a common-law conveyance, but a decree of court, and in that sense, *sui generis*. It partakes, however, to some extent, of the nature, and possesses in some degree the elements, of both the first and the last. It is, in a measure, like a deed in use, and also like a common-law deed; and at the same time different otherwise from both of them. One of three tenants in common joins with the others in par-

tition proceedings, and therein procures a decree vesting the title to her allotted share in herself for life, with remainder at her death to her children then living, and the issue of such as may be dead. Thus she may be said to have bound herself to stand seised to her own use for life, and to preserve the fee while she lived, so that the possession and ownership might pass to the intended remaindermen, if *in esse*, at her death; and in this view the inheritance, in the meantime, continued its abode in her, and, because there was no remainderman to take when she died, the remainder then ceased forever, and the will which she had made to her husband became operative and passed to him the whole estate. In the case of *Loring v. Elliot*, it appeared that Mrs. Hildreth, before marriage, conveyed her land to her father in trust, for the use of herself for life, with remainder to her children, if she should leave any. Having no children when she came to die, she undertook to dispose of the land by will. After her death her heirs at law claimed the land, and her devisees also claimed it. In deciding the controversy the court held that Mrs. Hildreth had an equitable reversion which she could lawfully devise, and that the claimants under her will were entitled to a conveyance from the trustee. 16 Gray, 568, 574. In so far as the decree involves the idea of a use or trust, it is essentially different from a common-law conveyance; and it is like a common-law deed, and unlike a conveyance by way of use, in that there is no interposition of a third person to stand as a technical or active trustee. Other points of similarity and dissimilarity need not be mentioned.

It is said for the complainants that this case must be controlled by the statute abrogating the rule in *Shelley's Case* [1 Coke, 88]; but that cannot be so, for the reason that the facts here—the decree and what followed—do not present the question intended to be answered by that enactment. The rule mentioned was abolished in this state by § 1, chap. 91, Acts 1851–52 (*Williams v. Williams*, 10 Helsk. 568; *Hurst v. Wilson*, 89 Tenn. 271), which is as follows: "Where a remainder is limited to the heirs, or to the heirs of the body, of a person, to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are heirs, or heirs to the body of such tenant, shall take as purchasers, by virtue of the remainder, so limited to them." Code 1858, § 2008; Mill. & V. Code, § 2814; Shannon's Code, § 3674.

Obviously none of the claimants in this case were contemplated as beneficiaries under the partition decree; they were in no sense embraced as remaindermen; hence the statute has no application to them. Those to whom it applies "shall take as purchasers, by virtue of the remainder so limited to them," and not as heirs of the life tenant. Complainants had no remainder limited to them, and for that reason they can take nothing "by virtue of the remainder." The object of the statute was to give the remainder exactly the effect indicated by the grantor or testator, and in the very persons intended by him, and to prevent it from passing otherwise, or to different persons.

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

W. S. McCORNICK, *Plff. in Err.*,
v.
WESTERN UNION TELEGRAPH COM-
PANY.

(40 U. S. App. 118, 79 Fed. Rep. 449.)

1. The provision of the Utah Constitution under the authority given by the act of Congress for the transfer of causes pending in the territorial courts of which the Federal courts do not have exclusive jurisdiction upon motion or petition under and in accordance with the act or acts of Congress does not require the application for removal to be made by the defendant before pleading or at any specified time before trial.
2. The power given by the act of Congress to the constitutional convention of Utah to provide for the transfer of actions pending in the territorial courts to the state or Federal courts is not an invalid delegation of the power of Congress, as Congress has power to create local legislative bodies and invest them with legislative powers.
3. The act of Congress admitting Utah as a state by accepting and ratifying the state Constitution invested all its provisions with all authority conferred by any act of Congress, even if the power given to provide for the transfer of causes pending in the territorial courts to the state and Federal courts was an invalid delegation of the power of Congress.
4. A telegraph company is not liable to a banker who cashes a draft upon the faith of a telegram from the drawee purporting to authorize the drawer to make such a draft, because of a mistake in transmitting the amount for which the draft is authorized, as the company cannot be liable to a stranger to whom it has never delivered the message, and to whom it owes no duty whatever, merely because he has seen the telegram and acted upon it to his injury.

(March 1, 1897.)

ERROR to the Circuit Court of the United States for the District of Utah to review a judgment in favor of defendant in an action brought to recover damages for failure to correctly transmit a telegram. *Affirmed.*

Before *Saiborn* and *Thayer*, Circuit Judges, and *Lochren*, District Judge.

Statement by *Lochren*, District Judge:

On October 18, 1892, George L. Frink, manager of the Glencoe Mining Company of the territory of Utah, applied to W. S. McCornick, the plaintiff, a banker of Salt Lake City, in said territory, with whom said mining company had an account, for a loan by way of overdrafts, to the amount of \$7,500, which was declined, but with the statement that plaintiff would so loan such sum as one D. E. Soule, of New Milford, Connecticut, would authorize said Frink to draw for upon the said Soule. Thereafter, on the same day, said Soule, in the city of New York, delivered to

the Western Union Telegraph Company, the defendant, a message, signed by him, to be telegraphed to said George S. Frink at Salt Lake City, to whom it was addressed, of the following purport: "May draw twenty-five hundred dollars at sight." By some error or mistake in transmission, the message, when delivered to Frink in Salt Lake City by the defendant's messenger, purporting to come from, and to be signed with the name of, said D. E. Soule, read: "May draw seventy-five hundred dollars at sight." Thereupon said Frink made on the same day a sight draft in favor of McCornick & Co. upon said D. E. Soule for the sum of \$7,500, and upon the delivery thereof to the plaintiff, and the exhibition to said plaintiff of said telegram as received by said Frink, the plaintiff advanced and loaned to said Frink, by placing the same to the credit of said mining company, the sum of \$7,500. Soule paid on said draft \$2,500, and no more, and the draft was protested. In the meantime the mining company had obtained from plaintiff \$7,276.68 of such loan. Frink and said mining company are insolvent, and the plaintiff seeks in this action to recover of the defendant \$4,776.68, as his damages because of the negligence and carelessness of defendant and its agents in the transmission and delivery of said telegram. The complaint was filed July 20, 1893, in the district court of the third judicial district of the territory of Utah, in and for Salt Lake county, and the answer of the defendant was filed in the same court on September 23, 1893, and the cause was pending in that court when, on January 4, 1896, the state of Utah was admitted into the Union. On February 1, 1896, the defendant filed in the district court of the third judicial district of the state of Utah, county of Salt Lake, its petition for the removal of this cause to the circuit court of the United States for the district of Utah, on the ground that the amount in dispute, exclusive of interest and costs, exceeded \$3,000, and that defendant was a citizen and resident of the state of New York, and the plaintiff a citizen and resident of the state of Utah. Defendant filed at the same time a proper bond for the removal of said cause, and thereupon, on the 21st day of February, 1896, by the order of the judge of said state court, said cause was removed for trial to said circuit court of the United States for the district of Utah, which last-named court afterwards denied the plaintiff's motion to remand said cause to the state court. Afterwards the said cause came on for trial at a regular term of said United States circuit court, and at the close of the evidence the jury, in obedience to the direction of the court, returned their verdict in favor of the defendant, and judgment was thereupon rendered in favor of the defendant for its costs.

Messrs. Arthur Brown and Brown, Henderson, & King, for plaintiff in error:
The liability of a telegraph company for neg-

NOTE.—On the question Who can maintain an action against a telegraph company for its default? see also *Milliken v. Western U. Teleg. Co.* (N. Y.) 1 L. R. A. 281; *Western U. Teleg. Co. v. Adams* (Tex.) 38 L. R. A.

6 L. R. A. 844; *Shingleur v. Western U. Teleg. Co.* (Miss.) 30 L. R. A. 444; *Fererro v. Western U. Teleg. Co.* (App. D. C.) 85 L. R. A. 648.

ligence rests upon the same principles as that of any other business, individual, or corporation for negligent acts to third persons. All that is necessary to be shown is the duty of the defendant to the plaintiff and the neglect of that duty.

A party must so use his own property as not to injure another. He shall not make representations to the injury of another if those representations are false, whether such falsehood was actually known to the defendant, and therefore malicious, or whether the statements were negligently made.

Western U. Teleg. Co. v. Coffin, 88 Tex. 94; *Harkness v. Western U. Teleg. Co.* 78 Iowa, 190; *Herron v. Western U. Teleg. Co.* 90 Iowa, 129; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72.

The defendant is liable to anyone to whom it makes a false representation, whether knowingly or negligently, whether that person is in contract relation with the defendant or not.

May v. Western U. Teleg. Co. 112 Mass. 90; *Boston & A. R. Co. v. Richardson*, 135 Mass. 478; *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140.

When the receiver of a despatch suffers loss from the careless and negligent performance of its duty by such a company, he is entitled to recover damages for the tort, and the proper remedy is an action on the case.

Western U. Teleg. Co. v. Dubois, 128 Ill. 254; *Western U. Teleg. Co. v. Short*, 53 Ark. 484, 9 L. R. A. 744; *Western U. Teleg. Co. v. Griswold*, 87 Ohio St. 318, 41 Am. Rep. 500; *New York & W. Printing Teleg. Co. v. Dryburg*, 85 Pa. 298, 78 Am. Dec. 888; *Smith v. Western U. Teleg. Co.* 83 Ky. 104; *Western U. Teleg. Co. v. James*, 90 Ga. 254; *Western U. Teleg. Co. v. Reynolds Bros.* 77 Va. 178, 46 Am. Rep. 715; *Reese v. Western U. Teleg. Co.* 123 Ind. 308, 7 L. R. A. 583; *Tobin v. Western U. Teleg. Co.* 146 Pa. 379; *Harris v. Western U. Teleg. Co.* 9 Phila. 88; *Western U. Teleg. Co. v. Richman*, 19 W. N. C. 569; *Western U. Teleg. Co. v. Adams*, 75 Tex. 522, 6 L. R. A. 844; *Western U. Teleg. Co. v. Nagle*, 11 Tex. Civ. App. 589; *Western U. Teleg. Co. v. Hale*, 11 Tex. Civ. App. 59; *Western U. Teleg. Co. v. Linn*, 87 Tex. 11; *Western U. Teleg. Co. v. Beringer*, 84 Tex. 88; *Erie Telg. & Teleph. Co. v. Grimes*, 82 Tex. 89; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72; *Herron v. Western U. Teleg. Co.* 90 Iowa, 129; *Western U. Teleg. Co. v. Longwill*, 5 N. M. 808; *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375; *Western U. Teleg. Co. v. Clifton*, 63 Miss. 807; *Croswell, Electricity*, § 462.

McCornick is not a stranger to this message. By its terms it was designed to be shown to him or one of his class. He is in privity with the message.

A party may not know the existence of a contract; but if it is made for his benefit or for the benefit of a class of which he is one, he would have a right of action upon the contract, and he would have a right of action in tort upon any duty growing out of the contract.

Pom. Rem. & Rem. Rights, § 139; Bliss, Code Pl. 240-242; *New York & W. Printing Teleg. Co. v. Dryburg*, 85 Pa. 802, 78 Am. Dec. 338; *Western U. Teleg. Co. v. Coffin*, 88 Tex. 94; *Western U. Teleg. Co. v. Kinsley*, 8 Tex. Civ. 38 L. R. A.

App. 527; *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511; *Hadley v. Western U. Teleg. Co.* 115 Ind. 191; 2 Jaggard, Torts, 800-910; *Tobin v. Western U. Teleg. Co.* 146 Pa. 375; *Harkness v. Western U. Teleg. Co.* 78 Iowa, 190; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L. R. A. 261; *Leonard v. New York, A. & B. Electric Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446; 3 Am. & Eng. Enc. Law, p. 828, note 3; 2 Shearm. & Redf. Neg. p. 543; *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375.

This rule of liability upon the telegraph company is in harmony with analogous liability on other subjects, such as the surgeon who goes to a hospital and without contract or even the consent of the patient undertakes to perform a professional operation upon the patient.

Du Bois v. Decker, 180 N. Y. 825, 14 L. R. A. 429; 2 Jaggard, Torts, pp. 910-918.

The builder of a scaffold for a high building was held liable to the persons using the scaffold—such as painters—for defects in it.

Declin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387.

The mere fact that a message is erroneously transmitted is prima facie evidence of negligence, and the burden is thrown upon the defendant to show any circumstances, if they exist, shifting the negligence to others.

Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 28; *Western U. Teleg. Co. v. Griswold*, 87 Ohio St. 318, 41 Am. Rep. 500; *Fowler v. Western U. Teleg. Co.* 80 Me. 390; *Ayer v. Western U. Teleg. Co.* 79 Me. 493; *Western U. Teleg. Co. v. McDaniel*, 108 Ind. 294; *Pearson v. Western U. Teleg. Co.* 124 N. Y. 265; *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 265, 4 Am. Rep. 673; *Turner v. Hawkeye Teleg. Co.* 41 Iowa, 458, 20 Am. Rep. 605; *Western U. Teleg. Co. v. Dubois*, 128 Ill. 243.

Messrs. George H. Fearons, L. R. Rogers, Joseph Dickson, David Evans, and Elemeious Smith for defendant in error.

Lochren, District Judge, delivered the opinion of the court:

1. The cause was properly removed to the United States circuit court. The right of removal in this case did not depend on the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as amended by the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), in relation to the removal of causes from the state to the Federal courts, which is inapplicable to suits pending in the courts of a territory. Such right of removal rested entirely upon the provision made by Congress for the special purpose of removing into the Federal courts such causes pending in the territorial courts of Utah, when such courts should cease to exist, on the admission of the new state, as might, conformably to the Constitution of the United States, be removed to the Federal courts for trial. By the act of Congress enabling the people of Utah to form a Constitution and state government, the convention provided for was empowered to provide by ordinance "for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah, at the time of the admission of the said

state into the Union, to such courts as shall be established under the Constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah, and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts, according to the laws thereof respectively." Act July 16, 1894 (28 Stat. at L. 107, 111, chap. 188, § 17).

Pursuant to this authority, the convention, in § 7 of art. 24 of the Constitution of Utah, ordained: "All actions, cases, proceedings, and matters which shall be pending in the district courts of the territory of Utah, at the time of the admission of the state into the Union, whereof the United States district or circuit courts might have had jurisdiction, had there been a state government at the commencement thereof respectively, shall be transferred to the proper United States circuit and district courts respectively; and all files, records, indictments, and proceedings relating thereto shall be transferred to the said United States courts. Provided, that no civil actions other than causes and proceedings of which the said United States courts shall have exclusive jurisdiction, shall be transferred to either of said United States courts, except upon motion or petition by one of the parties thereto, made under and in accordance with the act or acts of Congress of the United States; and such motion not being made, all such cases shall be proceeded with in the proper state courts."

Under these provisions, civil actions pending in the territorial district courts when the state was admitted, of which the United States courts had not exclusive jurisdiction, would remain in the state courts, unless a party thereto should move or petition for the removal, and the motion or petition was to be made under and in accordance with the acts of Congress. This means that the application and proceeding should, in form, conform to similar proceedings under the acts of Congress, and show the jurisdictional facts which would warrant the assumption of jurisdiction by the Federal court. It does not mean that the application for removal must be made before pleading by the defendant, or at any specified time before trial. The language used covers all cases so pending in the territorial courts "whereof the United States circuit or district courts might have had jurisdiction, had there been a state government at the time of the commencement thereof respectively." The provision should be so construed as to give effect both to the intention of Congress and of the convention. *Koenigsberger v. Richmond Silver Min. Co.* 158 U. S. 41, 39 L. ed. 889. To hold that no case pending in the courts of the territory of Utah could be removed, except such as came entirely under the removal act of 1897, is to hold that the congressional provision in the enabling act, and the provision in the Utah Constitution, are alike futile and meaningless, and that nothing but the act of 1897 has any 88 L. R. 2A.

force in respect to the subject. It is argued that Congress cannot delegate its legislative power to any other body, and therefore the provision in the Utah Constitution is void. It may be admitted that Congress may not delegate its general powers of legislation on subjects affecting the whole people. But it has never been doubted that Congress may, in respect to any designated district or territory outside of all the states, and therefore within its absolute control, create a local legislative body, and invest it with legislative powers. This has been done in respect to all of the organized territories, although the power of Congress remains complete over them, so that it can disorganize them, or abrogate any law passed by the local legislature, or make enactments for a territory as if it had no legislature. The constitutional convention of Utah was a governmental body, which Congress could properly provide for, to aid in preparing for the change from territorial existence to statehood, and which it could properly invest with authority to provide for all the details incident to such change. One of these unavoidable details was the proper distribution and placing of the causes pending in the territorial courts, which would go out of existence with the change. The argument, however, has no foundation. The act of Congress which admitted Utah as a state accepted and ratified its Constitution, and invested all its provisions with all authority conferred by any act of Congress.

2. The defendant telegraph company, by its contract with the sender of the telegram, made in consideration of payment for the service, was bound to him to transmit his message correctly, and would be liable to him for any damage he might sustain as the direct result of failure to perform such contract, except in so far as such liability had been lawfully limited by the terms of the contract. It also owed a duty to the person to whom the telegram was addressed, and to whom it was delivered by the telegraph company to be acted upon, to exercise care that the telegram so delivered should be authentic and accurate. The cases of *May v. Western U. Telegr. Co.* 112 Mass. 90, and *Elwood v. Western U. Telegr. Co.* 45 N. Y. 549, sustain the right of a person to whom a telegram is addressed and to whom it is delivered by the telegraph company, to recover for damage caused by negligence of the character indicated. But a telegraph company cannot be liable to a stranger to the company and to the telegram,—one to whom it has never delivered the message, and to whom it owes no duty whatever,—merely because he has seen the telegram, and acted upon it to his injury. *Western U. Telegr. Co. v. Wood*, 13 U. S. App. 317, 57 Fed. Rep. 471, 21 L. R. A. 706; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

The direction to the jury was correct, and the judgment is affirmed.

OKLAHOMA SUPREME COURT.

FIRST PRESBYTERIAN CHURCH of
Perry, *Pff. in Err.*,
v.

S. P. MYERS.

(\$ Okla. 808.)

***1. Voluntary religious associations and churches, organized to assist in the expression and dissemination of religious doctrine, may, by their governing bodies, prescribe rules and regulations for their church government and discipline, and such rules and regulations will be obligatory upon the members, congregations, and officers of such general association, and will be given effect to by the civil courts.**

2. It is the right of such religious unions or associations thus to establish tribunals for the decision of questions arising among themselves, and such decisions will be binding in all cases of ecclesiastical cognizance in matters of doctrine and discipline and to the extent of controlling the terms upon which the pastoral

*Headnotes by MCATTEE, J.

NOTE.—Liability for salary of pastor.

The question of liability for salary of pastor is governed by the rules which govern in cases of contracts generally. If a valid contract has been made for the payment of salary it will be enforced. If no valid contract has been made no recovery can be had as upon a contract. If services have been rendered in the absence of a contract there is some conflict as to whether or not a recovery can be had on a *quantum meruit*. The answer will depend largely on the rules governing the particular denomination to which the church is attached.

Taxes, subscriptions, etc.

Before the religious denominations in this country became strong, the custom was to support the pastor by individual subscription, public taxation, or endowment.

A subscription for the payment of the pastor's salary may be enforced. *Somers v. Miner*, 9 Conn. 465.

If a decision of an inferior tribunal of the church deposing the minister has been reversed on appeal and the minister reinstated, the subscriptions of the parishioners for his support are enforceable. *Dieffendorf v. Reformed Calvinist Church*, 20 Johns. 12.

If the members of the church sign a paper promising to pay the amount set opposite their names, each one is not liable for the full aggregate amount of the subscriptions. *Riddle v. Stevens*, 2 Serg. & R. 537.

If persons choose to give money to a person acting as a minister it is his right to receive it without regard to whether he rightfully or wrongfully officiates in such capacity, and he cannot be enjoined from receiving such voluntary contributions merely because he has been deposed from the ministry by some ecclesiastical judicatory. *Calkins v. Cheney*, 32 Ill. 463.

In *Huntington v. Ripley*, 1 Root. 323, it appears that it was the custom to assess the pastor's salary on the members of the church, and in case payment was not made suit was brought to enforce payment.

When a town has settled a minister an action will lie for his salary against the town notwithstanding there may be several unincorporated religious societies within the town the members of which may

relation shall be formed and the salary accompanying it shall be demanded; and the church judicatory having the jurisdiction on this matter, under the rules and regulations prescribed by the chief governing body of the church, shall be the exclusive judge, within the jurisdiction prescribed by such rules and regulations, as to whether the pastoral relation shall be formed between a minister of the denomination and one of the churches of such voluntary association.

3. According to the usage and form of government of the Presbyterian Church, a "call" made out by the congregation duly convened, in which the amount of salary is fixed and inserted in the "call," does not become effective under the rules and regulations of that church until such call is placed in the hands of the minister to whom it is addressed, and is deemed equivalent to a request of the congregation and of the pastor-elect for installation as a pastor, but the pastoral relation can only be formally consummated with the formal sanction of the presbytery; and the refusal of the presbytery to place the call in the hands of the minister, or to install him, puts an end to the civil contract.

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be exempted from contributing to the support of such minister. *Cochran v. Camden*, 15 Mass. 296.

An itinerate circuit rider of the Methodist Episcopal church cannot maintain an action to recover from a parish the money which has been paid under the tax assessment for the support of the gospel in that parish, from the mere fact that he has occasionally preached there. *Washburn v. Fourth Parish of West Springfield*, 1 Mass. 32.

A person who has contracted to officiate to two societies in two several towns cannot maintain an action for the taxes paid by his hearers for the support of public worship. The Constitution provides for the support of a public religious teacher in each parish by taxation. *Kendall v. Kingston*, 5 Mass. 524.

And to render the pastor regularly settled the society must be incorporated. *Barnes v. First Parish in Falmouth*, 6 Mass. 401; *Turner v. Second Precinct in Brookfield*, 7 Mass. 60; *Lovell v. Parish of Byfield*, 7 Mass. 230.

A contract for services is binding.

In *Taylor v. Gay*, 1 Sid. 409, an action was upheld on a contract to pay the plaintiff for preaching and teaching, although he was the vicar.

A parish cannot discharge its liability to its settled minister at its pleasure by simply passing a resolution that his services are no longer required. *Avery v. Tyringham*, 3 Mass. 182, 3 Am. Dec. 106; *Peckham v. North Parish in Haverhill*, 16 Pick. 274.

In *Youngs v. Hansom*, 31 Barb. 49, which was a case to enjoin the minister from officiating in a church, it is held that where a minister is called and settled in charge of an Episcopal church he cannot be dismissed without his consent except by the bishop of the diocese.

A rector of an Episcopal church may recover the salary provided in the original contract until dissolution of the pastoral relation, in the manner provided by the canons of the church. He cannot be forced to leave the pastorate by a reduction of his salary. *Bird v. St. Mark's Church*, 62 Iowa, 567.

In an action by a minister for his salary after his parish has voted to dismiss him, the parish cannot give evidence of previous immorality on his part not stated in its vote as a ground of dismissal. *Whitmore v. Fourth Cong. Soc.* 2 Gray, 308.

Ministers of the Methodist church are entitled to

ERROR to the Probate Court for Noble County to review a judgment in favor of plaintiff in an action brought to recover the alleged contract price for services as pastor of the defendant church. *Reversed.*

Statement by McAtee, J.:

The petition averred the incorporation of the church, and the employment of the plaintiff by it from the 16th day of September, 1893, to the 15th day of March, 1894, upon an oral contract, upon which he claimed a balance for services in the sum of \$50, all of which has

been paid since the incorporation of the church, except the sum of \$12, which includes interest, and charged to be due. The plaintiff further averred that from the last-named date, March 16, 1894, to the 15th day of March, 1895, he was employed by the defendant under an agreement, partly oral and partly in writing, the terms of which were that he was to receive the sum of \$200 for his services as minister; that the services were rendered, and were worth that sum, and that the defendant promised to pay the amount claimed. A small amount had been credited on this sum, received from va-

recover for their services as ministers whatever salary their congregations have contracted to pay them. *Jones v. Congregation of Mount Zion, 30 La. Ann. 711.*

If the contract is that a committee shall annually value the salary according to the price of the necessities of life, and that the salary shall be increased when the necessities rise in price, and decreased when they fall, the minister will be bound by the valuation of the committee unless it acts unfairly, partially, or corruptly. *Burr v. First Parish in Sandwich, 9 Mass. 277.*

Persons who sign a written agreement to pay a certain amount for the support of a certain person as minister so long as his services are employed cannot rescind the contract without the consent of the other party, but while the services are rendered their liability may be enforced. *First Religious Soc. v. Stone, 7 Johns. 112.*

If the trustees neglect to apply the revenue of the church to the payment of the minister's salary he may recover it by action against the corporation. *Ebaugh v. German Reformed Church, 3 E. D. Smith, 60.*

If the contract is that the minister will give his services for the amount of the subscriptions that have been made for his support which the church is to collect, the church may be held liable for whatever amount it might have collected but failed to collect. *Myers v. Baptist Soc. in Jamaica, 38 Vt. 614.*

The call of the rector by the vestry and the acceptance of such call create a contract for the payment of the stipulated salary so long as the pastoral relation continues. This contract is a valid right which the courts will enforce. *Jennings v. Scarborough, 56 N. J. L. 401.*

A priest cannot be removed from a church by a bishop so as to deprive him of the right to the rent of the pews of the church which is his only source of revenue, without cause. *O'Hara v. Stack, 90 Pa. 477.*

But that decision was repudiated in *Stack v. O'Hara, 98 Pa. 213.*

Interference with performance.

The fact that the pastor has not performed his offices in the church for a given time will not prevent his recovering his salary for that time if he offered to perform his duty but was prevented from doing so by the official members of the church. *Whitney v. First Eccl. Soc. in Brooklyn, 5 Conn. 405.*

That the minister preached in private houses upon being prevented from using the meeting house will not prevent his recovering his salary as minister. *Thompson v. Catholic Cong. Soc. 5 Pick. 439.*

If the minister is at all times ready to perform all the duties growing out of the pastoral relation, and in fact performs such duties as the parish permits him to perform, he is entitled to the stipulated sum as long as the relation continues. *Sheldon v. Congregational Parish in Easton, 24 Pick. 231. 38 L. R. A.*

Abuse of contract.

No recovery can be had for services if the association does not employ the minister or make any contract with him, express or implied, for services. So, where a congregation is permitted to use the church and to select the minister the religious society which owns the church will not be liable for his salary if it never enters into a contract with him. *Downs v. Bowdoin Square Baptist Soc. 19 Mass. 135.*

Unless the trustees as such are parties to the contract employing the pastor, no action can be sustained against the society as such for his salary. Although the contract by them need not be express, but it seems may be implied. *Miller v. Baptist Church & Congregation, 16 N. J. L. 251.*

The fact that the trustees as individuals sign a subscription paper for the raising of the pastor's salary does not make their action official so as to bind the society. *Landers v. Frank Street M. E. Church, 114 N. Y. 635.*

Under the New York statutes the salary is to be fixed by a majority of the persons who are entitled to elect trustees at a meeting to be called for that purpose and ratified by the trustees, and if the salary is fixed merely by the quarterly conference of the church no action will lie for its recovery. And it is further said that under the rules of the Methodist Episcopal Church no contract can be made binding the church to pay any particular amount of salary. *Landers v. Frank Street M. E. Church, 97 N. Y. 119. Reversing Landers v. Frank Street M. E. Church, 15 Hun. 340.* where it was held that the statutes providing a method of fixing the salary do not prohibit another method, and if the minister furnished services at the request of the society under an understanding that he was to be compensated, a promise is implied to pay him therefor upon which an action may be maintained.

There may be a valid implied contract for the services of the minister which may be enforced, the statute prescribing no form of contract except in the particulars mentioned, and if the amount of salary which is to be paid can be ascertained the court will enforce the contract. *Pendleton v. Waterloo Baptist Church, 49 Hun. 593.*

A person who has never become a pastor of a church according to its rules cannot recover for services rendered as such even upon a quantum meruit, and persons who sign a call which was not accepted are not liable for the payment of compensation as individuals. *Nell v. Spencer, 5 Ill. App. 461.*

If the call has not been accepted, but services are rendered pending the decision, no permanent obligation rests upon the church, and it may terminate the services when it chooses to do so; but for the services rendered the rate of compensation fixed in the call may be referred to and properly adopted as a measure of compensation. *West v. First Presby. Church, 41 Minn. 24, 4 L. R. A. 692.*

IN FIRST PRESBYTERIAN CHURCH v. MYERS et

ious members of the church, and there remained due upon this item, as he claimed, \$192. The plaintiff averred for a third cause of action a certain oral contract and agreement made with the defendant, by which he agreed to serve them as minister from the 16th day of March, 1895, to the 15th day of September, 1895, which services were to be rendered for the sum of \$100, upon which the sum of \$72 had been paid to him from the treasurer of the church and by the president of the board of trustees, leaving a balance due thereon of \$28. A copy of the written part of the contract referred to was filed with the petition marked "Exhibit A," and is as follows:

recovery is denied for lack of contract, but the question of recovery on *quantum meruit* is not settled.

Absence of incorporation.

The persons who sign the call to a minister who performs services as pastor in response to it are responsible for the salary where there is no incorporation of the society. *Thompson v. Garrison*, 22 Kan. 765.

If the deacons and elders of the church which is not incorporated enter into a contract with a minister for services, and after the church becomes incorporated the services are continued and accepted by the church and the contract having been assumed by it under its seal, no action will lie against the deacons and elders for arrears of salary. *Van Vlieden v. Welles*, 6 Johns. 85.

In *Baldwin v. McClinch*, 1 Me. 102, the court, in considering the question whether or not a certain person was a minister within the statutory exemption from taxation, says: "We do not see how an unincorporated society as such can obligate itself to its minister in such a manner as to create a legal liability on its part."

Dissolution of pastoral relation.

If the minister is suspended by the proper authority, and his relation to the church is finally dissolved, he cannot recover for his salary during the time of his suspension. *Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457.

A rector of an Episcopal church whose relation to his congregation has been dissolved by recommendation of a committee appointed by the bishop according to the custom of the church, can recover only the amount of salary recommended by the committee until the time when his relation was to cease. *Perry v. Wheeler*, 12 Bush, 544.

Entitled to compensation.

Nicholson v. Daniel, 152 Pa. 461, was a suit to compel a minister to account for money which he had received to carry on the work, and it appeared that he had started a mission and collected money with which a chapel was built, and some charitable work done, and a balance applied to his own salary amounting to a little less than \$1,500 per year, and the court allowed him to keep it and reversed a ruling of the master requiring him to turn over part of it to the trustees of the building fund.

A clergyman who enters into a contract with a vestry for services to the church may maintain an action against the church for his salary, although the vestry was illegally elected if he did not know of the illegality, but if he did know of it he cannot recover. *St. Luke's Church v. Mathews*, 4 Desauss. Eq. 572, 6 Am. Dec. 619.

Individual liability.

If a rector gives a person a title to the bishop, and thereby appoints him curate of his church, promising to allow him a salary and to continue him in office until otherwise provided of some

Perry, Oklahoma, April 9, 1894.

To the Rev. S. P. Myers: The congregation of the First Presbyterian Church of Perry, Oklahoma, at a regularly called congregational meeting February the 25th, 1894, being well satisfied with the ministerial qualification of you, S. P. Myers, and having good hopes from their past experience of your labors among them that your ministrations in the gospel will be profitable to their spiritual interests, did elect and earnestly call you and desire you to undertake the pastoral office in said congregation, furnishing you in the discharge of your duty all proper support, encouragement, and obedience in the Lord. And that you may be free

ecclesiastical preferment unless lawfully removed for fault, he cannot remove him without cause, and will be liable for his salary in case he permits it to fall into arrear. *Martyn v. Hind*, 2 Cowp. 437, 1 Dougl. 142.

A bishop is not liable for the salary of a priest whom he has engaged. *Rose v. Vertin*, 46 Mich. 457, 41 Am. Rep. 174.

No priest can bring assumpsit against his bishop for an amount sufficient decently to support him in the absence of express contract to furnish such support to him. *Tuigg v. Sheehan*, 101 Pa. 363, 47 Am. Rep. 727.

A call from a Presbyterian congregation to a minister, signed by three elders and a trustee, does not bind them to pay the minister's salary, but is to be regarded as the act of the congregation. *Pad-dock v. Brown*, 6 Hill, 532.

In *Stewart v. Martin*, 18 U. C. Q. B. 480, where it appeared that a committee of the church was elected annually, and members of the committee for one year were sued for salary upon a contract made by the committee of the previous year without anything to show that the members were the same in both years: the court says there is no principle of law which makes the members of a church committee chosen for one year liable for the engagement entered into by a committee which had served for a previous year. And it was held that the action was improperly brought.

Members of an unincorporated religious society, who through their trustees and priest who had power to incur debts stated an account with an ex-priest of the amount due him for salary and advances, may be held individually liable upon the indebtedness. *Sheehy v. Blake*, 72 Wis. 411, Affirmed, 77 Wis. 401, 9 L. R. A. 564.

Sale of property.

It has been held that a church site and edifice may be sold to pay the salary of the pastor. *Lyons v. Planters' Loan & Sav. Bank*, 56 Ga. 485, 12 L. R. A. 155.

Although in Vermont it has been held that the church property cannot be taken on execution to satisfy a judgment for salary of the pastor. *Bigelow v. Congregational Soc. of Middletown*, 11 Vt. 283.

So, the communion service of the church is not liable to seizure on execution to pay the pastor's salary. *Lord v. Hardie*, 82 N. C. 241, 83 Am. Rep. 682.

But equity may appropriate any fund applicable to the purpose to the payment of arrears of salary of the pastor. *Bigelow v. Congregational Soc. of Middletown*, 11 Vt. 283, Affirmed 15 Vt. 370.

Accord and satisfaction.

If the minister has taken a valid deed to some of the church property in settlement of his claim for services he cannot maintain an action for them. *Skinner v. Grace Church*, 54 Mich. 543.

H. P. F.

from worldly cares and avocations, according to their instructions, promise and oblige said congregation to pay you in quarterly instalments annually during the time of your continuing to be the regular pastor of said congregation the sum of \$200 in addition to what the Board of Home Missions will appropriate to your support. After the first year of your services as our pastor, the salary will be arranged in accordance with the appropriation of the Board of Home Missions for the support of the preaching of the Word in the congregation. The time for the beginning of your remuneration shall be the 16th of March, 1894. In testimony of the foregoing according to the instructions given us by said congregation at the aforesaid congregational meeting, we, the elders and trustees of the aforesaid congregation, do hereunto subscribe our names this, the 9th day of April, 1894.

Elders: J. O. Young,

M. S. Stahl.

Trustees: M. C. Latta,

Chas. Wenner,

George Todd.

The foregoing is correct.

Attest: J. O. Young, Moderator.

The defendant church answered, and filed its cross bill for an accounting, in which it was declared that the defendant expressly denied the employment and agreement alleged; that it had never obligated itself to pay the sum of \$50 for the first six months referred to, but averred that the plaintiff was employed to come to Perry to serve as a minister for the Presbyterian church at the time when there was no such church in existence, and without the knowledge of the defendant as a church, or any of the members afterwards constituting the defendant corporation, and was so employed by the Board of Home Missions of the National Organization of the Presbyterian Church in New York City, and at the sum of \$400 for the said period of six months; that said amount was paid by said New York board, and received by the plaintiff, and that he had collected a complete compensation for the services rendered, and that the employment had been accepted by the plaintiff at that salary, and that the people comprising the congregation of the church afterwards made a voluntary and free-will offering of \$50 to the plaintiff in addition to the amount for which he was so employed, and which was paid to him, and that he therefore received an excess of the amount for which he was employed, to wit., the sum of \$450, for the six months of service referred to in the first cause of action. The defendant further denied that from the 16th day of March, 1894, to the 15th day of March, 1895, the plaintiff was in the employment of the defendant, and denied that there was any contract and agreement entered into between the plaintiff and defendant whereby the plaintiff was to serve as a minister for the defendant during the said period of time, and that it ever agreed to pay him \$200, or any sum, for his services during that time, or that any money was ever paid to the plaintiff by the defendant or any of its members upon the pretended contract for \$200, and it averred that the plaintiff was again employed as a home missionary or "stated supply" for

this field by the Board of Home Missions referred to, at the sum of \$600 for the said year from March 16, 1894, to March 15, 1895, and that said amount was paid by the New York board of missions, and received by the plaintiff, and that he had full and complete compensation for his services, and there was nothing due the plaintiff. In answer to the third cause of action, the defendant admitted that it had employed the plaintiff from March 16, 1895, to September 15, 1895, and agreed to pay him the sum of \$100 therefor, but averred that different sums had been paid to plaintiff at different times amounting to almost the entire sum, and more than the amount of \$72.50, which plaintiff admits he had received on that account; but that the plaintiff had volunteered and agreed to collect the amount of \$100 for the members of the defendant corporation, and did make collections, but refused to account for them, and had made collections from the citizens of Perry, for the purpose of erecting a church edifice for the defendant congregation, and that he had refused to account for such sums, and that upon the accounting of the moneys thus collected and appropriated the defendant believed that such amount would show that the plaintiff was fully paid.

The plaintiff replied under oath to answer and cross petition of the defendant, denying all its allegations except the service of the notice therein mentioned. The plaintiff introduced evidence in support of his petition, and the defendant introduced evidence consisting to a "large extent of documentary evidence, introduced and marked as exhibits for identification, and brought here with the case made, consisting of 'The Rules and Form of Government of the Presbyterian Church and the different bodies thereof, to wit, the General Assembly, the Synod, the Presbytery, and the Local Churches.'" The plaintiff introduced evidence of an original "call," marked "Exhibit A," filed with his petition, to the introduction of which the defendant objected. Evidence was introduced showing that the services declared upon in the petition were well and faithfully performed, and worth the sum stated in the plaintiff's petition, and in support of the other allegations of his petition. It was admitted in the plaintiff's testimony that he had served the defendant corporation as minister only, and never served as pastor; and it was further admitted by the plaintiff that the "call" introduced by him in evidence had never been presented to him or confirmed by the presbytery in whose jurisdiction the local church, the defendant, was situated.

The defendant introduced the following documentary evidence, being extracts from the Rules and Form of Government of the Presbyterian Church, and extracts from the records of minutes and transactions of the presbytery in whose jurisdiction the defendant church is situated: Chapter 10. Of the presbytery: "A presbytery consists of all the ministers, in number not less than five, and one ruling elder of each congregation, within a certain district." "(13) The presbytery has power to receive and issue appeals from the church sessions, and references brought before them in an orderly manner; to examine and license candidates for the holy ministry; to ordain, install, remove,

and judge ministers," etc. "(15) Of the election and ordination of bishops or pastors: 1. When any probationer shall have preached so much to the satisfaction of any congregation as that the people appear to desire to elect a pastor, the session shall take measures to convene them for the purpose; and it shall always be a duty of the session to convene them, when a majority of the persons entitled to vote in the case shall, by a petition, request that a meeting be held. 2. When such meeting is intended, the session shall solicit the presence and counsel of some neighboring minister to assist them in conducting the election contemplated, unless highly inconvenient on account of distance, in which case they may proceed without such assistance.

4. On the day appointed, the minister invited to preside, if he be present, shall . . . announce to the people that he will immediately proceed to take the votes of the electors of that congregation for a pastor, if such be their desire; and, when this desire be expressed by a majority of voices, he shall then proceed to take votes accordingly. . . . (5) When the votes are taken, if it appear that a large minority of the people are averse from the candidate who had a majority of the votes, and cannot be induced to concur in the call, the presiding minister shall endeavor to dissuade the congregation from prosecuting it further. But, if the people be nearly or entirely unanimous, or the majority shall insist upon their right to call a pastor, the presiding minister in that case, after using his utmost endeavors to persuade the congregation to unanimity, shall proceed to draw a call in due form, and to have it subscribed by the electors; certifying at the same time, in writing, the number and circumstances of those who do not concur in the call. All proceedings shall be laid before the presbytery, together with the call. (6) The call shall be in the following or like form, *viz*: 'The congregation of —, being, on sufficient grounds, well satisfied of the ministerial qualifications of you, —, and having good hopes, from our past experience of your labors, that your ministrations in the gospel will be profitable to our spiritual interests, do earnestly call and desire you to undertake the pastoral office in said congregation; promising you, in the discharge of your duty, all proper support, encouragement, and obedience in the Lord. And, that you may be free from worldly cares and avocations, we hereby promise and oblige ourselves to pay to you the sum of —, in regular quarterly (or half year or yearly) payments during the time of your being and continuing the regular pastor of this church. In testimony whereof, we have respectively subscribed our names this — day of —, A. D. —. Attested by A. B., Moderator of the Meeting.' "(9) The call thus prepared shall be presented to the presbytery under whose care the person shall be; that, if the presbytery think it expedient to present the call to him, it may accordingly be presented; and no minister or candidate shall receive a call but through the hands of the presbytery."

The defendant then offered the following extracts from journal of minutes of meetings of Oklahoma Presbytery: "Meeting of April 88 L. R. A.

11, 1894. Home Missions. The report of the committee on home missions was received, and its recommendations adopted, and is as follows: '(8) We recommend the church at Perry to the Board of Home Missions for the sum of \$1,000, less the amount of money which the field shall be able to raise. We recommend as supply of the church the Rev. James Farr, a senior in Princeton Seminary. Submitted by the committee. F. W. Hawley, Chairman.' A call was presented from the First Presbyterian Church of Perry for the Rev. S. P. Myers as pastor. The presbytery declined to place the call in Mr. Myers' hands." "Called meeting, June 19th, 1894. A paper was received from the Perry Church, setting forth the grounds of its grievance at the action of the presbytery in relation to that church, and asking that the action of presbytery taken April 11th, 1894, regarding the work at Perry, be rescinded. On motion the paper was laid on the table. A call from the Perry Church for the installation of Rev. S. P. Myers was received, and laid on the table. Rev. S. P. Myers was appointed stated supply of the Perry Church for one year beginning March 16th, 1894, and the field was recommended to the Board of Home Missions for aid to the amount of \$800."

The defendant offered, among others, the following instructions: "(8) The jury are instructed that the written instrument relied upon by plaintiff in support of his second cause of action, and denominated a 'call,' is not, under the government and rules of the Presbyterian Church, by which both parties hereto are bound, a contract or obligation binding upon the church. And it being admitted that such 'call' was not presented to plaintiff by the presbytery controlling this territory, such call must not be considered as, alone, fixing any liability upon the defendant corporation. (4) The jury are instructed that unless they find from the evidence that subsequent to the presentation and rejection of the call the defendant corporation, by its proper officers or agents, and in the manner and form prescribed by the government and rules of such church (by which both parties hereto are bound), entered into a contract with the plaintiff whereby the defendant promised to pay plaintiff for the services set up in his second cause of action the sum of \$200 in addition to the amount received by him from the Board of Home Missions, then plaintiff cannot recover upon his second cause of action. But if you do find that such contract was, after the refusal of the presbytery to extend the call, so entered into, then you will find for the plaintiff upon said second sum." The judge refused to give these instructions offered by the defendant numbered 8 and 4, to which ruling of the court exceptions were reserved. The jury found for the plaintiff, and assessed the amount of his recovery at \$238. Motion for a new trial was heard and overruled.

Mr. F. H. Kellogg for plaintiff in error.
Mr. Henry Rucker for defendant in error.

McAtee, J., delivered the opinion of the court:

It was assigned as error (1) that the paper de-

nominated a 'call' was admitted in evidence over the objection of the defendant, and (2) that the court erred in refusing instructions numbered 8 and 4 asked by the plaintiff in error. The defendant in error argues in his brief that, as the only errors assigned are those of the court in regard to the admission of documentary evidence designated as a "call," and the instructions given and refused, all such entire evidence is not before the court, and the court must affirm the judgment of the trial court. The case made is certified to by the probate judge as "a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgment in said action." We cannot say, in the presence of this certificate, that the evidence is not all here. The probate judge before whom the evidence was taken and the case tried certifies that it is all here, and the assignments of error will be considered upon that statement. The proposition is, upon the merits of the case, whether the plaintiff below had a right to regard the "call" made out by the officers of the defendant corporation as a contract made with him directly, or whether, as the plaintiff in error contends, the "call" was a tentative proposition for a contract which could not become effective without the concurrence of the presbytery of the church; that the defendant in error was, like the plaintiff in error, bound by the rules and regulations prescribed by the "form of government of the Presbyterian Church in the United States of America," and that these had to be complied with in order to establish the pastoral relation which is here claimed by the plaintiff, and that, inasmuch as, under these rules and regulations, no minister or candidate shall receive a call but through the hands of the presbytery, and if it be true that the presbytery never placed the "call" in the defendant in error's hands, that as a matter of law it was noneffective for any purpose, and ought not to have been admitted to show the written part of the contract alleged in the petition, and ought not to have been given to the jury to consider for any purpose in behalf of the defendant in error. Questions of a similar character in which the legal effect of the rules and regulations adopted by the chief governing bodies of the churches in this country, and the effect of the action of their various judicatories, together with the rules and regulations which they adopt, have been considered in the supreme courts of a number of the states, and to a certain extent by the Supreme Court of the United States; and it has been uniformly held that wherever religious associations have been organized to assist in the expression and dissemination of religious doctrine, and have created for their direction in matters of doctrine, church government, and discipline tribunals within the association, and that the final and controlling effect of the ecclesiastical polity thus formed upon the individual members, congregations, and officers within the general association will not be questioned, but will be given effect to in the civil courts; and that all who unite themselves to such a body do so with the implied consent to submit to the system of ecclesiastical control, and are bound by it; and that it would be vain consent, and would lead to the total subversion of such re-

ligious bodies, if anyone aggrieved by one of their decisions should appeal to the secular courts, and could thus have that voluntary control which they had thus agreed to reversed and destroyed; and that it is of the essence of these religious unions and it is their right thus to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance in matters of doctrine and discipline, and that this control goes to the extent of controlling the terms upon which the pastoral relation shall be formed, and the salary accompanying it shall be demanded. It was said in the case of *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666, in the Supreme Court of the United States, by Justice Miller, that: "Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian Churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so." The opinion proceeds further to say that "in the very important case of *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95, recently decided in the same court, Judge Lawrence, who dissented, says: 'We understand the opinion as implying that in the administration of ecclesiastical discipline, and where there is no other right of property involved than the loss of the clerical office or salary as an incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, . . . and its decision of that question is binding upon secular courts.' And he dissents with Judge Sheldon from the opinion because it so holds." And it is further said that "we cannot better close this review of the authorities than in the language of the supreme court of Pennsylvania, in the case of the *German Reformed Church v. Com., Seibert*, 8 Pa. 291: 'The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the Word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.' It cannot be otherwise than concluded that, in order to maintain the unity of the faith and doctrine as held in either of the voluntary religious associations of this

country, the individual opinions of the pastors placed in authority and charge over the various churches of the denominations respectively should be the proper subject of ecclesiastical control and discipline, to be treated of and regulated by the various authoritative church bodies and judicatories to which each respectively belongs. And that in the presence of rules and regulations, if such are found to have been made by the supreme governing body of such a voluntary association, the various members, congregations, and officers who have voluntarily associated and have subscribed to such rules and regulations and books of discipline shall be bound by them, and, as in this instance, to the extent of holding that the right to salary is an incident to such discipline, and that the spiritual court provided for in the book of discipline is the exclusive judge of its own jurisdiction, and that its decisions upon all questions touching the establishment of the pastoral relation, if treated of and the terms upon which that relation is provided for in such books of discipline, are final, and binding on the secular courts. And this is the view which has been held and fully announced in the case of *West v. First Presby. Church*, 41 Minn. 94, 4 L. R. A. 692. In that case the call was extended to the plaintiff regularly by the presbytery, but was never formally accepted by him. It was therefore contended that he had never become a regular pastor of the church. The opinion holds that "according to the usage and form of government of the Presbyterian Church, the call is made by the congregation duly convened, and the amount of compensation or salary is fixed by it, and inserted in the call. . . . But the pastoral relation can only be established with the consent, and under the authority and direction, of the presbytery having jurisdiction. The call and proceedings of the parties under it are subject to the usages and discipline of the church, and the courts will not interfere any further than is necessary to ascertain and protect the strict legal rights of the parties. The call made by the congregation is submitted to the presbytery, and, if approved by that body, and accepted by the candidate, the pastoral relation is then formally constituted by installation by or under the direction of the presbytery, and usually as soon as conveniently may be. The call and its acceptance are deemed equivalent to a petition and request of the congregation and pastor-elect for such installation; but, as the pastoral relation can only be finally consummated with the formal sanction of the presbytery, so that judicatory may withdraw its approval, and refuse to proceed with the installation, and, according to its rules and established usage, it will refuse to do so if at the time appointed therefor the congregation then declines to receive the candidate as their minister. The presbytery, it appears, has the supervision and care of the churches in a particular district in connection with it, and in general has authority to order whatever pertains to their spiritual welfare, so that it may approve and establish the pastoral relation, or disapprove and annul it, and a dissolution of the pastoral relation, or a refusal to install, puts an end to the civil contract."—citing *Robertson v. Bullions*, 9 Barb. 185; *Con-*

nitt v. Reformed Protestant Dutch Church, 4 Lans. 339. And it was held in *Paddock v. Brown*, 6 Hill, 532, that "the form, character, and purpose of it, as well as the authority whence it issues, will be seen by referring to the fifteenth chapter of the form of government, etc., of the Presbyterian Church (Const. of the Presby. Church, 1842, p. 436), which may be resorted to, upon established principles of law, in order to arrive at the true meaning and legal effect of the 'call.' It will there be found to be an instrument issuing from the congregation, which may be signed either by the elders and deacons, by the trustees, or by a select committee, and attested by the moderator of the meeting. In the case before us it did so issue, was signed by three elders and one trustee, and attested by the moderator. The plaintiff was himself a minister of the Presbyterian denomination, and was, of course, familiar with the prescribed mode of proceedings preparatory to and in making out of a 'call' in due form." The question in that case was one as to the liability of the congregation itself or of the trustees. No question arose as to the action of the presbytery upon the call, and consequently no action of the presbytery was requisite in order to make the "call" valid. The case was decided in 1844, and it is cited here solely for the purpose of showing that the courts will consider the call, its form, character, and purpose, and will charge the minister who may sue with knowledge of the prescribed mode of proceedings preparatory to and in the making out of a "call" in due form. Other authorities are: *East Norway, L. N. Evangelical Lutheran Church v. Halvorson*, 42 Minn. 503; *State, Watson, v. Farris*, 45 Mo. 183; *McGinnis v. Watson*, 41 Pa. 31; *McRoberts v. Moudy*, 19 Mo. App. 26; *Powers v. Budy*, 45 Neb. 208; *Kuns v. Robertson*, 154 Ill. 894; *Krecker v. Shirey*, 163 Pa. 534, 29 L. R. A. 476; *Pounder v. Ashe*, 44 Neb. 672; *Juker v. Com.*, *Fisher*, 20 Pa. 484.

Adopting the views thus uniformly expressed, it is manifest that, inasmuch as the rules and regulations of the Presbyterian Church require that a "call" should be made out by a regularly called meeting of the congregation, and when thus made out it should be presented to the presbytery under whose care the person called shall be, and that, if the presbytery think it expedient to present the call to him, it may accordingly present it, and no minister or candidate shall receive a call but through the hands of the presbytery, and that, if the presbytery had declined to place the call in the plaintiff's hands, then it could never have been effective, nor could ever have been so considered by the defendant in error. The plaintiff himself admitted that the call had never been presented to him, or confirmed by the presbytery in whose jurisdiction the local church, the defendant, was situated; and that, while he was serving the defendant church during the period, he served them as minister only, and never as "pastor." The call itself provides in express terms for a "pastorate." It is an invitation to the plaintiff to undertake the pastoral office of said congregation, and creates a compensation upon the condition of "your being and continuing to be the regular pastor of said congregation." Leaving out of

view that control and effect which this court must concede to the judicatory termed "Presbytery" in the Presbyterian Church system, it is here admitted by the plaintiff that he never undertook the work to which the call offered by him in the case and introduced in evidence invited him,—that is, that he never became the regular pastor of said congregation; and upon this contention alone it would appear that he must fail in this action unless it be held that the casual service termed "ministration" is held to be equivalent to and identical with the service, office, and responsibility of the "regular pastor" filling the pastoral office. But this cannot be, since a minister is one who, having been ordained to the ministry, undertakes to perform certain services for another, while a pastor is one who has been "installed according to the usage of some Christian denomination in charge of the specific church or body of churches." Century Dict. titles, *Minister, Pastor*; Webster Dict. same titles. And under the form of government of the Presbyterian Church it is one who has been installed by the presbytery itself over the particular church, and that they have approved the "call" made

out by the congregation, and placed the same in his hands, and he has accepted it. The "call" specifies that the compensation shall be paid for "services as our pastor." We hold that the "call" should not have been admitted in evidence to prove the contract in the absence of evidence to prove the contract here sued upon, but that the court should, as a matter of law, have instructed the jury that the written instrument relied upon by the plaintiff in support of his second cause of action, and denominated a "call," is not, under the government and rules of the Presbyterian Church, by which both parties are bound, a contract or obligation binding upon the church; and that, since it was admitted that the call was not presented to the plaintiff by the presbytery controlling this territory, the "call" should not have been considered, alone, as fixing any liability upon the defendant corporation.

The case will therefore be reversed, and remanded for further proceedings in accordance with these views.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Eliza WILLIAMSON *et al.*

v.

Joseph T. JONES, *Appt.*

(..... W. Va.)

- *1. Petroleum oil in place is part of the land. Its wrongful extraction by one lawfully in possession is waste, and by a stranger is trespass; in both cases irreparable injury, which may be enjoined.
2. It is waste in a tenant for life to take petroleum oil from the land, for which he is liable to the reversioner or remainderman in fee.
3. A tenant for life may work open salt or oil wells or mines even to exhaustion, without account, but cannot open new ones.
4. It is waste in a tenant in common to take petroleum oil from the land, for which he is liable to his cotenants to the extent of their right in the land.
5. Things part of the land, wrongfully severed by a tenant for life, become personalty, but belong to the owner of the next vested estate of inheritance in reversion or remainder, not the life tenant.
6. Where there is a life tenant, and timber or other thing part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainder-

*Headnotes by BRANNON, J.

NOTE.—As to the nature of property in mineral, oil, and gas, see *note* to Williamson v. Jones (W. Va.) 25 L. R. A. 222.

As to the rights of dower in mines, see Seager v. McCabe (Mich.) 16 L. R. A. 247, and *note*.

As to the rights of life tenants generally, see also Koen v. Bartlett (W. Va.) 81 L. R. A. 128; Marshall v. Mellon (Pa.) 35 L. R. A. 816.

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man or reversioner. Equity has power to do so, if it do no harm to the life tenant, or he be compensated.

7. Principles of estoppel *in pais* discussed.

8. If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right.

9. A purchaser at a judicial sale is conclusively held as having notice of all facts touching the rights of others in the property sold, disclosed by the record of the case.

10. Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decrees will not affect or pass their right in the land.

11. A married woman cannot, by even fraudulent conduct, be barred under the principle of estoppel *in pais* from asserting her title to land, though separate estate; but as to her personal estate it is different. Now that she is enabled to contract as if single, she will be bound by estoppel *in pais* touching her contracts as if single.

12. An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel *in pais*, from asserting her title to either real or personal property against one misled thereby.

13. A tenant for life, or a tenant in common in sole possession claiming exclusive ownership, taking petroleum oil, and converting it to

- his exclusive use, is liable to account on the basis of rents and profits, not for annual rental.
- 14. A remainderman or reversioner has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid multiplicity of suits. The same is the case between tenants in common where one is guilty of waste.**
- 15. A tenant for life, who, by waste, has severed from the realty things that are part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest therein during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance.**
- 16. One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them.**
- 17. One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, cannot claim for permanent improvements.**
- 18. Under the circumstances, a party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits.**

(June 11, 1897.)

A PPEAL by defendant from a decree of the Circuit Court for Tyler County in favor of plaintiffs in an action brought to enforce a division of the proceeds of oil obtained from property in which complainants claimed an interest. *Reversed.*

The facts are stated in the opinion.

Meurs, Caldwell & Caldwell, for appellants:

The remaindermen, although not named as parties in the consolidated chancery suits in which the land was sold, were real and actual parties in such suits.

The sale was evidently made in their interest and with their concurrence.

The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the questions, and who are estopped by the previous decision.

Freem. Judgm. 1st ed. § 174; 7 Am. & Eng. Enc. Law, p. 1; *Tate v. Hunter*, 3 Strobb. Eq. 147.

Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party.

2 Black, Judgm. § 539.

If the remaindermen did not desire and concur that the sale should be made, and did not acquiesce in such sale with full knowledge, as is the only reasonable inference from the facts appearing in this cause, why were not Mrs. Williamson, Mr. Benjamin Engle, Nancy Engle, Mr. David H. Stealey, and Miss Kate Stealey called and examined by plaintiffs as witnesses?

36 L. R. A.

If, on the supposition that a charge or claim is unfounded, the party against whom it is made has evidence within his reach by which he may repel that which is offered to his prejudice, his omission to do so supplies a strong presumption that the charge or claim is well founded.

1 Starkie, Ev. 6th Am. ed. of 1837, p. 499; *Clifton v. United States*, 45 U. S. 4 How. 242, 11 L. ed. 957; *Glenn v. Glenn*, 1 Iowa. 498; *Goshorn v. Snodgrass*, 17 W. Va. 771; 2 Whart. Ev. § 1286, citing in note 1, *King v. Burdett*, 4 Barn. & Ald. 161; *Durgin v. Danville*, 47 Vt. 95; *Frick v. Barbour*, 64 Pa. 120; *Fowler v. Sergeant*, 1 Grant, Cas. 855; *Miller v. Jones*, 33 Ark. 845; *Wallace v. Harris*, 32 Mich. 894; *Bindley v. Martin Bros.* 28 W. Va. 774.

Captain Jones spent before this suit was brought over \$200,000 in developing the land as oil territory and in buying out his partners, Haskell and Tennant. He acted, in making his expenditures on the property, in the bona fide belief that he had a perfect title, and the plaintiffs must have known that Capt. Jones so believed. The transaction spoke for itself; and there was no pretense at the hearing that they did not so understand.

Sumner v. Seaton, 47 N. J. Eq. 119.

For the plaintiffs to stand by as they did, under such circumstances, and preserve silence for eighteen months as to their claims, is held to be fraud.

Anderson, Law Dict. p. 416; Bigelow, Estoppel, 2d ed. p. 453, note 1; *Goshorn v. Snodgrass*, 17 W. Va. 766.

The holding back of material evidence by any party to a suit raises a presumption of fact against him, whenever it appears that he could have produced such evidence.

Bindley v. Martin Bros. 28 W. Va. 774; *Union Trust Co. v. McClellan*, 40 W. Va. 412; *Wheeling v. Hawley*, 18 W. Va. 472; *Heflbower v. Drick*, 27 W. Va. 16; *Farley v. Bateman*, 40 W. Va. 542.

Near relationship affords a presumption between relatives of notice of matters of mutual concern.

Bump, Fraud. Conv. 3d ed. p. 208, and cases there cited; Roberts, Fraud. Conv. 452.

The remaindermen are estopped in equity without reference to the sale being concurred in and consented to by them, because they knew that Captain Jones paid the deferred instalments of the purchase money, made his expenditures for improvements, and bought out his co-owners, under the mistaken but honest belief that his title was perfect.

Sumner v. Seaton, 47 N. J. Eq. 108; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Mullan v. Carper*, 37 W. Va. 220.

Possession under his deed, which was duly recorded, was constructive notice to all the world, the presumption being that he was in, claiming under, and according to, his deed.

Forest v. Jackson, 56 N. H. 357; *Swan v. Thayer*, 36 W. Va. 50; *Sumner v. Seaton*, 47 N. J. Eq. 119.

The laches in delaying to sue in this case constitute a good defense by equitable estoppel. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 592, 593, 23 L. ed. 831; *Whittaker v. Southwest Virginia Improv. Co.* 34 W. Va. 229.

Lapse of time is not the test of equitable es-

toppel. The only criterion is whether it would not work more hardship to enforce the claims of the plaintiffs than not to enforce them.

Whittaker v. Southwest Virginia Improv. Co. 84 W. Va. 280; *Gallisher v. Cadwell*, 145 U. S. 873, 86 L. ed. 740; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 591, 593, 23 L. ed. 831; *Harwood v. Cincinnati & C. Air Line R. Co.* 84 U. S. 17 Wall. 78, 21 L. ed. 558; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 423; *Hayward v. El. of Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Holgate v. Eaton*, 116 U. S. 88, 29 L. ed. 588; *Darison v. Davis*, 125 U. S. 90, 31 L. ed. 635; *Société Foncière et Agricole v. Milliken*, 185 U. S. 805, 84 L. ed. 208; *Cox v. Montgomery*, 86 Ill. 898; *Gatzmer v. German Roman Catholic St. Vincent School Soc.* 147 Pa. 818; *Perry v. Pearson*, 185 Ill. 218; *Richardson v. Levi*, 69 Hun. 482; *Condon v. Hughes*, 93 Mich. 867; *Hammond v. Wallace*, 85 Cal. 532; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90; *Kline v. Vogel*, 90 Mo. 289; *Chetwood v. Berrian*, 89 N. J. Eq. 203, and 517; *Hunt v. Blanton*, 89 Ind. 88; *Lee v. Vacuum Oil Co.* 126 N. Y. 588; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 489; *McMurray v. Noyes*, 73 N. Y. 526, 28 Am. Rep. 180; *Smith v. Clay*, 2 Ambl. 645; *Darison v. Associates of the Jersey Co.* 71 N. Y. 838; *Re Lord*, 78 N. Y. 111; *Fowler v. Lewis*, 86 W. Va. 118; *Dryden v. Stephens*, 19 W. Va. 1; *Whittaker v. Southwest Virginia Improv. Co.* 84 W. Va. 217.

No excuse for the laches of plaintiffs in standing by without complaint or protest and seeing Captain Jones develop this oil territory by such great expenditures entirely at his own risk is shown, and therefore the defense of laches, in default of such excuse, ought to be sustained.

Pratt v. California Min. Co. 24 Fed. Rep. 869, 9 Sawy. 354; *Brown v. Buena Vista County*, 95 U. S. 160, 24 L. ed. 423; *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 453; *Sumner v. Seaton*, 47 N. J. Eq. 119.

The remaindermen were estopped in equity by their delay.

Hoyt v. Latham, 143 U. S. 569, 570, 86 L. ed. 265; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 592, 593, 23 L. ed. 831; *Bates v. Swiger*, 40 W. Va. 427; *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 443; *Farley v. Bateman*, 40 W. Va. 542.

Silence with knowledge of the mistake of the opposite party is included in "conduct" as applied to equitable estoppel.

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 453.

The very object of equitable estoppel "is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law unless prevented by the estoppel."

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 453.

Certainly the maxim *caveat emptor* can have no application under the circumstances of this case.

Kiefer v. Rogers, 19 Minn. 32; *Stone v. Tyree*, 80 W. Va. 704; *Bates v. Swiger*, 40 W. Va. 427.

The conduct of plaintiffs having been inequitable, they have no right to equitable relief.

Clarke v. Hart, 6 H. L. Cas. 633.

88 L. R. A.

There may be concealment of material facts by silence; there is such a concealment in contemplation of law when one who knowingly suffers another to deal with land as though it were his own, one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like, is silent when the circumstances would impel an honest man to speak.

Norfolk & W. R. Co. v. Perdue, 40 W. Va. 454; *Brown v. Buena Vista County*, 95 U. S. 160, 24 L. ed. 423; 2 Pom. Eq. Jur. 2d ed. § 805; *Gallisher v. Cadwell*, 145 U. S. 872, 86 L. ed. 740; *Johnston v. Standard Min. Co.* 148 U. S. 370, 37 L. ed. 485; *Felix v. Patrick*, 145 U. S. 817, 834, 86 L. ed. 719, 727; *Hoyt v. Latham*, 143 U. S. 555, 567, 86 L. ed. 259, 264; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90; *Clegg v. Edmondson*, 8 DeG. M. & G. 813; *Prendergast v. Turlon*, 1 Younge & C. Ch. Cas. 110.

The doctrine of equitable estoppel applies to married women and to infants of years of discretion.

Bigelow, Estoppel, 2d ed. of 1876, p. 448; 2 Pom. Eq. Jur. 2d ed. §§ 814, 815; *Knight v. Watts*, 26 W. Va. 207; 2 Herman, Estoppel & Res Judicata, §§ 1120, 1121; *Gibson v. Herriott*, 55 Ark. 85; 6 Wait, Act. & Def. p. 687.

Captain J. T. Jones, as tenant for life, had a right to the whole of the oil produced from the Williamson farm.

Koen v. Bartlett, 41 W. Va. 559, 81 L. R. A. 128; *Williamson v. Jones*, 89 W. Va. 264, 25 L. R. A. 222.

The oil was a part of the profits of the land, as much so as growing crops.

National Transit Co. v. Weston, 121 Pa. 495; 2 Bl. Com. 282; 1 Washb. Real Prop. p. 130; Taylor, Land. & T. § 846.

Captain Jones having opened the mines as owner of three undivided tenths of the land in fee, he had the same right to continue to work these open mines as if some other owner of the three undivided tenths had opened the mines.

If the mines were opened Mrs. Williamson, the life tenant, would take the profit of the land in proportion to her interest, being seven undivided tenths.

Neel v. Neel, 19 Pa. 328.

So long as they are unworked and unsevered, minerals are a part of the freehold; but when lawfully severed they become personal chattels.

15 Am. & Eng. Enc. Law, p. 508.

David Hickman knowing that this lawful severance and conversion into realty might be brought about after his death by the owner or owners of the three undivided tenths of the land, must be held to have intended that the life tenant should take this profit thus made from the land, or David Hickman would have cut Mrs. Williamson off from such profits by his will.

Clavering v. Clavering, 2 P. Wms. 888; *Koen v. Bartlett*, 41 W. Va. 559, 81 L. R. A. 128; *Neel v. Neel*, 19 Pa. 329; *Findlay v. Smith*, 6 Munf. 134, 8 Am. Dec. 733.

Even if the plaintiffs had not been estopped in equity to claim the land of oil, and if Captain Jones as life tenant had not had a right to

all of the oil produced from the Williamson farm, the remaindermen would only be entitled to a fair rent, being the usual royalty, for the share owned by them of the property in the condition it was when he took possession.

Rust v. Rust, 17 W. Va. 802; Woodfall, Land. & T. Webster's ed. with Am. notes 1890, **375, 376; Taylor, Land. & T. § 152; *Queen v. Westbrook*, 10 Q. B. 178; *Daniel v. Gracie*, 6 Q. B. 145; *Marquis Bute v. Thompson*, 18 Mees. & W. 487; *Jervis v. Tomkinson*, 1 Hurlst. & N. 195; MacSwinney, Mines, chap. 6, § 1b; *Henderson v. Eason*, 17 Q. B. 701; *Sargent v. Parsons*, 12 Mass. 149; *Dodson v. Hays*, 29 W. Va. 601; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Wheeler v. Horne*, Willes, Rep. 208; *Sturton v. Richardson*, 18 Mees. & W. 17.

A cotenant in the exclusive possession of land is liable for the rent of so much of the premises as was capable of producing rent at the time he took possession, but not for what was rendered capable by his labor.

Hancock v. Day, McMull. Eq. 69, 86 Am. Dec. 298; *Thompson v. Bostick*, McMull. Eq. 75; *Nelson v. Clay*, 7 J. J. Marsh. 188, 23 Am. Dec. 887.

The circuit court on its own view of the case at bar erred in refusing to put the royalty on one eighth of seven tenths at interest to be paid to Captain Jones as life tenant during Mrs. Williamson's life, after her death the principal to go to the remaindermen.

Blakley v. Marshall, 174 Pa. 425; Black, Judgm. § 509; *Webb v. Bucklew*, 82 N. Y. 555; *Collins v. Jennings*, 42 Iowa, 447; 1 Whart. Ev. § 781; 21 Am. & Eng. Enc. Law, p. 181; *Hawks v. Truedell*, 99 Mass. 557; *Bagot v. Bagot*, 82 Beav. 509.

Mr. W. P. Hubbard, for appellees:

Captain Jones is the grantee of Tennant, who was the purchaser at the judicial sale, and who, as the evidence shows, was his agent.

Wherever a purchaser holds under a conveyance, and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate which appears, either by description of parties, by recital, by reference, or otherwise, on the face of any deed which forms an essential link in the chain of instruments through which he must derive his title.

2 Pom. Eq. Jur. § 626.

Notice to an agent acquired while about his principal's business is constructive notice to him.

2 Pom. Eq. Jur. § 666.

As to the married women claimants, it is not a separate estate, but a general estate as at common law, unaffected by the married woman's law of 1898.

Parties under disability, as infants and married women, certainly are not estopped unless their conduct has been intentional and fraudulent.

Bigelow, Estoppel, 580, note 1; *Schnell v. Chicago*, 33 Ill. 582, 87 Am. Dec. 804; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629.

A life tenant may work mines already opened, or may open new ones to facilitate the work of the old, but cannot open and operate entirely new ones, and in case of working

opened mines may take the product as profit, and is not impeachable of waste.

Jones must account for the whole seven tenths because Jones operated under a void title as to the seven tenths.

Upon any fair statement of the facts, how can it be claimed they established any one of the essential elements of estoppel.

Norfolk W. R. Co. v. Perdue, 40 W. Va. 454; *Morgan v. Chicago & A. R. Co.* 96 U. S. 718, 24 L. ed. 743.

The estoppel of Mrs. Williamson did not convey any title to Jones or vest any estate in him.

2 Pom. Eq. Jur. § 813.

One cotenant has not the right to dig up a part of a building lot and use the earth obtained therefrom in the manufacture of brick, nor to take out turf.

Freem. Coten. §§ 24, 925.

For the destruction by a cotenant of the article held in common, trover or trespass will lie, and for a partial injury waste or an action on the case will lie.

Freem. Coten. § 297; *Re Smith*, L. R. 10 Ch. 85.

If the seven tenths of the oil was wrongfully severed it and its proceeds belong absolutely to the remaindermen, free from any allowance of any kind to Jones, the wrongdoer.

Whitfield v. Bewit, 2 P. Wms. 240; MacSwinney, Mines, chap. 8, 2b; *Ruffner v. Lewis*, 7 Leigh. 790, 80 Am. Dec. 518; *Dodson v. Hays*, 29 W. Va. 602; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Stuart v. White*, 25 Gratt. 800, and 76 Va. 546; *Rust v. Rust*, 17 W. Va. 901; *Dodge v. Davis*, 85 Iowa, 77; *Huff v. McDonald*, 23 Ga. 181, 68 Am. Dec. 487; *Hayden v. Merrill*, 44 Vt. 836, 8 Am. Dec. 872; *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473; *Pearson v. Carlton*, 18 S. C. 47; *Jones v. Massey*, 14 S. C. 292; *Dewing v. Dewing*, 165 Mass. 230; *Winton Coal Co. v. Pancoast Coal Co.* 170 Pa. 487; *Fiquet v. Allison*, 12 Mich. 828, 86 Am. Dec. 54; *Loomis v. O'Neal*, 73 Mich. 582; *Tuttle v. Campbell*, 74 Mich. 662; *Denys v. Shuckburgh* (1840) 4 Younge & C. Exch. 42; *Job v. Pottton*, L. R. 20 Eq. 84; *Elwell v. Burnside*, 44 Barb. 447; *McCord v. Oakland Quicksilver Min. Co.* 64 Cal. 139, 49 Am. Rep. 686.

Brannon, J., delivered the opinion of the court:

I refer to the report of a former decision in this case for a full statement of the facts. 39 W. Va. 231, 25 L. R. A. 222. Under the judicial sale, Jones thought and claimed that he purchased the entirety of the two tracts,—one of 165 acres, and the other 45 poles; but, as seven undivided tenths vested by the will of David Hickman in Engle, as trustee, to hold for the use of his daughter Eliza Williamson for her life, with remainder to her sisters, and as the remaindermen were not parties to the suit, the decree of sale, and sale under it, were void and ineffectual to pass anything but the life estate in those seven tenths, and so the remainder in them did not pass under the sale, but remained in the sisters of Eliza Williamson. Jones, however, took exclusive possession,

claiming the whole. He bored twenty-three wells in the pursuit and production of petroleum oil. The plaintiffs sued him in equity to enjoin his further production of oil, and for an account of what he had produced. After the decision upon a former appeal an account was taken, and the circuit court held that Jones pay the owners of the seven tenths of the land for one eighth of seven tenths of the oil produced, and seven tenths of the value of the timber taken from the land, thus charging Jones only for one eighth of the oil, that being the usual rent, commonly called "royalty" in that section stipulated and paid to the landowner under oil leases. Jones appeals, and he assigns error in charging him with anything at all, and for other causes; and the plaintiffs cross assign error in charging Jones only with one eighth, and for other causes.

We start with the fact that Jones was owner of three undivided tenths in fee in possession, and owner of a life estate for the life of Mrs. Williamson in the remaining seven tenths, and the plaintiffs owners of the remainder in fee in those seven tenths; after the end of the life estate, a vested remainder; and in this condition of right to the land Jones bored twenty-three wells upon the land, and produced from May, 1892, to December 21, 1895, 622,281 barrels of petroleum oil therefrom, valued at \$500,298. Did he have right to bore for this oil? He claims that he had, and that every barrel of it is his, without liability to account to the plaintiffs; while the plaintiffs claim that he had no right to bore and produce this oil, but, having done so, he must account to them for full seven tenths. Did Jones, as tenant for life, have right to extract this oil. He had not. Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron. *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566; *Williamson v. Jones*, 39 W. Va. 281, 25 L. R. A. 222. A tenant for life cannot do anything entailing permanent injury to the estate of the remainderman or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals. 1 Lomax, Dig. 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste. *University v. Tucker*, 31 W. Va. 622. It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so doing himself. 1 Washb. Real Prop. p. 116, § 24; 1 Lomax, Dig. 57. Therefore, when Jones himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remaindermen could sue him in an action of waste as at common law under the English statute of Marlbridge, or in action of trespass on the case under chapter 92 of the Code, and recover the full value of their seven tenths.

It is sought to show that Jones, as life tenant, had a right to all the oil, by the case of *Koen v. Bartlett*, 41 W. Va. 559, 31 L. R. A. 128; but that case will not sustain this claim. It asserts only that a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence. 33 L. R. A.

There the owner in fee had made a lease for oil, with a royalty as rent, and then conveyed the fee, reserving a life estate, and it was held that he, as life tenant, was entitled, as against the remainderman, to the royalty; but there the owner had authorized the boring for oil, and the conveyance was subject, in terms, to the lease, and, though the boring had not produced wells open at the commencement of the life estate, they were bored, under authority, during its continuance. We held that a mine bored in the period of life estate, under prior authority, was to be deemed as if an open mine at the commencement of the life estate. It is established that an open mine may be worked to even exhaustion by the life tenant. *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528; 1 Lomax, Dig. 54. The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land. *Taylor, Land. & T.* § 249a. When Jones penetrated the soil, he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. *Koen v. Bartlett* is no help to him. It may occur that, if Jones could not bore, his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant, he was entitled to none of it. Such is the quality of that estate.

Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three tenths gave him the right to do so. Jones was a tenant in common with the owners of the seven tenths. By the old law one tenant in common was not liable to another for waste, but our Code of 1891 (chap. 92, § 2), has remedied this unreasonable rule by making tenants in common, joint tenants, and parceners liable for waste. 1 Lomax, Dig. 499; 2 Minor, Inst. 620. Then we have simply to inquire whether the extraction of oil is waste, and under authorities above given we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common. As the statute uses the law word "waste," we must give it the legal meaning as applied to tenants for life. *Elluell v. Burnside*, 44 Barb. 447. Chapter 100, § 14, Code 1891, gives an action of account between tenants in common for receiving more than his just share,—that is, more than his just share of rents and profits from the legitimate use of land; but this has no reference to waste. It does not license waste. There stands § 2, chap. 92, branding it as a tort and giving action for it, and it applies though one claim title to the whole, and commit waste. 23 Am. & Eng. Enc. Law, p. 895. As owner of three tenths in fee, Jones could not bore for oil, any more than a stranger, because the act whether done by a cotenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned. He had right to possession for residence or other ordinary use working no injury to the inheritance, and therefore we term his act waste, not technically trespass as done by a stranger. "Waste is an injury to the freehold

by one who is rightfully in possession. This marks the distinction between waste and a trespass." 1 White & T. Lead. Cas. Eq. 1011. But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty into personalty, the injured cotenant may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Indeed, Jones claimed to own the whole land, repudiated any co-ownership with the Hickman heirs, and thus assigned to himself the position of a stranger. This, however, only strengthens the argument that he is to be regarded a wrongdoer against the owners of the seven tenths, as the statute makes him a wrongdoer, though he were regarded as a tenant in common. It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been opened, Jones, as cotenant, might set up claim under his three tenths interest to work them, and take all profits under some cases (*McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 139, 49 Am. Rep. 886), though I should think he would have to account under § 14, chap. 100, Code. *Rust v. Rust*, 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three tenths of the oil. If he chose to do so, of every gallon seven tenths belonged to the owners of the seven tenths in the land, because it had been a part of their soil. These considerations repel all idea that as owner of the fee in three tenths he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. It is true, an expression in a former opinion in this case said that Jones, as owner of three tenths, had right to bore for oil, so he took no more than his share. This is not announced as law in the syllabus. On examination I find no warrant for this expression. The only materiality of this is that it may be claimed to enter into the process of the accounting for the oil, as, if its extraction was lawful, the charge against Jones might be different from what it would be if regarded a wrongdoer. It is, however, sought to be made by counsel a weapon of great potency. Counsel say that this court in the former opinion said that, the act of boring being lawful, and lawfulness of severance gave him who severed it the right to keep the whole, just as the right to use open mines by a life tenant gives him all the product, because he has right to sever. But in this case the severance is unlawful, and the legal deduction fails. Counsel from that expression would say further that when David Hickman, as owner of the seven tenths, gave Mrs. Williamson a life estate, as he must have known as a matter of law that the owners of the other three tenths would have the right to produce oil, he must be understood as contemplating that they might do so, and is to be taken as intending, if they did, that the life tenant should enjoy all the seven tenths of the oil. As the owners of the three tenths had

no such right, the argument here again fails. In addition, this would give the life tenant, by mere implication (remote and weak implication at that), a right to what her devise did not carry as an incident,—things a part of the soil, which can only go with it by express grant. It is argued that Hickman, in his devise of a life estate to his favorite daughter, Mrs. Williamson, did not prohibit waste; but as Judge Roard said in *Findlay v. Smith*, 6 Munf. 148, 8 Am. Dec. 733, exemption from waste cannot result "from the omission, to restrict waste, in the will. That omission became unnecessary, from the limited nature of the estate which was granted. The estate granted was only an estate for life, and it is incident thereto that waste shall not be committed. It would have been a work of supererogation to have inserted such a restriction, and the question may be properly retorted, Why, if it were so intended, was not waste specially permitted by the will? This is not only not done, but the contrary is done, by granting an estate which carries with it the restriction, as an incident. The silence of the will, in this particular, cannot weaken the rights of those in remainder. It cannot destroy rights conferred by the law." At one time, to restrict a life tenant from waste, there must be a restriction in the grant; but now all tenants are forbidden to do waste by statute, unless their grant render them expressly unimpeachable for waste. 2 Minor, Inst. 616, 619; 1 Lomax, Dig. 56; 1 Washb. Real Prop. 107. Of course, when that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance, as he owns it. *University v. Tucker*, 81 W. Va. 621; *Fearne, Contingent Remainders*, 841; *Whitfield v. Bewit*, 2 P. Wms. 240; 1 Lomax, Dig. 56. The owner of the severed chattel can alone seize it, or bring trover for its conversion, as it came from the inheritance, or claim the thing itself by replevy or detinue, or bring trespass *de bonis asportatis* for damages for the taking of it, or assumpsit for money had and received from it. "Nor does it matter whether the timber is cut by a stranger or by the tenant [for life] himself, since the tenant cannot convey any interest in it when severed." 1 Washb. Real Prop. 119; 1 Lomax, Dig. 59; *Freem. Coten.* §§ 297, 302. For the same reason the cotenant doing waste neither owns nor can sell what is not his. "If, however, at the time of the improper working, there is any person *in esse* entitled either indefeasibly or defeasibly, to an estate of inheritance, the property in the severed chattels, or the amount to be accounted for, will belong absolutely and immediately to such person, or (if more than one) to the first of such persons. And his right of the person so entitled is not affected by the circumstance that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life *in esse* without impeachment of waste." MacSwiney, *Mines*, chap. 3, § 2d (B), p. 59; 1 Lomax, Dig. 56, 57; *Pigot v. Bullock*, 1 Ves. Jr. 479; *Birch Wolfe v. Birch*, L. R. 9 Eq. 683. This shows that Jones, as owner of the life estate intervening before the seventh tenths would be vested in possession could not keep the oil "Oil in

the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it." *Hughes v. United Pipe Lines*, 119 N. Y. 428. It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, so it must be as a quality of his estate. But it is not so; for if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainderman, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land. Here Jones was himself the life tenant. 1 Lomax, Dig. 60; Story, Eq. Jur. § 919. Thus the owners of the seven tenths in the land had plain legal title, and their rights are such as above given to seven tenths of the oil, unless something not yet considered debars them from such rights.

It is urged strenuously, with great elaboration and ability, by counsel, that they are barred by the doctrine of estoppel *in pais*: that their conduct works this result. Here I first remark that a clear legal title to land, requiring written conveyance to transfer it, is, by this theory, to be divested out of its owners, and invested practically as effectually in others as if such conveyance existed. A clear strong case of estoppel is required for such a result. What is the conduct of these parties bringing about this result? As to Mrs. Williamson, she, having procured the decree of sale, and received its proceeds, is estopped. That is *res judicata* under our former decision. As to the other devisees of David Hickman, what have they done or left undone to estop them? It is said they ought to have made themselves parties to this suit. There is no force in this. Perhaps they did not want their land sold. There was no ground for the sale of their remainder for the debts of Thomas Jones, deceased, except perhaps one of their seven tenths, as Jones' heirs had conveyed their interest before the suit. If anybody wanted to sell their land for debt, or because partition could not be made, or other cause, he must bring them and their estate before the court. Strange that anyone is to lose his land because he did not cause himself to be sued. Counsel for Jones make their chief point under this head of estoppel by saying: "Because these plaintiffs stood by for eighteen months, and made no claim to the land or oil, knowing that Capt. Jones in good faith, and believing he had a perfect title in fee simple to the farm, was making great expenditures on the land in developing it as oil territory, and had paid \$40,000 to buy interests of his copurchasers, Tennant and Haskell, and paid up the preferred instalments of the purchase money for the land, which he would not have done unless he had believed that he had the sole and unquestioned

title thereto, the said plaintiffs intending, if Captain Jones succeeded in developing the farm as oil territory, to bring this suit. If he did not succeed, they would let the sale stand without attack, and they would finally take and enjoy the avails and proceeds of the same." By no means does the evidence sustain these predications. Admit, however, these as facts, they do not bar the plaintiffs. First, they do not predicate, nor does any evidence, any contract between the parties, giving Jones a right. The plaintiffs stand in no wise bound to Jones by any contractual relation. Then, to bar them, you must show such conduct as is misconduct amounting to fraud, and this is not shown by these facts, or others in the circumference of the case. Most of the cases cited to support this estoppel are cases in which there was privity or obligation springing from contract, or constructive or other trust. Such are *Clarke v. Hart*, 6 H. L. Cas. 633; *Sumner v. Seaton*, 47 N. J. Eq. 119; *Gallagher v. Cadwell*, 145 U. S. 872, 36 L. ed. 740. There is no contract or trust here. Not the slightest obligation under contract, trust, or fiduciary relation bound these Hickman devisees to Jones. Let us see what is an estoppel by conduct. Let us see whether the defendants can meet its requirements. "An estoppel *in pais* operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up." Judge English in *Norfolk & W. R. Co. v. Perdue*, 40 W. Va. 454, says that for an estoppel *in pais* there must be conduct, acts, language, or silence amounting to a representation or concealment of material facts, and the misrepresented or concealed facts known to the party sought to be charged with the estoppel, and unknown to the other party, and the conduct must be with the expectation that it will be acted on, or will likely be; and Judge English further said: "The general rule is that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation good. It applies to one who denies his own title or encumbrance when inquired of by another who is about to purchase the land, or to loan money upon it as security; to one who knowingly suffers another to deal with the land as though it were his own; to one who knowingly suffers another to expend money in improvements without giving notice of his own claim, and the like. . . . In the language of the most recent decision, to preclude the owner of land from asserting his legal title or interest under such circumstances, there must be shown either actual fraud, or fraud or negligence equivalent to fraud on his part, in concealing his title, or that he was silent when the circumstances would compel an honest man to speak." The plaintiffs never accepted a dollar of the sale of the land under the decree. These plaintiffs were not at the judicial sale, standing by silent, or at the

place of improvement; never said a word denying their title; never renounced it; never induced Tennant or Jones to buy or bore; never were inquired of as to their title; never were placed in such circumstances as to call upon them legally, nor perhaps even morally, to speak out. All they are guilty of is silence, quiescence. They did not, it is true, seek Jones, and warn him. This is their offense, in length and breadth. Under the doctrine of estoppel above given, this is not enough. 1 Bigelow, Fr. 590, says: "Having now considered the subject of deception by act, on all sides, we are next brought to the subject of deception by omission; in other words, to the case of silence where there was a duty to speak. Now silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby; a man's unpublished thought is surely his own. But it must be understood at the outset that by silence we mean entire silence as distinguished from that sort which merely keeps back part of a truth told or suggested. . . . But speaking of pure silence, the general rule stated is very strong. It governs, even though the silence was meditated, and with knowledge that the opposite party was laboring under mistake or ignorance." These people were not bound to volunteer to warn Jones, and we can the more excuse them for silence and inaction—all they are guilty of—when we reflect that, if they knew anything about the title's condition, they knew Capt. Jones held the life estate, and they would have no right to possession until its end, which exculpates them from any animadversion for intentional wrong.

Again, it is not clear they knew their title, especially as some—nearly all—were infants and married women. If a business man like the defendant could not judge correctly of his title, could they? Moreover, I say that if one man chooses to go upon another's land, and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title. He is given the time fixed by the statute of limitations, though he do know that his adversary is expending money in improvements. He may every week pass along and see the work. Mere silence will not rob him of title until time does the work under the statute. Unless there is a duty to speak out, one need not. "To create a duty to speak, it must be known by the one keeping silence that someone is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told." *Viele v. Judson*, 82 N. Y. 40. There is no proof that these parties knew Jones was relying on them or their silence, and in fact he shows himself he did not. But I say the test just put in the New York case is not strong enough. Mere silence and knowledge that another is relying on it is not enough. He must be brought into such close quarters or situation towards him as to call on him to speak out. Again, a potent fact against Jones on this estoppel is that before Tennant, who, as his agent, bought at the judicial sale, Jones knew of the defect of the title.

1. The record in the cases stated that Thomas Jones died leaving ten heirs; and the petition

of Engle and Williamson, on which the sale of the whole tract was first based, stated that Eliza Williamson only owned a life estate in seven tenths. Who owned the remainders? The very decree of sale declares: "It appearing to the court that the interests held by C. Engle as trustee as aforesaid are for the use and benefit for life of Eliza Williamson by virtue of a provision in the will and codicil of said David Hickman." Who owned the remainder? This record put this question to a purchaser. Prudence would make a man inquire where the real estate in the land was. A purchaser at a court sale purchases under the rule of *caveat emptor* (look out buyer). The court or commissioner warrants nothing. One buying at such a sale is held—conclusively held—to have notice of all the facts which the record, if inspected, would communicate. *Stout v. Philippi Mfg. & Mercantile Co.* 41 W. Va. 239; Pom. Eq. Jur. § 626; *Wood v. Krebs*, 30 Gratt. 708; *Burwell v. Fauber*, 21 Gratt. 448. Where one claimed for improvements, such record notice was held enough to debar him as showing that he did not improve with bona fide belief that his title was good. *Hall v. Hall*, 30 W. Va. 785. Jones had actual notice of this defect of title, and of the fact that the plaintiffs owned of the seven tenths as the remainder. He, as a witness, says his agent, Tennant, to procure oil leases, reported to him that a lease of this land from Mrs. Williamson would not be safe, "as she only owned part in fee and a life interest in the balance," and the only way was to buy it. This knowledge defeats his plea of estoppel under cases cited above, and *Beltman v. Harness*, 42 W. Va. 483, 38 L. R. A. 566, and *Dawson v. Grou*, 29 W. Va. 383. A small modicum of prudence would have saved him. He heeded not this warning, but venturesomely risks a purchase, and the expenditure of his money. He was not moved by any words or act or representation of the plaintiffs, nor by their silence, but hazarded his action in the spirit of speculation, not relying on their silence, but his own judgment. Jones says he claimed the whole, and would not have heeded the claim of the plaintiffs, if they had made it. It would not have stopped this expenditure. How can he lay his misfortune at their door? His counsel argue that the commissioner who sold told him it was a good title. Jones says he did not say he did so until July, 1893, and he had then bored all but two or three wells. But, what if he did? Are these plaintiffs responsible, even if the lawyer told him that it was not necessary to make the remaindermen parties? This mistake, in legal opinion, does not bind the plaintiffs. He was not their lawyer. He had no authority, as commissioner, to bind them, or guarantee title, and they were not parties to the suit even. It is argued that the sale was made under decree with the knowledge and desire of the remaindermen, and this position is sought to be supported on circumstances entirely inadequate to sustain this contention. The judge who rendered the sale decree was father to children of one of the remaindermen, the commissioner was husband to another, and a son of David Hickman performed the clerical work of recording the decree; and the remaindermen must therefore have known of,

and been satisfied with, the decree, say counsel. This does not follow. Suppose they did know it, and were satisfied. If they did nothing active, it is not enough. One with legal title to land cannot, by oral disclaimer of right, even the most expressed, divest himself of legal right. *Cline v. Catron*, 22 Gratt. 878; *Jackson, Van Schaick, v. Davis*, 5 Cow. 128, 15 Am. Dec. 451.

Counsel would explain why these remaindermen were not made parties, saying the lawyer in the case thought, as Jones' heirs were parties, and Mrs. Williamson owner of a life estate in seven tenths and three tenths in fee, they were not necessary parties, as Hickman purchased shares of Jones' heirs after his death, and they were liable to his debts. They were not liable, except one of the seven tenths; and anyhow they owned legal title to the remainder in fee, and were absolutely necessary parties, and neither they nor their estate were before the court, and their estate was not sold under the decree, and it was a nullity as to the remaindermen. No matter who made the mistake in the conduct of the suit, or how it came about, it could not prejudice these remaindermen. They can be bound only by record, not by mere supposition, or even proof, that they knew or approved of it. The decree and deed under it conveyed no title. Mrs. Williamson, though before the court, was only life tenant of the seven tenths, and there is no privity between life tenants and remaindermen, so that the presence of a life tenant as a party by representation makes the remainderman a party. "A stranger, who is not a party or a privy, can neither be barred nor aided" by a judgment or decree. *Barton*, Ch. Pr. 213; 2 Pom. Eq. Jur. § 818. Engle was a dry trustee; the real owners of the remainder were the remaindermen. The trustee could not represent their interest. Even a creditor under a deed of trust, not merely a trustee, must be a party; much more the remainderman in a case of dry trusteeship, where it is proposed to sell the very *corpus* or fee of the land, and all rights whatsoever therein. It is essential that there be before the court, not merely the owner of particular estate, but also the owner of the first vested estate in reversion or remainder, and this was in these remaindermen. 1 Dan. Ch. Pr. 227, 228; *Story*, Eq. Pl. §§ 144, 145; *Opinion, Faulkner v. Davis*, 18 Gratt. 684, 98 Am. Dec. 698. The trustee and life tenant not representing the remaindermen, and they being necessary parties to bring the fee of the land before the court, they are not bound by the sale. But this was decided on the former decision. Counsel ask, why, if the plaintiffs did not acquiesce in the sale, did they not adduce evidence to show that they did not? The burden to show acquiescence is on the defendant asserting it. Mere acquiescence, if proved, would not divest their title. If these parties knew of the sale and boring, which is only by mere inference, there is evidence tending to show that they thought it was only Mrs. Williamson's interest that was sold, as she is shown to have been anxious to get rid of the land. It is not clear that they knew of it; but, what if they did? Can their land be taken from them merely for that? So I conclude that estoppel *in pais* will not defeat the plain, legal right of

the plaintiffs. But, as some of them were infants and married women, even if there were facts to show such estoppel as is here contended for, it would not bind the married women or infants. They would not be guilty of such a fraud as would estop them. The title of these plaintiffs vested before April 1, 1869, and therefore the interests of the married women were not separate estate. A distinction is made in a brief between land that is separate estate and that not separate estate, the theory being that as to separate estate the married woman may lose it by estoppel *in pais*, whereas she cannot so lose land not separate estate; but, as under our statute her sole deed is void in both cases, and she could only pass either class of land by a deed with privy examination (when this transaction occurred), and now by acknowledgments, her husband joining, I do not see where any distinction comes in. Whether a married woman, by positive, intentional fraud, can lose her land, when her sole deed will not divest her of it, the authorities are divided. I should say that, as the law scrupulously limits her power of alienation to one only mode, she could not do so; that she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by an act of hers to part with her land except in one way. *Bigelow, Estoppel*, 599; *Bishop, Married Women*, § 488; 2 *Herman, Estoppel*, § 1102. Note that I am speaking of her losing her land, not personality, for I think she may thus lose her personality, as she is competent to sell that. But in this case no affirmative act of fraudulent representation is shown; only silence. If I be right in the position that actual fraudulent representation would not lose her right, for stronger reason mere silence would not; but, even if positive, affirmative fraud would lose her land, mere silence would not. 14 Am. & Eng. Enc. Law, p. 643, says that, as "such estoppels as arise out of a failure to assert a right, or out of silence and acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by her silence and acquiescence only in cases when she would have been bound had she expressly made the statement which is implied. Thus, when a married woman makes an invalid deed she is not estopped by afterwards recognizing its validity and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto; but if she could contract as a *feme sole*, and allowed her grantee to improve property on the faith of a title given him by her, she could not deny the validity of that title." It is cautious to observe that the law books say that, in order that a fraud by a married woman shall constitute an estoppel against her, it must be unconnected with a contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it; but that was when she was disabled from contracting; and, now that our statute has fully enabled her to contract, I think that any fraudulent act which would es-

top her when not connected with a contract would also do so though connected with a contract. This limitation proceeded from her disability, and, that having been removed, the limitation would be removed. Bishop, Married Women, § 493; 1 Pom. Eq. Jur. § 418; *Tufts v. Copen*, 37 W. Va. 629. But observe, further, that as to selling and conveying her land she remains under limited disability. Wherefore I am clearly of opinion that the mere silence or inaction of the married women—their quiescence, for it is not acquiescence—does not bar them.

How as to infants? Positive intentional fraud would bar an infant of years of discretion, but mere silence or quiescence surely will not. I think the weight of authority is that matter sufficient to raise an estoppel, if unconnected with a contract, would bar an infant from asserting a right even to land. It must, however, be intentionally fraudulent. Mere silence or quiescence, as in this case, will not do so. Bigelow, Estoppel, 600; 2 Pom. Eq. Jur. § 815. The deed of a married woman is void; an infant's only voidable,—a difference.

I have discussed the question whether or not the plaintiffs are barred by the doctrine of estoppel *in pais* as an open question unaffected by the former decision, though it may be said plausibly that it did decide against that defense, in deciding that Jones must account on some basis. If a good bar, he would not have to account, and the court would have dismissed the bill. That decision did not decide finally that Jones rightfully bored for oil. It did not decide how much Jones should be charged nor on what basis. That decision was, in terms, in these matters, not final, but provisional.

There cannot possibly be anything in the contention that laches bars relief. The delay from the judicial sale was only eighteen months; from the commencement of boring, some less. The statute of limitations gives ten years. The many cases of laches cited are cases of deeds of other things procured by fraud, as in *Whittaker v. Southwest Virginia Improv. Co.* 34 W. Va. 280, where there must be promptness. Here is no such case, but simply one in adverse claim of another's land, or ouster by one tenant in common, or a suit to make Jones account for oil taken from the land; the statute giving five years. Why, in such case, plead laches short of the period fixed by statute? Viewed as a suit to recover possession,—but it is not,—time would not begin until the end of the life estate. *Merritt v. Hughes*, 36 W. Va. 357; *Arnold v. Bunwell*, 42 W. Va. 478. Time has no weight in any view in this case.

Having reached the conclusion that the plaintiffs have right to relief, the next question is as to what shall be charged to Jones, or the mode of account. It is not questioned, but may be stated as law pertinent to the case, that though action as law in case for waste, or trover, or trespass *de bonis*, or perhaps pure trespass, would lie, yet equity can take the account. It has indubitable jurisdiction for an injunction to restrain the waste. *Bettman v. Harness*, 42 W. Va. 438, 36 L. R. A. 566; *Williamson v. Jones*, 39 W. Va. 281, 25 L. R. A. 222. Having jurisdiction for one purpose, it will go 38 L. R. A.

on to do complete justice to avoid multiplicity of suits. *Christip v. Teter*, 43 W. Va. —, 27 W. Va. 288. And with respect to a suit of this particular cast to enjoin waste, it is clear equity will take an account and give compensation for damages. Story, Eq. Jur. § 517; 1 Washb. Real Prop. 126. As above stated, Jones had no right to any of the oil as life tenant. As owner of the three tenths of the land, he had no right to produce the oil, and his act in so doing was one of waste. When he did extract the oil, seven tenths of it was by right and title oil of the plaintiffs, the very oil itself, because taken from their land. Jones converted this, their property, to his own use. They are entitled to recover the money he received for it, if ascertainable; if not, its value. It is urged that in a former opinion it is said that Jones had right to bore, so he did not take more than his share of the oil. Would not that leave the balance the property of the plaintiffs? I do not see that this expression that he had right to bore is material, unless it show, as counsel seeks to use it, that, having the right to bore, Jones had the right to keep all the oil; but that the opinion in words denies. The plaintiffs owned seven tenths of the oil when it reached the surface. It has been converted to his own use by Jones. His claiming all the land would be an ouster. He took the oil under adverse hostile claim, as an act of trespass. Indeed, the plaintiffs can treat it as an ouster. It is not a question of rent in the shape of royalty of one eighth of the oil or otherwise, for royalty is rent, and springs from contract; and there was nothing contractual between these parties. If a stranger had bored, could the plaintiffs not render him liable for the conversion of their oil? Jones is as a stranger, a hostile claimant shutting them out; and even if he had not claimed the whole land, but acknowledged their right to part of the land, the taking of the oil was waste, and gave him no right to their share. The former opinion says this.

It is claimed for Jones, if he is not allowed all the oil, he should pay only one eighth of the seven eighths as royalty. If he had worked already opened wells, it might be more plausible to say so; but he first penetrated the soil as a wrongdoer, in a legal view. If an open well, it would be lawfully used by a life tenant, and probably by a tenant in common, as one mode of enjoyment of his share. I say probably. That matter is not before us. *Rust v. Rust*, 17 W. Va. 901, holds that where one tenant in common occupies the whole property he is liable to cotenants for a reasonable rent for it in the condition it was in when he took possession. This is approved in the opinion in *Dodson v. Hays*, 29 W. Va. 601. This doctrine follows *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649. In the two West Virginia cases the use of the land was for ordinary purposes, not extracting minerals, and the occupying tenant had right to occupy and farm the land. The *Early Case* was the use of a salt well opened before the commencement of the cotenancy and perhaps the use of the salt water in making salt by the occupying tenant was lawful, as the use of the land in the condition it was in when he went upon it, and as it had been used by the ancestor. And besides, between him and

some of the co-owners, there was a stipulated rent, which the judge gives as a reason for the charge of a rent; and besides he says the occupying cotenant and the others regarded it as a renting. And the court refrained from laying this down as an inexorable rule, saying there might be cases calling for an account of rents and profits. The case in hand is a case of a different hue; not the case of one cropping the land in that legitimate use which a tenant in common may make of the land; not use of open salt or oil well, which likely can be used by one tenant as it had been before; but when one pierces the earth, and takes from its place oil that is a part of the realty,—an act not of legitimate use, but destruction and waste of the inheritance of the others. Almost an exactly similar case to the one in hand is *Ruffner v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513, where persons claiming adversely to plaintiffs were held tenants in common with them, and had sole occupation, and had discovered salt, and bored wells. Great controversy arose as to the mode of charge against them. Held chargeable, not with rental, but rents and profits, if any made, with credit for expenses and improvements. *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658, is like unto this case. It was a case of lead mines, where parties jointly operated them for a time, and one continues to use the open mines. President Moncure said: "The court is further of opinion that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his cotenants, or occupies and uses more of the common property than his just share or proportion, the best measure of his accountability to his cotenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early v. Friend*, 16 Gratt. 21, 52, 78 Am. Dec. 649; yet, as was said in that case 'there may be peculiar circumstances in a case making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common.' Id. 54; *Buffner v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513. Under the circumstances of this case it was proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for use and occupation; nor is it such a case as that of *Early v. Friend*, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but in the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, nor to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be

founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine." If the difference in the nature of a lead mine and a salt works was such as to require in the case of the former an account of rents and profits, with how much more force are we driven to the conclusion that in a property such as that in the case at bar, consisting of oil wells, the yearly value of which was still more uncertain and difficult of ascertainment, in which the cost of operation is still more uncertain than that of the lead mine, the account must be taken as one of rents and profits. In *Newman v. Newman*, 27 Gratt. 722, the court had to determine the basis of an account between cotenants of an iron mine. On pages 723 and 728, President Moncure refers to the cases of *Graham v. Pierce* and *Early v. Friend*, and quotes from *Graham v. Pierce* the distinctions between the two cases there stated. The opinion says: "That was the case of a lead mine, while this is the case of a iron mine, and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself, and may by such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum is to make a bargain of speculation and hazard, which is always objectionable in such cases as it is almost sure to operate unequally on the parties. Whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allowing interest to the party who advances the capital. In this case the property was of known and established value, and there would probably have been no difficulty in finding a suitable agent and borrowing the necessary capital to carry on the operations, even if both had not been readily furnished by one of the parties." As counsel say: "Here are pointed out other facts which are also found in the case at bar and which, it seems to me, are controlling, and require the application to this case of the rule in *Graham v. Pierce*. Those facts are that the development of oil property necessarily uses part of the subject itself more rapidly and completely than in the case of a lead mine, and renders the residue of the subject of no value

whatever. It is even more true of an oil well than a lead mine that explorations and operations may show that it is of great value, or the contrary. The speculation and hazard are more in the case of an oil well than in that of a lead mine. Indeed, all that is said by President Moncure in *Newman v. Newman*, as quoted above, is applicable with added force in the case at bar. In both the Virginia cases in which a rent was charged (actually in one, nominally in the other) the property consisted of open mines, and the parties interested had theretofore settled accounts on the basis of a rent. Neither of those facts exists here, where the wells were not open; no rent had theretofore been charged, and the inheritance itself was being taken."

In *Dodge v. Davis*, 85 Iowa, 77, an instruction was held proper (pp. 81, 82, 85 Iowa) that a tenant in common was entitled to recover from a defendant cotenant, who had ousted him, claiming exclusive right to use the land, in addition to a fair rent for the use of the premises, his share of the fair market value of the trees or timber, if any, that defendant sold to third parties off of said land. In *Huff v. McDonald*, 23 Ga. 131, 68 Am. Dec. 487, relating to a gold mine, it was held: "A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his cotenant, who, therefore, stands to him as principal. He, consequently, is bound to pay his cotenant the actual profits which he has made out of such surplus, as well as the surplus itself." In *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Dec. 372, the defendant cotenant was held liable for profits, and not for rent. In *Shepard v. Richards*, 2 Gray, 424, 61 Am. Dec. 473, the inquiry was to the profits received, not the rents due. In *Pearson v. Carlton*, 18 S. C. 47, an account for rents and profits (p. 49) was held proper (pp. 53, 54). This was a case where land was sold under decree where an heir was not a party, and he was given partition and rents and profits. That case refers to *Jones v. Massey*, 14 S. C. 292, which held that the accounting should be of rents and profits, and not of rental value. Such was the accounting in *Dewing v. Dewing*, 165 Mass. 230. In *Winton Coal Co. v. Pinecast Coal Co.* 170 Pa. 442, the court, after construing the statute of Anne, says: "Where the cotenant has actually received the rent of the common property, or has converted coal, timber, oil, gas, or minerals—part thereof—into cash, and retains a share thereof which actually belongs to his co-owner, there would seem to be no good reason why, in a proper case, he may not be sued in assumpsit for his cotenant's share thereof." See also *Riquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Loomis v. O'Neil*, 73 Mich. 552; *Tuttle v. Campbell*, 74 Mich. 602. In *Job v. Pottou*, L. R. 20 Eq. 84, the court regarded the defendant cotenant as having been in all respects blameless, not a wilful wrongdoer against whom the accounts would be taken rigorously, not negligent or tortious; so that while he would be allowed for bringing the coal to the pit's mouth, but not for the expense of severance, but as having produced the coal in the exercise of a strict right (p. 97), and decreed an account against the defendant for the value at the pit's mouth of the coal

raised, less the cost of getting and raising it. The idea that he should be dismissed on payment of a rent does not seem to have occurred to anyone.

It does seem to me on authority and reason that an account of rents and profits is the true basis. I cannot see how, where there is no lease, no contract, no tacit understanding between the parties, no past mode of business, but one not the true owner has used and received rents and profits from land of other people, you can charge an annual rental, and not their fraction of rents and profits received by the occupier. What is to be done with the money to which the plaintiffs are entitled? Does it go to them at once, or is it to be put at interest, and Jones, as life tenant, get the interest on it, during Eliza Williamson's life, or a certain sum for its present worth?

As above shown, by reference to *MacSwiney on Mines*, it goes at once to the plaintiffs, and Jones has no right to interest on it during the life estate: (1) Because he is, in a legal point of view, a wrongdoer, and, if given interest, this would give him the benefit of his own wrong. In *Williams v. Duke Bolton*, 1 Cox, Ch. Cas. 72, cited in 3 P. Wms. 268, a tenant for life committing waste, who owed the next existent estate of inheritance, subject to an intermediate contingent remainder, was not allowed to take advantage of his own wrong in cutting timber, but the fund was kept for the contingent remaindermen, and he was made to pay interest on it from the time the money for the timber was received. There are instances where the reversioner or remainderman, during a life estate in another, wrongfully severs minerals, the proceeds are invested, and the income paid to the life tenant during life, though the minerals really belonged to the wrongdoer, because he could not take advantage of his wrong against the tenant. *MacSwiney, Mines*, 66. This is doubtful but shows how far courts go against one doing the unlawful act.

2. Jones is not entitled to interest, because he did not own a drop of the oil belonging to the owners of the seven tenths. He is not entitled to the oil, and, of course, is not entitled to the income of interest from its proceeds. The decree gave the collateral heirs of Dr. Weirich, husband of Laura Weirich, shares in the amount charged to Jones for the oil. I think this was error. Laura Weirich was a child of David Hickman, outliving her father, dying childless, leaving her husband, to whom by her will she gave all her interest in the estate of her father, "both as legatee and residuary distributee under his last will." The will of her father gave her a legacy of \$600 and some silverware. By clause 14 he provided that his real estate not before disposed of (and this land had been given to Mrs. Williamson for life with remainder to her sisters) be sold, and out of it and his personalty his debts paid and the bequest be made, and the residue divided equally among his daughters, among them Laura Weirich. The will of Laura Weirich would give her husband her legacy of \$600 and the silverware, and her share in the residue arising from the sale of land and personalty, as the words, "both as legatee and residuary distributee," would in their legal im-

port imply. They are subjects fitting those words in their legal meaning. She gave, too, "subject to certain devises and bequests hereinafter to be made," but made bequests,—no devises,—but used improperly the word "devise" in making bequests, tending to show still further that she had her mind on personalty, not realty. Her will gave nothing in this land. Hence her husband got no interest in this land, and she died intestate as to it; and as she died before the Code of 1868, and under the reign of clause 3, § 1, chap. 123, Code 1860, it would go to her sisters, the plaintiffs, not to the husband, under § 1, cl. 2, chap. 78, Code 1868. And besides, she died under Code 1860, and chapter 122, § 3, allowed a married woman to make will only of her separate estate; and this was not separate estate, because it vested in her before our first separate estate act (Code 1868, chap. 66).

As to the alleged error in not decreeing that the purchase money under the judicial sale, paid by the purchaser, be refunded to the purchaser, that was not cognizable in this case, but by some proceeding or step in the case in which the sale was had, or other independent proceeding, whatever it may be.

This decision may be burdensome to Jones, who appears to be a man of great energy, business capacity, and merit, and I will not conceal the wish that we could, consistently with law, be more favorable to him; but we are bound by the law, seemingly very plain, and in itself logical and well established. The plain and simple showing of the voluminous record and contestation in this case is that he has taken sole and exclusive possession of land belonging in greater fraction to others, and of his own accord drawn from it vast quantities of oil belonging to them in clear law, and sold it, and reaped rich return, and the true owners demand their own under the law. If he was mistaken in his own judgment as to the title, or from misadvice, it is a misfortune that is to be regretted, but for which the plaintiffs are not legally responsible; and if he knew of the defect of title, and he surely had enough to warn him and put him upon inquiry before embarking in large expenditures, it seems only rashness, or rash speculation. In fact, however, the returns bored the wells after the first.

I have said so much only in consideration of the pecuniary magnitude of the case, and in deference to the elaboration, in the oral arguments and briefs of distinguished counsel, of the points involved in the case, which do not seem to me to be very difficult of solution up to this point. As stated above, the charge against Jones is to be by rents and profits, not by annual rentals; but this presents a question which has given me great perplexity, and this is the question, What shall be credited to Jones against rents and profits?—especially whether he shall be repaid expense of boring wells. Where one man, in possession under a hostile defective claim or title, makes permanent improvements, the common law gave him no pay for them, as he voluntarily put them upon the land of another; but our Code (chap. 91) gives compensation therefor if, when the improvements are made, there is "reason to believe the title good under which he or they were hold-

ing." As shown above, warning was given Jones by Tennant, his agent, and by the record under which he purchased, of the rights of the plaintiffs, and our court has held that this notice precludes allowance for improvements. *Hall v. Hall*, 30 W. Va. 779; *Dawson v. Gros*, 29 W. Va. 333; *Cain v. Cox*, 29 W. Va. 258; *Id.*, 28 W. Va. 613. Good faith would seem to be the test, but these cases affect Jones, legally speaking, with a notice repelling good faith; and yet there is good ground for saying that, as a matter of fact, Jones, from misadvice as to the law, thought he was buying a good title. People generally think that a court sale always gives good title, whereas often it does not. Therefore, viewing Jones as an adverse claimant, or as one who, being really a tenant in common, yet takes sole possession, denying the claim of all others and claiming the entirety, and taking exclusively all rents and profits, it is difficult to accord him compensation consistently with dry law. Even where one joint tenant or tenant in common, not claiming the whole,—not denying his fellow's right,—makes permanent improvements, without his fellow's consent, he cannot charge him, nor hold exclusive possession until reimbursed by rents and profits. *Ward v. Ward*, 40 W. Va. 611, 29 L. R. A. 449; *Freem. Coten*, § 263. In *Crest v. Jack*, 3 Watts, 238, 37 Am. Dec. 353, and note, it was held that "a joint tenant or tenant in common may not erect buildings or make improvements on the common property without the consent of his cotenant, and then claim to hold until reimbursed a proportion of the moneys expended. . . . Nor will it alter the case that the cotenant knew that the buildings were being erected, and made no objection." The opinion there says: "There are, however, cases in which an owner of land standing by and permitting another to expend his money in improving it, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement. But in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the one party acts ignorantly and without the means of better information, and the other remains silent when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But, on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet wilfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is wilful, and he acts at his peril. . . . In the case before us there is no evidence that the plaintiff in any respect encouraged or connived at the erection of these buildings by T. Blair. Nor was the plaintiff bound to notify Blair of his right in the land, or of his dissent to the erection of the buildings. Blair was well acquainted with the titles of the respective parties, . . . and if he was not, he was bound to inquire into the title before he undertook to

appropriate the lot. It was a matter of record, accessible to all."

It is difficult to ignore the force of that argumentation in this case. In fact, if we turn to the case of *Foster v. Weaver*, 118 Pa. 42, and the principles stated in it, we could, with some plausibility, deny any cost of production at all. That case held that one tenant in common, tortiously deprived by fraud of his cotenant of his interest in an oil lease, is entitled, in a suit brought for his share of the oil produced and converted by the cotenant, to recover as damages the value of the oil in the tank without deducting for expenses of production. The test there made as to such allowance is whether the party acted under honest mistake of good right, or otherwise; and seeing that our cases of *Hall v. Hall*, 80 W. Va. 779, and *Dawson v. Grow*, 29 W. Va. 833, upon the record of the case in which Jones purchased, and other circumstances, would affect him with notice and deny him improvements, I repeat that there would be plausibility for denying any cost of production. The thought occurred to me that the record charged Jones with only constructive notice, not actual notice, and that perhaps actual notice was necessary; but *Hall v. Hall*, *Dawson v. Grow*, and *Cain v. Cor*, 29 W. Va. 258, and 23 W. Va. 618, reject this thought, also 10 Am. & Eng. Enc. Law, p. 247. *Effinger v. Hall*, 81 Va. 94, holds constructive notice tantamount to actual notice, but holds that purchasers at judicial sales may well presume everything rightly done, but that purchasers *in pais* must examine the chain of title. This exception as to judicial sales I doubt. Our case of *Hall v. Hall*, 80 W. Va. 779, is *contra*. The very record of the case in which the sale was made and Hickman's will spoke the rights of plaintiffs. If a man's deed tells him of another's right, why may we not say so when the record giving him title tells him of it? To say otherwise is to say that a purchaser at a court sale may shut his eyes to the contents of the record, which would notify him of another's right, make improvements, and then take away that other's rights, though by the sale he derived no title to such other's rights; the suit thus operating to do indirectly what it does not do directly. If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him. Opinion in *Hall v. Hall*, 80 W. Va. 785; *Harper v. Price*, 17 W. Va. 523; 10 Am. & Eng. Enc. Law, p. 248, note.

But there are other considerations. We are in a court of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflexible, iron-clad rule in equity in this matter, unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition,—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, with-

out which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements (page 789, 80 W. Va.; *Freem. Coten.* § 262; Code, chap. 91, § 2; *Moore v. Ligon*, 80 W. Va. 155; *White v. Stuart*, 76 Va. 566; *Early v. Friend*, 16 Gratt. 21, 78 Am. Dec. 649; *Fishack v. Ball*, 34 W. Va. 644). This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruit of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They came into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage there that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the plaintiff. I repeat that no immovable rule binds a court of equity in this matter. *Freeman's Cotenancy & Partition* (§ 279) says: "Improvements made by one cotenant independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account but, under what circumstances and to what extent, improvements may be considered in taking an account between cotenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of a usual character and are necessary for the ordinary and economical use of the property." There is a difference between the case where the party making improvements seeks, as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements. See opinion in *Effinger v. Hall*, 81 Va. 103; 8 Pom. Eq. Jur. § 1241. There is some authority that where one has in good faith put improvements on land he may, by a suit of his own, charge the land. *Bright v. Boyd*, 1 Story, 478. But unless there was an agreement or circumstances tantamount, or fraud, I would doubt this. Clearly, a consent to such improvement binds the party, and creates a lien on the land and a personal obligation. *Houston v. McCluney*, 8 W. Va. 185. (It is proper to remark that defendants claiming improvements under chapter 91, Code, may recover beyond rents and profits, if in good faith claimants.) I repeat that this suit is to charge Jones with rents and profits, and it is not inconsistent to allow him as a set-off expenses of production, including, not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of Jones he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiffs large returns. If we give Jones his expenditures, still a larger amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that "by the natural

law it is not right that anyone should grow rich by the detriment and injury of another." Much authority can be shown to support this doctrine in addition to that given above. Story, Eq. Jur. § 1236, note; *Corcoran v. Corcoran*, 119 Ind. 138, 4 L. R. A. 742; *Stewart v. Stewart*, 90 Wis. 516; 11 Am. & Eng. Enc. Law, p. 1107. But for Jones, acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be blind to the argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We cannot be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by set off all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus.

In conclusion I must not omit to say that our holding in allowing costs of wells is fortified by the precedent of *Ruffner v. Lewis*, 7 Leigh, 720, 30 Am. Dec. 513, where parties holding adversely to the plaintiff were treated as tenants in common with them, and as they had bored wells, and discovered and produced salt water, were allowed improvements, including cost of wells, as set-offs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profit must share the burden." True, in that case, the court found that the parties acted under fair belief of good title, so that their good faith could not be doubted. Here, under cases above cited, we cannot find that Jones is unaffected by notice of the plaintiffs' right; but for which I should not, for a moment, entertain any hesitancy in allowing him costs of wells. I have above treated the wells as if permanent improvements. Perhaps they are not to be so treated, but rather as a part of the cost of production, like a tank for keeping the oil when produced. An al-

lowable improvement must be that which adds to—enhances the value of—the land permanently for general uses; but a well or derrick adds nothing permanently, at least for general use, and usable only for producing oil,—the mere means or instrument of production. If this be so, there is less question about allowing their cost as but an item in the cost of production, though I have discussed the subject under the law relating to improvements. Treating cost of productive wells as cost of production of oil, we may say that, though Jones had notice of plaintiffs' right, yet he should be charged with net rents and profits, not gross,—with what he actually received,—otherwise equity inflicts a penalty. As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its costs. I confess that, under our statute and decisions, I have hesitancy in this holding; but other members of the court do not, and feeling that Jones, under the circumstances, has strong claims to such allowance, I concur with other members in so holding. But the law ought to be clearly and accurately understood in so important a matter, and I want to state for myself what I understand to be the law, under our statute and decisions. An ejected defendant who made permanent improvements valuable to the estate, not when he merely believed his title good, but when there was reason to believe it good, may by filing his claims under § 33, chap. 90, and § 1, chap. 91, Code 1891, not only set off the value of such improvements against rents and profits, but recover any balance by which their value may exceed rents and profits; but if, when the improvements were made, there was not reason to believe the title good, he cannot even set them off against rents and profits; and notice either actual or constructive, of the defect of the improver's title and of the rights of others will preclude allowance for such improvements. He is precluded because he acts in bad faith or negligence, and cannot take away even the rents and profits of another by improvements the latter did not sanction, which by the common law became part of the land and belonged to the true owner, no matter how they came there, and which the statute allowed only to one legally without blame. The wrongdoer is not given the benefit of his wrong.

Reversed and remanded.

LOUISIANA SUPREME COURT.

Carrie HOELZEL

v.

CRESCENT CITY RAILROAD COMPANY, *App't.*

(49 La. Ann. 1302.)

*1. A pedestrian in the night-time, who suddenly leaves the path on grounds

*Headnotes by BREAU, J.

NOTE.—As to negligence of person crossing street-car track, see also *Newark Pass. R. Co. v. Bloch* (N. J.) 22 L. R. A. 374; *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *Consolidated* 33 L. R. A.

identified as the neutral grounds, and crosses or attempts to cross immediately in front of a street car moved by electricity, is imprudent.

2. The rule that one, before attempting to cross the track, should "stop, look, and listen," applies to a street railway moved by electricity. The approaching car must have been visible, and the noise heard by anyone near, looking, and listening.

3. The attempted crossing was the matter of a moment, rendering it impos-

Traction Co. v. Scott (N. J.) 33 L. R. A. 122; *Baltimore Traction Co. v. Helms* (Md.) 36 L. R. A. 215; and *Johnson v. St. Paul City R. Co.* (Minn.) 36 L. R. A. 583.

ble to stop the car in time to prevent the accident. *Held*, whenever the plaintiff's case shows any want of ordinary care, his right to recover is thereby destroyed.

(Watkins, J., dissenting.)

(April 12, 1897.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed*.

The facts are stated in the opinions.

Messrs. Farrar, Jonas, & Kruttschnitt, for appellant:

It is gross negligence for one to walk or step upon the track of an electric railway directly in the path of an advancing car; more especially so on a dark night, and in the middle of a block.

On approaching a street crossing of a railway track, it is the duty of a traveler to exercise his senses of sight and hearing and to look and listen for an approaching train; his failure so to do is negligence, which, in case of collision, will prevent his recovery of damages for injuries sustained.

Schulte v. New Orleans City & Lake R. Co. 44 La. Ann. 510; *Herlich v. Louisville, N. O. & T. R. Co.* 44 La. Ann. 280; *Smith v. Crescent City R. Co.* 47 La. Ann. 838; *Scheynaydre v. Texas & P. R. Co.* 46 La. Ann. 248.

Ordinarily the fact that the train neglected to make statutory and customary warnings does not relieve a person approaching an open crossing from the duty of lookout on approaching the road.

Arte v. Chicago, R. I. & P. R. Co. 84 Iowa, 160; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542; *Harlan v. St. Louis, K. C. & N. R. Co.* 64 Mo. 480; *Havens v. Erie R. Co.* 41 N. Y. 296; *Hinckley v. Cape Cod R. Co.* 120 Mass. 257; *Toledo, P. & W. R. Co. v. Riley*, 47 Ill. 514; *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264; *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180.

While railroads are held to strict observance of all precautions necessary for the protection of the public in crossing the crowded streets of cities, there is also an obligation on the part of the public to be vigilant and attentive when passing such crossings.

White v. Vicksburg, S. & P. R. Co. 42 La. Ann. 991. Also see *Guthen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609; *Settoon v. Texas & P. R. Co.* 48 La. Ann. 807; *McLaughlin v. New Orleans & C. R. Co.* 48 La. Ann. 23; *Snider v. New Orleans & C. R. Co.* 48 La. Ann. 1.

Anyone crossing a railroad track is bound to use his senses—to look and to listen—before he may prudently venture across.

Murray v. Pontchartrain R. Co. 81 La. Ann. 492; *Childs v. New Orleans City R. Co.* 38 La. Ann. 157.

The motorman swears positively that he rang his gong, and "affirmative testimony outweighs that of the witnesses who, it may well be said, did not hear."

Blackwell v. St. Louis, I. M. & S. R. Co. 47 La. Ann. 271.

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Mr. Joseph N. Wolfson, for appellee:

The liability exists if there is any failure on the part of the railroad employees to use proper care for avoiding the accident after the person is discovered on the track, or if that discovery, by using proper care, would have been made and the calamity averted.

McGuire v. Vicksburg, S. & P. R. Co. 46 La. Ann. 1552; 1 Thomp. Neg. p. 449.

A driver can only be justly charged with negligence when he fails to observe something that he ought to see, and would see with ordinary vigilance.

Hearn v. St. Charles Street R. Co. 84 La. Ann. 161; *Gallagher v. Crescent City R. Co.* 87 La. Ann. 291.

Railroad companies are held to the greatest care and diligence, both in regard to the machinery and equipments of the road, and the conduct and acts of their officers, agents, and employees.

Hanson v. Mansfield R. & Transp. Co. 38 La. Ann. 114, 58 Am. Rep. 162.

It is negligence to omit any reasonable duty necessary for the safety of the public, particularly at crossings where there are frequent passage and traffic.

Curley v. Illinois C. R. Co. 40 La. Ann. 816; *White v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 994.

Where the negligence of the defendant greatly multiplies the chances of accident to the plaintiff, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury.

Reynolds v. Texas & P. R. Co. 37 La. Ann. 698.

It is the duty of the drivers of cars, not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track.

1 Thomp. Neg. p. 898; *Barnes v. Shreveport City R. Co.* 47 La. Ann. 1223; *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 408, 21 L. ed. 114.

The duty of looking and listening before crossing railroad tracks imposed on citizens is attended by the correlative duty on the part of those in charge of railroad cars to keep careful watch and exercise the greatest care to avoid injuring others, and even the grossest contributory negligence on the part of the persons injured will not defeat his action "if, with proper care, their employees in charge of the train can avoid the injury and fall in that care."

McGuire v. Vicksburg, S. & P. R. Co. 46 La. Ann. 1552; 1 Thomp. Neg. p. 449.

Railroad companies are bound to keep a proper and vigilant lookout and to exercise a constant watchfulness for persons upon their track, or who may be approaching the track, particularly at crossings where there are frequent traffic and passage; and if they fail in such lookout and watchfulness it is gross negligence.

Hanson v. Mansfield R. & Transp. Co. 38 La. Ann. 114; *Curley v. Illinois C. R. Co.* 40 La. Ann. 816; *White v. Vicksburg, S. & P. R. Co.* 42 La. Ann. 994; *Barnes v. Shreveport City*

R. Co. 47 La. Ann. 1224; Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 405, 21 L. ed. 114.

Even if plaintiff was a trespasser on defendant's track, defendant was not relieved from liability, if he was injured by reason of its culpable ignorance of his dangerous situation, or negligence in any other particular.

Mitchell v. Boston & M. R. Co. (N. H.) 34 Atl. 674; *Oahill v. Chicago, M. & St. P. R. Co.* 46 U. S. App. 85, 74 Fed. Rep. 285, 20 C. C. A. 184.

One who used a footpath over a railroad, which has been long used as a walkway by him and other occupants of adjoining lots, with the knowledge but without the objection, of the railway company, is a licensee, and is not wrongfully on said path.

Norfolk & W. R. Co. v. DeBoard, 91 Va. 700, 29 L. R. A. 825; *Roth v. Union Depot Co.* 13 Wash. 525, 81 L. R. A. 855; *Kreis v. Missouri P. R. Co.* 181 Mo. 538; *International & G. N. R. Co. v. Tabor*, 12 Tex. Civ. App. 283; *Central R. & Bkg. Co. v. Vaughan*, 98 Ala. 209; *Texas & P. R. Co. v. Watkins* (Tex. Civ. App.) 26 S. W. 780; *Johnson v. Lake Superior Terminal & Transfer Co.* 86 Wis. 64.

On petition for rehearing.

Failure of a person to look and listen before crossing the tracks of an electric railway in a public street where the cars have not an exclusive right of way is not negligence as matter of law.

Benjamin v. Holyoke Street R. Co. 160 Mass. 8; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *Robbins v. Springfield Street R. Co.* 165 Mass. 80.

The right of street cars to precedence must be exercised with due regard and proper precautions for the rights of others, and the fact that it has a prescribed route does not alter the duty of the defendant to the public who have a right to travel upon its tracks until met or overtaken by its cars.

Rascher v. East Detroit & G. P. R. Co. 90 Mich. 418.

A person in charge of a car is required to check his speed upon seeing a person or vehicle on the track, and in dangerous proximity, or who is about to enter thereon.

Birkett v. Knickerbocker Ice Co. 110 N. Y. 504; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571; *Huerzeler v. Central C. T. R. Co.* 1 Misc. 136.

Ordinary care does not exclude the idea of all negligence, however slight.

Calumet Iron & S. Co. v. Martin, 115 Ill. 358.

There is a difference between steam railroads and street railways in regard to the right of crossing track—for in regard to the latter it has been repeatedly held that a pedestrian has the right to walk on any portion of a track, to cross the same at any point, and those in charge of vehicles must use due care to prevent a collision.

Moebus v. Herrmann, 108 N. Y. 349; *McClain v. Brooklyn City R. Co.* 116 N. Y. 459; *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. 481, 87 Am. Rep. 639; *Meyer v. Lindell*, 6 Mo. App. 27; *Baker v. Eighth Ave. R. Co.* 62 Hun, 39; *Eckensberger v. Amend*, 10 Misc. 145.

It is negligence for an electric street car company to run a car along a narrow and unlighted alley on a dark night so fast that it cannot be
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stopped within the distance covered by its own headlight.

Gilmore v. Federal Street & P. Valley Pass. R. Co. 158 Pa. 81.

When street cars are propelled by agencies capable of attaining a speed of 10 or 12 miles per hour it is the duty of the gripman, not only to see that the track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track.

Muncie Street R. Co. v. Maynard, 5 Ind. App. 372.

The degree of care is not required of persons passing along or crossing a street railway that is required of those crossing or walking along the tracks of ordinary railroads.

Muncie Street R. Co. v. Maynard, 5 Ind. App. 372; 2 Am. & Eng. Enc. Law, *Carriers*, p. 780; *Mulvaney v. Brooklyn City R. Co.* 1 Misc. 425; *Baltimore Traction Co. v. Wallace*, 77 Md. 435.

It is not negligence to fail to look when the situation and surrounding circumstances were such that a person of ordinary prudence could not have looked.

Pyne v. Broadway & S. Ave. R. Co. 46 N. Y. S. R. 662; *Moebus v. Herrmann*, 108 N. Y. 349; *Koch v. St. Paul City R. Co.* 45 Minn. 407.

The proposition, too, is totally untenable that the motorman of a street car has a right, when in a case like this he admits that he saw the deceased was in danger, to presume that he could get out of the way.

Gallagher v. Coney Island & B. R. Co. 24 N. Y. S. R. 746; *Rend v. Chicago West Div. R. Co.* 8 Ill. App. 517; *Liddy v. St. Louis R. Co.* 40 Mo. 506; *Ryberg v. Portland Cable R. Co.* 23 Or. 224; *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755; *Sullivan v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 800; *Gallagher v. Crescent City R. Co.* 87 La. Ann. 288; *The Maz Morris v. Curry*, 187 U. S. 1, 34 L. ed. 586.

Contributory negligence is no bar to recovery when defendant was guilty of gross wanton recklessness.

Christian v. Illinois C. R. Co. (Miss.) 12 So. 710; *McDonald v. International & G. N. R. Co.* (Tex. Civ. App.) 21 S. W. 774; *Hall v. Ogden City Street R. Co.* 18 Utah, 243.

Street-railway companies have no superior or predominant right to the use of the highways in which their cars run, over the rights of other persons passing on foot or with vehicles, except that, because of the inability of their cars to deviate from their track, other passers must give them the right to pass when occasion requires.

If a motorman running a trolley car on a highway in the day time perceives a person passing along on foot upon or closely beside the track, and apparently heedless of signals, and the motorman can arrest the movement of the car before striking the man, his failure to do so is evidence of negligence which must be submitted to the jury.

Butteli v. Jersey City H. & R. Electric R. Co. 59 N. J. L. 802.

Breaux, J., delivered the opinion of the court:

Plaintiff, tutrix of her minor children, and personally, brought this suit for \$10,000

damages caused by the asserted negligence of defendant's agents and employees, which resulted, she avers, in the death of her husband, father of her children. The defendant corporation was the owner of a line of street railways running through Louisiana avenue. She alleges that her late husband was crossing the public street, about 10 o'clock at night, near his residence, fronting on the avenue, between Franklin and Liberty streets, when one of defendant's electric cars negligently and carelessly ran over her husband, inflicting injuries causing death a few minutes after the accident; that her late husband was lawfully on the street, and was at the time duly careful. The defendant pleads the general denial, and avers that the plaintiff's husband lost his life by his own carelessness and recklessness, and that, if there was negligence on its part, there was contributory negligence on the part of plaintiff's husband. From a description of the place of record, it is shown that the defendant company has a double track on Louisiana avenue,—one track for the car running down on the lower side of the avenue, between Baronne and Freret streets, and the other track for the cars going up to Carrollton on the upper side of the neutral ground between Dryades and Howard streets. Between the two tracks there is a steam railroad track of the Illinois Central Railroad. In the front of the cottage occupied by plaintiff and her late husband, he had raised the banquette, and laid a plank walk from the banquette to the neutral ground. There was no passable banquette on either side in front of this lot, and he and his family for more than three years used the plank walk and neutral ground for ingress and egress; for the ground where there should have been a banquette was low and muddy, the gutters wide and deep, and walking was practically impossible. There was a path between the Illinois Central track and the track of the defendant company, well known (it is asserted by the plaintiff) by the employees of the defendant company, where people were frequently seen walking. On the night of the accident the deceased, a few minutes prior to the accident, was standing on the Illinois Central Railroad track, and conversing with an acquaintance. Leaving his acquaintance, he walked in the direction of his house, which was about half a block away from where they were standing. His home was on the lower side of the track. He was going in the same direction that the car was going. The acquaintance with whom he was conversing walked away in an opposite direction, and met the alleged offending car, running, he says, at a rapid speed. The noise of the car stopping, because of the accident, a short distance from where it had passed him, attracted his attention. He walked back to the place of the accident. His back at the moment of the collision was turned to the car. He saw nothing of the accident. He says that the headlight of the car, as it passed him, was dim. No alarm bell was sounded. The deceased was struck by the car when he was opposite the plank walk immediately in front of his house. Evidently he had left the walk, and was crossing defendant's track on his way to the plank crossing leading to his

gate, when he was struck. The car ran about 40 feet after the blow. The headlight was broken; also the fender. Two of plaintiff's witnesses testify that there was no ringing of the bell prior to the accident. The motorman, as a witness for the defendant, testifies that he could see that the deceased was in danger from where he was, and that he sounded the gong and uttered a cry to him; that he (the deceased) stepped immediately in front of the car, to his right. He and the conductor testified that the headlight was burning brightly. This is a summary of the salient facts. The case was tried before the court without the intervention of a jury. The judgment was for plaintiff in the sum of \$10,000. The defendant has appealed.

Our attention is directed to the fact that the width of the path on which the defendant was walking between the tracks was not large,—only about 7 feet. The car must have been near him when he left this path or street and stepped in front of the car to go over to the plank walk opposite his home. Three steps would have carried him across. As he was struck while attempting to cross, it is, in our judgment, evident that his first step on the track must have been made when the car was dangerously near. Witnesses for the plaintiff saw the coming car at some distance. The noise made by the running car was clearly heard by witnesses who were not on the track at all. The width of the walk was, we have seen, about 7 feet. We assume that the deceased was about the center of the walk at the time that he turned to the right to cross the track of the defendant. We assume, further, that four steps was the distance from the center line of the walk in question to the center line of defendant's track. Upon this basis, about two and a half steps must have been the distance stepped from the center line of the walk to the outer line of the track over which the car runs, and one and a half steps the distance between the outer line of the car to the center line of the track. From the fact that the headlight and the fender of the car were broken, we judge that the deceased was at or very near the center line of the railroad track when he was struck. At the moment that the deceased crossed the outer line of the car, the car must have been quite near to him,—a distance which can be computed with some degree of accuracy by reference to the time it takes to walk over a space in length of about one and a half steps. It was impossible, it is evident, to stop the car, after the deceased crossed the outer line, in time to prevent the accident. The question arises, Was it prudent, in the dark, to attempt to cross? Three grounds of alleged negligence urged were the asserted speed of the car, the dim light, and failure to ring the alarm. The evidence upon these points is conflicting between the witnesses for the defendant and those for the plaintiff.

The issue brings us to a consideration of the rule that one approaching a railway crossing, or attempting at any place to cross a railroad track, must carefully look up and down the track, and in that connection we must determine whether it applies to an electric street railway. The rule itself is supported by a long list of decisions. Its correctness does not

admit of any question. When street cars ran slowly, and could be stopped within a distance of a few feet, the rule for the pedestrian to exercise his senses of sight and hearing, and to stop, look, and listen, did not apply as it does to the electric cars. Even in the case of horse cars one was enjoined to be careful in walking on a railroad track, or in attempting to cross it. Greater prudence is required of a pedestrian who crosses a railway track of a steam or electric car in a city. It is his duty to exercise his senses of sight and hearing. The evidence of plaintiff's witnesses in regard to the speed of the car is in general terms. No attempt was made to approximately fix the rate at which it was running. Granted that it was running with speed; that, of itself, was not negligence, if all needful care was exercised by the company. The dim headlight, and the fact that there was no ringing of the bell at a place not known as a regular public crossing, do not relieve the pedestrian of his obligation to exercise ordinary care to avoid an injury. There was light, although it may have been dim. There must have been noise made by the moving car very near the place of the accident. One who, in the night-time, with full knowledge that the car may come at any moment behind him, attempts to cross, must use his senses to avoid an accident. In a recently well considered case this court said: "It is a well-recognized rule that a person, before attempting to cross the track of a steam or electric car, should look to ascertain whether prudently the crossing should be attempted." *Snider v. New Orleans & C. R. Co.* 48 La. Ann. 12. Again, in the same opinion, which has a direct application to the case before us: "The motorman upon the car had no reason to anticipate that plaintiff would attempt to cross the street under existing conditions. Plaintiff knew perfectly well that the moving car was bound on its regular trip up to a point above that street on a fixed line, and must therefore inevitably cross the path he was taking as he moved across." This case has the support of four preceding decisions of this court: *Schulte v. New Orleans City & L. R. Co.* 44 La. Ann. 510; *Hersch v. Louisville, N. O. & T. R. Co.* 44 La. Ann. 240; *Smith v. Crescent City R. Co.* 47 La. Ann. 833; *Schernaydre v. Texas & P. R. Co.* 48 La. Ann. 248.

As to the dim light, failure to ring the bell, and the speed of the car, the evidence was conflicting. The car was not without light. It had the light of the car and of the headlight. The very short distance between the deceased and the car rendered it impossible to ring the bell in time to warn him to get off the track. The car was an ordinary electric car, not noiseless. It was plainly heard by all the witnesses who testified upon the subject. These are important considerations, which have received our careful attention. Weighed with the fact that the victim of the sad accident suddenly turned and stepped one step or a step and a half from a safe path to a very unsafe place, we have concluded that he was imprudent to a degree which renders it impossible, under the rule heretofore announced by this court, to allow damages. This court has decided that the rule, "stop, look, and listen," applies to one attempting to cross an electric car track. There

is greater reason for its application at night, when the motorman is less able, in the darkness, to see persons near or persons crossing or attempting to cross. Nothing of record shows that the least attempt was made to guard against the danger of an approaching car on a track over which cars frequently pass.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed. It is further decreed that plaintiff's demand is rejected.

Watkins, J., dissenting:

The plaintiff instituted this suit in her own right as the surviving widow of Edward Hoelzel, and also in the capacity of natural tutrix of the children of her marriage with the deceased, for recovery from the defendant of the sum of \$10,000 as damages occasioned by the death of her said husband through the gross carelessness and negligence of its agents and servants, depriving them of a support and maintenance. The defense is contributory negligence. The case was tried by the judge who found for the plaintiff the full amount claimed, and the defendant appealed. The judge *a quo* prepared his reasons for judgment in writing, and they are not only incorporated in the transcript, but they are reproduced in the brief of plaintiff's counsel *in extenso*; and, as the salient facts are brought forward in clear and concise form, I have taken the liberty of making the following extracts therefrom, namely: "The substantial facts are as follows: The defendant owns and operates a line of electric cars in this city known as the 'Judah Hart Line.' It runs from Canal street to Carrollton. On Louisiana avenue it has a double track,—one track for the cars going down on the lower side of the neutral ground, in the center of Louisiana avenue, between Baronne and Freret streets, and the other track for the cars going up to Carrollton on the upper side of the neutral ground, between Dryades and Howard streets. Between these tracks is a single track of the Illinois Central Railroad,—a steam railroad. Between Baronne and Freret and between Dryades and Howard, and especially on the lower side of Louisiana avenue, between Franklin and Liberty streets, there are no banquettes. This part of the city has been settled in the past five or six years. When a building was erected the owner would raise the banquette in front, and lay a plank walk over the gutter, and across the street to the neutral ground. To reach their homes, all the residents in that neighborhood were in the habit of walking on the neutral ground, on or between the tracks, until they were opposite their homes, when they would cross over on their plank walks. The same course was pursued in leaving their homes. They were compelled to adopt this mode and custom because the ground where a banquette should have been was low and muddy, the gutters wide and deep, and walking inconvenient, if not practically impossible. This custom was well known to the employees of the railroad company, for there was a well-beaten path between the Illinois Central track and the track of the defendant company, the plank walks were visible, and people were frequently seen walking on the neutral ground,

passing up and down, and crossing over to their homes. John Hoelzel lived with his family on the lower side of Louisiana avenue, between Franklin and Liberty streets, about the center of the block, in a small cottage owned by him. In front of his cottage he had raised the banquette, and laid a plank walk from the banquette to the neutral ground in the manner described. There was no banquette on either side of him to the corner of either Franklin or Liberty streets. There was a bad, muddy place next to him, towards Franklin street, and the weeds were very high, and he and his family were compelled to use the plank walk and neutral ground for ingress and egress. They had been in the habit of doing so for three years. It was their habit before the road was built and after. On the night of April 13, 1895, John Hoelzel was returning to his home from a barber shop. He met witness Emile Gearhart on the neutral ground on Louisiana avenue, corner of Franklin. He was then half a block from his residence. They conversed five or ten minutes, standing on the track of the Illinois Central Railroad, and then Hoelzel walked towards his home,—towards the woods. The witness walked towards the river. Gearhart had hardly walked 20 feet when an electric car going down town passed him at a very rapid speed. Its headlight was dim. He walked about 20 feet further, when the car stopped. He then walked back to the car, and found that Hoelzel had been run over, horribly mangled, killed by the car, in front of the plank walk leading to his residence. The motorman did not sound his gong at the crossing, or before he struck Hoelzel. Another witness, Martin, tried to stop the car a block and a half away from where the accident happened, with the intention of going down town. He stood on the track and waved to the motorman, but the car was going so fast it was impossible to stop it, and the headlight so dim that the motorman could not or did not see him, and he had to step aside and let the car go by. He heard no gong sound from the time the car passed him until it struck Hoelzel and stopped. Martin then walked to the car in about five minutes. Other witnesses testified that the car was running at a very rapid speed, and one other that no gong was sounded. The car ran from 40 to 50 feet beyond the spot where Hoelzel was struck before it stopped. The motorman saw Hoelzel walking between the Illinois Central Railroad Company's track and the Traction Company's track. His back was to the approaching car. He was right near to the line of the car, and the motorman says that he 'saw he was in danger from where he was.' The motorman saw him when he was within 15 feet from him. It is evident from the whole testimony that Hoelzel was walking within 2 or 3 feet of the uptown rail of the Traction Company's downtown track. When he reached the plank walk leading to his house, the car was within 15 feet behind him. The motorman saw him, but he did not see or hear the car, being slightly deaf or absent-minded. He then turned to his right to go across to the plank walk to his home, stepped upon the track and was instantly killed. When he stepped upon the track it

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was too late for the motorman to stop his car, if he had tried so to do, as he testified. The court is of the opinion that the defendant was grossly negligent, in its motorman's running in that square at so fast a speed with a dim headlight, without sounding his gong, and in not seeing the deceased in time to give him timely warning, and that the gross carelessness of the defendant company was the true cause of the accident. The court is of the opinion, from the facts above stated, that the deceased was not guilty of contributory negligence. He had a right to walk to his home on the neutral ground, and across the track. Where 50 to 100 people daily for four or five years use a railway track for foot travel with the acquiescence of a railroad company, without their objection, such acquiescence creates a right which imposes on the company a duty of ordinary diligence to avoid injury to persons so using the track. The deceased simply did what he and his neighbors had been in the habit of doing for years, to the knowledge, without objection, and with the acquiescence, of the company."

Having gone over the testimony in the record, I feel satisfied of the correctness of the statement of my learned brother of the district court, but am of opinion that some additional extracts therefrom would somewhat fortify the facts stated by him, and I append the following:

First. In respect to the speed of the car, the failure of the motorman to sound the gong in the vicinity of the accident, and the dimness of the headlight. The statement of a witness who was standing at a street corner near by, waiting for a car, is that he 'stood on the track and tried to stop the defendant's car;' that "he stood on the rail of the track, and tried to signal [the motorman] down, but it was impossible; he did not stop, and [witness] then moved out of the way [so as] not to get knocked down; that the car was going at a very rapid rate of speed, and there was hardly any headlight; the light was bad; there was hardly any light in the headlight; that the headlight was so dim the motorman could not see him, was the reason he did not stop his car when he hailed him to do so; his headlight was not giving enough reflection;" that it was about 10 o'clock at night, and very dark. The statement of one of the defendant's witnesses—the only one introduced for the purpose of supporting the testimony of the motorman and the conductor—is that at the time of the accident he was walking along the banquette on the opposite side of the avenue from the residence of the deceased, in the same direction that the latter was going, and about ten steps in his rear; that he saw the deceased while he was talking with the watchman at the corner near by, and followed him when he started towards his home, as he wished to borrow a tool of some kind from him; that he shouted to him "to look out, just as he stepped on the track, and the car hit him at the same time" (but he does not speak of hearing the gong sounded, or seeing the illumination of the headlight, notwithstanding his close proximity to the car); that he saw the car when it was about 40 feet distant, but that "it did not take a minute—a half minute, it did not take

that"—to overtake the deceased. He states further that the deceased turned from the pathway between the two tracks to take the street crossing to go to his home just at the moment he shouted to him, and he was instantly struck by the car.

Second. As to circumstances attending the accident, illustrating the carelessness of the motorman in charge of the car, and the speed of the car: A witness who resided just on the opposite side of the avenue from the deceased, and knew him well, states that he heard the report, and jumped up and ran across the street to the car; that he spoke to the motorman, and he said in reply that he thought that he had killed a man, and, it being dark, he lighted a match and saw that the dead man was Hoelzel, who lived just on the opposite side of the street from the place of the accident; that he observed "that the headlight was all bursted up, and that the fender in front of the car to protect it was bursted in half, that the skin and hair of Hoelzel's head were taken off, and it must have been done by the headlight." Another witness describes the scene thus: "Well, I ran down and jumped the gutter, and when I got over there Mr. Yokum was there; and the conductor or the motorman—one of them—said it was a negro that was lying on the track sleeping; drunk, at least, it was. That Mr. Yokum said, 'No, it is not,' and he lighted a match and said, 'It is Mr. Hoelzel.'" He also stated that the headlight was bursted and the cowcatcher broken; that Mr. Yokum raised the body up off of the track, his head facing towards the river, and his body lying across the track of the defendant, about the center, just opposite the plank walk leading to his house. Another witness who resided in the vicinity of the accident said: "Well, as soon as he could jump across the gutter he ran across the avenue to where the deceased was. That he was sitting on his gallery step at the time and heard the crash, and got up and jumped across and ran into the street. . . . When he got there he could not tell what it was, it was so dark. That he saw it was a dark object, but did not know whether it was a human being or not, when some one struck a match and pulled the head up, and he then recognized Mr. Hoelzel." He stated that he observed that the distance between the deceased and the car was apparently about 40 feet, and the headlight was broken, and the fender also. Another witness testifies that, when he arrived at the place of the accident, he spoke to the motorman about it, and he said that it was impossible for him to stop the car; that he thought he had killed a man; that he thought he saw a man on the track, but he did not know. Another witness says that she was engaged in sewing while waiting for her husband, "when she heard a car coming along at a frightful rate of speed; then, all of a sudden, when it got in the middle of the block, she heard a crash, and got up and ran out and across the track, and ran down to Mr. Hoelzel, in front of his door." The statement of the motorman is that the night was a very dark one, but aided by his headlight, he "discovered an object, . . . and as he was nearing it he could see that it was a man on the left, between the Illinois

Central belt and the Traction Company's electric line, walking on the outside; that the first thing that entered his mind was, knowing it was a man, of course he would keep out of the way of the car, and as he approached him he kept right near the line of the car; that he could see that he was in danger from where he was, and sounded the gong and hallooed to him at the same time; that he stepped immediately in front of the car, to the right of witness, where the car struck him; that when he shouted to him the deceased was within 10 feet of the car; that as soon as he discovered what he had done he just threw up his hands and said, 'My God! what have I done?' and ran back through the car to the conductor, and said, 'Look out! I believe I have killed a man.'" He further states that, when he first saw there was an object on the side of the track, "he could just tell there was an object moving," and that after seeing the moving object he supposes the car ran about 40 feet, and the man kept right ahead of the car; that, when the car had approached near enough for him to hail Hoelzel and say "Look out," he stepped in front of the car and upon the track. The statement of the conductor is as follows, viz.: "Well, we were running along there about the usual rate of speed, when he heard a crash, all of a sudden, in front of the car, and he started through the car and asked the motorman what was the matter; and when he was about one third through the car the motorman turned to him, and threw up his hands and said: 'My God! I believe I have killed a man.' Just that way, and with that the car stopped, and he ran back on the track, when he saw the man laying between the rails," etc. But the conductor did not confirm the statement of the motorman to the effect that he sounded his gong near the place of the accident, nor that he shouted or hailed the deceased. Nor did he state that he sounded his gong even at the adjacent street corner, though he does say that his supposition was that he did. He admits that the fender and headlight were broken in their contact with the deceased.

The best proof that no gong was sounded at or near the scene of the accident is furnished by the replies which the motorman made to the interrogatories that were propounded to him at the time on the spur of the moment, and the voluntary statement he made to the conductor at the instant the crash occurred, and the further fact that after the accident the car was found to have passed some 40 feet beyond the place of contact, and had the deceased been plainly visible, by the aid of a good headlight, he should have been readily seen for a distance of 70 feet in front of the car, so that the car could have been stopped in time to have saved the life of the deceased. And the further important fact is that the car was moving with such frightful rapidity that its contact with the deceased produced a crash that was plainly heard by, and arrested the attention of, more than half a dozen of the witnesses, who instantly rushed to the scene; and the violence of the shock was so great that it caused the instant death of a strong man, broke down the fender, and shattered the headlight of the car! Had the deceased, under the circumstances, looked—as possibly he did—just before mak-

ing the attempt to step across the street-car track, of not more than 8 feet in width, to see if a car was approaching, his reasonable belief must have been that there was no danger, as the gong had not been sounded, and the headlight was not sufficiently bright to indicate a dangerous proximity of the car, and no means were afforded him of judging of the speed of the car which was in fact so rapidly approaching him. In any view that can be taken of the testimony, the gross and culpable negligence of the motorman is manifest; and to say that an electric car can be run on a street of this city at such a frightful rate of speed as the testimony discloses that of the defendant was moving when it ran over and killed Hoelzel that dark night in April, without giving him any warning by the sound of the gong or aid of the headlight, and the corporation be exonerated from liability, is, in my opinion, to place the lives and limbs of its inhabitants in imminent peril, and leave those who are dependent upon them for society and support without any security whatever! The deceased was not upon the defendant's track, but he was traveling a plain beaten path that lies between it and that of the Illinois Central Railroad Company, and which had been in common use for years by the people of the neighborhood; and he was attempting to step across the track of the defendant in the effort to reach his home when he was run over by the defendant's car and instantly killed. The deceased had an equal right to use this pathway as a means of ingress to and egress from his house as any citizen to traverse any of the banquettes of the city, and is quite as much entitled to the protection of the law in the prudent exercise of that right. In my opinion, there was gross carelessness on the part of the defendant, and no contributory fault on the part of the deceased.

I do not think the facts of this case bring it within the scope of *Snider v. New Orleans & O. R. Co.* 48 La. Ann. 1, nor of *McLaughlin v. New Orleans & O. R. Co.* 48 La. Ann. 28; nor of *Settoon v. Texas & P. R. Co.* 48 La. Ann. 807. In the first case, the plaintiff attempted, in open daylight, to drive his wagon across the defendant's track on St. Charles avenue, in front of an approaching car, and was run into and injured thereby. In the second, plaintiff's little son was proceeding out Melpomene street, driving a hoop with a stick, and, while attempting to cross the defendant's track on St. Charles avenue, was struck and injured by one of its cars. In the third case, plaintiff's son was killed by a box car of the defendant while a train was being made up at a station. The boy, in attempting to cross the track at night suddenly came in contact with a pole which was used in coupling cars.

The foregoing cases are cited in defendant's brief, and it also refers to the following cases as being conclusively in its favor: In *Childs v. New Orleans City R. Co.* 88 La. Ann. 154, the plaintiff was held to have contributed to his injury by "either misunderstanding or not heeding the warning thus given." In *White v. Vickburg, S. & P. R. Co.* 42 La. Ann. 991, a lady was driving in a buggy with three young children through a street in Shreveport in open daylight, and, notwithstanding the

whistle was blown and the bell rung a warning signal, she drove so close to the train that her horse became frightened, ran away, and upset the vehicle, whereby she was injured. In *Hertlich v. Louisville, N. O. & T. R. Co.* 44 La. Ann. 280, the plaintiff was struck and injured by a switch engine of the defendant, which was slowly moving, at a point in its yard a short distance from the street crossing in the vicinity of an electric light,—he having failed to either look or listen,—and the bell was rung and the whistle sounded. In *Stanton v. Harvey*, 44 La. Ann. 511, the injured lady was hard of hearing, wore a large sun-bonnet which covered both sides of her face, when she was knocked down by a horse car, and had her ankle broken by the car wheel that passed over it; but this accident occurred at a street crossing in open daylight, when, with proper care, she could have protected herself with ease. In *Scheznaydre v. Texas & P. R. Co.* 46 La. Ann. 248, the plaintiff's son, who was a deaf mute, was walking on the defendant's track with his back to an approaching train; but the day was clear and bright, and the usual signals were given. The engineer was not aware of his infirmity, and consequently approached the boy too closely to be able to stop the train, assuming that he had heard the warning and would get off the track. In *Blackwell v. St. Louis, I. M. & S. R. Co.* 47 La. Ann. 268, the plaintiffs were shown to have received injuries by the defendant's train while riding in a wagon and attempting to cross the track ahead of same, notwithstanding it was in open view in broad daylight, though there were some buildings which partially intervened. In *Smith v. Crescent City R. Co.* 47 La. Ann. 888, the plaintiff received injuries by a horse car running over and breaking his leg while he was walking on the track in front of same as it was approaching him from the rear; but his inattention to the approaching car was held to have been inexcusable negligence, especially as he had just parted with a friend at the corner near by, who was waiting for the car to carry him home.

Per contra, the plaintiff's counsel cite the following cases, viz.: In *McGuire v. Vickburg, S. & P. R. Co.* 46 La. Ann. 1548, after a careful examination and analysis of authority, we held that in an action for damages against a railroad company by the surviving parents for the loss of their son, who was run over and killed by the locomotive, the defense of contributory negligence will not avail, if by the exercise of reasonable care on the part of those in charge of the train the accident might have been avoided. This doctrine is also announced in 2 Thompson, Neg. p. 1105: Patterson, Railway Accident Law, 51, 55: Pierce, Railroads, 880. The court in its opinion says in the *McGuire Case*: "But it is in proof that the signal for the brakes was not given, nor any whistle sounded to announce the approaching train, until the deceased was almost under the wheels of the locomotive, and his death inevitable. The engineer says he saw an object, but very close, and could not tell what it was," etc. That case presents quite a striking likeness to the instant case, and involves an exactly similar principle, in my opinion. "It is the duty," says the author, "of drivers of cars, not only

to see that the rail track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track." 1 Thomp. Neg. 898; *Barnes v. Shreveport City R. Co.* 47 La. Ann. 1218. In *Gallagher v. Crescent City R. Co.* 87 La. Ann. 288, it was correctly held that "a car driver can be charged justly with negligence only where he fails to observe or do something he ought to see or do, and would notice or do with ordinary vigilance where he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected of him." In this case the evidence clearly shows that the motorman of the defendant's car did not discharge his duty, but, on the contrary, was negligent, in the sense of the rule announced in that opinion. In *Curley v. Illinois C. R. Co.* 40 La. Ann. 810, we said that a railroad company running and operating its road through the streets of a populous city is bound to observe extraordinary precautions for the safety of the public, particularly at street crossings. In *Johnson v. Lake Superior Terminal & Transfer Co.* 56 N. W. 161 [86 Wis. 64], the Wisconsin court held that as it appeared from the evidence "that persons were accustomed to walk on the track, and that this had been done to such an extent that between the rails near where plaintiff was injured there was a path worn by pedestrians, while the ground on either side was so incumbered as to make it inconvenient to walk outside the track," both the question (1) of whether the defendant had licensed the public to walk on its track, or had acquiesced in such use of it; (2) whether the defendant was guilty of negligence in the method of moving its train in respect to the plaintiff, were for the jury to determine. Accepting that ruling as correct, in my opinion it applies to the instant case with far greater force, because (1) the pathway Hoelzel used was not on the defendant's track, but parallel with it; (2) the case was decided by the judge of the lower court and not by a jury. In *Kris v. Missouri P. R. Co.* 33 S. W. 64 [181 Mo. 533], the Missouri court held that the proof disclosing that the plaintiff's wife, in "going to a depot, walked in the space on a double-tracked railroad, between the two tracks, with an umbrella over her head, so near one of the tracks as to be struck by a train coming back of her, does not show such negligence on her part as to justify the taking of the case from the jury, there being evidence that those in charge of the train knew that people were in the habit of walking between the tracks at that point, and that they did not use proper means to pre-

vent the accident after they saw, or by ordinary care should have seen, her peril." (My italics.) That decision seems to present an exactly parallel case to the one under consideration. In *Texas & P. R. Co. v. Watkins* (Tex. Civ. App.) 28 S. W. 760, the Texas court held (1) that "where a railroad company has notice that a large number of pedestrians used its tracks at a particular place, and takes no steps to prevent this use, it is negligence for its train to approach such place without giving warning;" (2) that "where a person walking along a railroad track, at a point where a great number of persons were accustomed to walk with the acquiescence of the company, is so startled by suddenly seeing a train, which had approached from the rear to within a few feet of her without warning, that she jumps in front of it, she will not be held guilty of contributory negligence." (My italics.) But an even stronger case is stated than either of the foregoing in *Chamberlain v. Missouri P. R. Co.* 133 Mo. 587, in which the Missouri court held that "where a train is running through a populous neighborhood, just outside the city limits, where workmen have for years been accustomed to use the track in going to and returning from their work, and the company's servants in charge of the train see, or by the exercise of ordinary care may see, a person on the track in time to avoid a collision, but fail to use such care, the company will be liable, though the person injured was a trespasser." (My italics.) In *Roth v. Union Depot Co.* 43 Pac. 641 [13 Wash. 525, 81 L. R. A. 855], the Washington court held that "where from fifty to one hundred people, daily, for four or five years, use a railway track for foot travel, with the acquiescence of the railway company, such acquiescence creates a right, which imposes on the company a duty of ordinary diligence to avoid injury to persons so using the track." (My italics.)

It is upon the opinion in this last case that our learned brother of the lower court chiefly relied for the clear and sagacious statement he made of the plaintiff's case; aided, it is true, by the opinions of this court *in pari materia*. A careful examination of the law and evidence applicable to this case has convinced me that the liability of the defendant is clearly made out, and that deceased was without contributory fault. The judgment of the lower court should be affirmed. For these reasons I dissent from the opinion of the majority of the court.

Rehearing denied June 29, 1897.

RHODE ISLAND SUPREME COURT.

Marlin HENSON, Admr., etc.,
v.

Lydia D. BECKWITH.

(..... R. L.)

A lessor who is not in possession or control of an elevator well in a leased build-

ing which the tenant has covenanted to keep in repair is not liable for the death of a person who falls into it while delivering goods to the tenant on the latter's invitation, although there was a dangerous defect consisting of a large opening between the elevator and the outer wall.

(June 29, 1897.)

NOTE.—As to the liability of a landlord for injuries to tenant's guests and servants from defects
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in premises, see also *McConnell v. Lemley* (La.) 84 L. R. A. 609.

ON DEMURRER by defendant to the declaration and by plaintiff to the plea in an action to recover damages for death by the alleged negligence of defendant. *Demurrer to declaration sustained.*

The facts are stated in the opinion.

Messrs. Joseph C. Ely, Herbert Almy, and James M. Gillrain, for defendant:

The obligation to keep the premises in repair being in the tenant, if an accident happened to anyone through the defective condition of the elevator during the existence of the lease, then the defendant is not liable in damages, because she would have no power to make either repairs or changes in said building until after expiration of the lease.

State v. Piper, 89 N. C. 551; 12 Am. & Eng. Enc. Law, p. 682, cases cited in note 3.

If the lessee has covenanted to make repairs the landlord is not liable for injuries due to defective premises, because it cannot be said that the landlord has given authority that the premises should be kept in a dangerous state.

Pretty v. Bickmore, L. R. 8 C. P. 401; *Dalry v. Savage*, 145 Mass. 38; *Guinnell v. Eamer*, L. R. 10 C. P. 658.

The law presumes that the tenant was bound to repair, and that the landlord was not liable.

Batterman v. Finn, 32 How. Pr. 501; *Kastor v. Newhouse*, 4 E. D. Smith, 20; *Rich v. Basterfield*, 4 C. B. 783; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391.

As there is no allegation in the declaration that the plaintiff's intestate was rightfully upon the defendant's premises, it follows that defendant owed no duty to him to keep the elevator safe, and so is not liable for the injury.

Smith v. Tripp, 18 R. I. 152; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588; *Woodruff v. Bowen*, 138 Ind. 431, 22 L. R. A. 198; *Beehler v. Daniels*, 18 R. I. 563, 27 L. R. A. 512; 16 Am. & Eng. Enc. Law, p. 415.

It must be presumed, in the absence of an averment to the contrary, that plaintiff's intestate knew of the condition of the elevator, as it was an obvious defect, as appears by the declaration itself; and the defendant is not liable.

Harpel v. Fall, 68 Minn. 520; *Ellis v. Waldron*, 19 R. I. —, Index RR, 188; *Davidson v. Fischer*, 11 Colo. 588; *Bedell v. Berkey*, 76 Mich. 435.

It does not appear directly by averment in the declaration that the tenant at whose request the plaintiff's intestate entered the elevator had any right to use it himself. Then how can the tenant authorize another to use it, so as in case of accident to hold the defendant liable?

Ellis v. Waldron, 19 R. I. —, Index RR, 190; *Third Nat. Bank v. Angell*, 18 R. I. 1; 1 Chitt., Pl. **227-256; *Andrews' Stephens*, Pl. ¶ 205.

An allegation that the defendant knew of the defective construction of said elevator at the time of the making of the lease to Cady is necessary to the maintenance of the plaintiff's case.

Marshall v. Heard, 59 Tex. 266; *Dalry v. Rice* (Mass.) 27 Am. L. Reg. N. S. 253, note.

Where a lessee has covenanted to repair, and an accident happens during the continuance of the lease, due to negligence, the lessee is alone

liable, because he has it in his power to alter the premises and make them safe for the use made of them.

Dalry v. Rice (Mass.) 27 Am. L. Reg. N. S. 251, note; *Guinnell v. Eamer*, L. R. 10 C. P. 658; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Dalry v. Savage*, 145 Mass. 38.

It was optional with the tenant to use the premises with the defective elevator or not, and if he made use of it as it was, he and not the landlord is liable, because the premises could be used without the elevator.

Rich v. Basterfield, 4 C. B. 783; *Mallen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 635.

The hole was not in and of itself a nuisance, and it was not negligence in defendant to maintain it there.

Freeman v. Hunnewell, 163 Mass. 210; *Caldwell v. Blade*, 153 Mass. 84; *Malloy v. New York Real Estate Assn.* 13 Misc. 496; *Hilton v. Waller*, 95 Iowa, 545; *Harpel v. Fall*, 68 Minn. 520.

Messrs. Bassett & Mitchell, for plaintiff, contra:

The owner of leased premises is liable for such an accident caused by a defective construction of the premises existing prior to such lease, which he allows to remain unremedied, although the entire premises are in the possession of the lessee. This is a liability which he shares equally with the tenant.

Joyce v. Martin, 15 R. I. 558; *Taylor, Land. & T.* 8th ed. § 175; *Larue v. Farren Hotel Co.* 119 Mass. 67; *Leavoyd v. Godfrey*, 138 Mass. 315; *Dalry v. Savage*, 145 Mass. 38; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Wendell v. Barter*, 12 Gray, 494; *Moody v. New York*, 43 Barb. 282; *Albert v. State, Ryan*, 66 Md. 325, 59 Am. Rep. 159; *Stratton v. Staples*, 59 Me. 94; *Tomle v. Hampton*, 129 Ill. 383; *House v. Metcalf*, 27 Conn. 681; *Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295; *Careon v. Godley*, 26 Pa. 111, 67 Am. Dec. 404; *Shepard v. Cramer*, 160 Mass. 496; *Lee v. McLaughlin* (Me.) 26 L. R. A. 198, note b.

Stiness, J., delivered the opinion of the court:

The declaration alleges that the defendant, owner of a building known as the "Owen Building," on Dyer street, in the city of Providence, on April 3, 1895, and for a long time prior thereto, knew of a dangerous defect in the construction of the elevator well therein, by leaving a large opening between the elevator and the outer wall; that while the plaintiff's intestate was delivering goods, on said April 3, to a tenant in the building, by his invitation, and while in the exercise of due care, said intestate fell through the opening and was killed. The defendant demurs to the declaration for lack of material averments, but as these could be supplied by amendment, and as the real question of the case arises in a broader way upon the defendant's plea, to which the plaintiff demurs, we will consider the whole case as it is shown by the pleadings.

The plea set up the fact that, excepting a small store, the whole building, together with the elevator, was under lease from January 1, 1895, to December 31, 1899, with covenant by the lessee to keep the interior in repair, and that the defendant had no control over the

elevator, nor the right to make alterations. The case as thus stated raises the question of a landlord's liability to a stranger for the defective condition of premises under lease. In *Joyce v. Martin*, 15 R. I. 558, this court recognized three classes of cases of this sort: First. Where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, then, whether in or out of possession, he is liable for injuries resulting from such nuisance. Second. Where premises are let for rent or profit, to be used for purposes for which they are not fit or safe, and all this was known, or ought to have been known, to the lessor, he is also liable for injuries resulting from such use. Third. Where property, at the time of a demise, is not a nuisance, and an injury happens by some act of the tenant, or while he has entire possession and control of the premises, the owner is not liable. These three rules seem to us to be both comprehensive and correct. Our inquiry, therefore, is to which class the case at bar belongs. The first class of cases includes those where an owner has, by an express or implied invitation, brought persons to danger and injury, under conditions which amount to a nuisance. Examples of this kind are found in *Gordon v. Cummings*, 152 Mass. 518, 9 L. R. A. 640, where an owner maintained a common hallway for his tenants, to which a letter carrier was thereby invited; *Leahey v. Godfrey*, 138 Mass. 315, where an owner maintained an uncovered well in a passageway to a house, to which a police officer was held to be invited; *La Rue v. Farren Hotel Co.* 116 Mass. 67; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, and *Tomlin v. Hampton*, 129 Ill. 883, which were cases of holes in or adjacent to a public walk; and *House v. Metcalf*, 27 Conn. 681, where an over-shot water wheel, so near the road as to frighten horses, was held to be a nuisance. *Wendell v. Baxter*, 12 Gray, 494; *Moody v. New York*, 43 Barb. 282; *Albert v. State*, Ryan, 66 Md. 325, 59 Am. Rep. 159, like *Joyce v. Martin*, were cases of piers and wharves to which the public were held to be invited. Of the second class, *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404, is an example, the building having been unfit for the purpose for which it was let. We think it is clear that the case at bar does not fall within the first of these classes. The defect complained of was not in or near a public way, nor in a part of the premises held out by the owner for the entry of strangers, so as to amount to an invitation to a place which is a nuisance. The term "nuisance," in legal phraseology, "is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, . . . working an obstruction of, or injury to, a right of another or to the public." Wood, Nuisances, § 1. One has the right to erect the building, in general terms, as he pleases; and, even if there be dangerous places in it he violates no right of other people in so doing. If he invites others into such a building, he is, to some extent, responsible for their safety; but the building is not on that account a nuisance. So, one has the right to hire such a building, and under the same limitation, he

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does not thereby maintain a nuisance. Nor is the case at bar within the second class of cases above described. It does not appear that the building was unfit for the purposes for which it was let. The defect complained of was open and obvious. It could easily have been guarded against by warning or, a barrier. Being a freight elevator, it was of itself a warning that it was not intended for the safety of passengers, and equally so was it a warning to those at work upon it. The injury was not caused by any defect in the elevator itself. Such elevators are now in common use, and it is a matter of common knowledge that they are more or less unprotected at the sides. The declaration does not state whether the plaintiff's intestate was an employee of the lessee, or a stranger; but it seems to imply the latter in stating that he entered upon the invitation of a tenant in said building. If he was an employee, the rule of *Kelley v. Siter Spring Bleaching & Dyeing Co.* 12 R. I. 112, 34 Am. Rep. 615, that one who works exposed to manifest danger cannot look to his employer if he is injured, would apply with stronger reason to exonerate the lessor of the employer. If he was a stranger, on the premises at the invitation of a tenant, the case falls within the third class described above, and the owner is not liable. In *Harpel v. Fall*, 63 Minn. 520, the rule is stated that where there is no agreement to repair leased premises by the landlord, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy; and the landlord is not liable to him, or to any person entering under his title, or who is upon the premises by his invitation, for injuries sustained by the unsafe condition of the premises. To the same effect are *Freeman v. Hunnewell*, 168 Mass. 210; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Mollen v. Morrill*, 126 Mass. 545, 30 Am. Rep. 695; *Davidson v. Fischer*, 11 Colo. 583. Shearman & Redfield on Negligence, 4th ed. § 711, states the rule and the reason for it thus: "Those who claim upon the ground that they were invited into a dangerous place must seek their remedy against the person who invited them. If they are the guests of the tenant he, and not the landlord, is the person from whom they must seek redress for injuries caused by any defects in the premises, even though the defects existed when the lease was made; for such persons would never have suffered any injuries from these defects if they had not entered the premises; and this entry was not made at the request of the landlord or any agent of his." Bearing in mind the distinction of cases such as those cited above, where an invitation by a landlord may be implied, this rule limits the liability of the lessor and the lessee to their own acts with reference to a stranger.

Do the facts in this case amount to an implied invitation by the landlord? We think not. In *Gordon v. Cummings* and *Leahey v. Godfrey* the landlords were in control of the dangerous passageways, and so themselves held out the invitation to enter. So in places where the public go, the owner is held liable because of his participation in a nuisance.

But it would be a startling proposition that every owner who has leased property to others is liable for its absolute security, at the time of letting, to every person whom a tenant may invite to the premises, when such owner can neither have knowledge of such entry nor the chance for warning or protection. We do not think that the law goes to this extent; yet such a proposition would be necessary to sustain the present case. Ordinarily a freight elevator is used by employees. Can it be said that a landlord is bound to know that it will be used by strangers? The tenant and his servants, knowing its condition, may use it carefully and safely. If, then, the tenant invites a stranger to use it, he is the one who should give warning and look out for the safety of his guest. We are unable to see how the landlord in such a case can be held responsible, without saying that nobody has a right

to let property that is in any way dangerous or out of repair, even though the lessee may be willing to take it as it is, and be able to use it with safety, having knowledge of the risk. Such a doctrine would be a serious limitation upon the ownership of real property. For these reasons, we conclude that, as the building in question was not a nuisance, nor unfit for the purpose for which it was let, by reason of any secret defect which the landlord may be presumed to know, and as the plaintiff's intestate was not upon the premises by invitation of the defendant, express or implied, and as the defendant was not in possession or control of the elevator well, the plaintiff shows no right of action against the defendant.

The demurrer to the defendant's plea is overruled, and the demurrer to the declaration is sustained. Case remitted to the common pleas division for further proceedings.

TEXAS COURT OF CRIMINAL APPEALS.

Abe RICH, *Appt.*,
v.
[STATE of Texas.

(.....Tex.....)

The Texas statute against betting on the result of an election is not violated where one party offers to bet a specified amount which he puts up, and the other puts up a smaller amount, which is to be forfeited upon his failure within a specified time to put up the balance, which he does not do, so that a forfeiture is declared.

(October 12, 1897.)

APPPEAL by defendant from a judgment of the County Court for Anderson County convicting him of betting on an election. *Reversed.*

The facts are stated in the opinion.

Messrs. Thomas B. Greenwood & Son, for appellant:

There was no evidence that defendant had ever wagered or bet, in any manner whatever, upon the result of any public election, held or to be held within this state.

Penal Code, arts. 395, 396; *Covington v. State*, 28 Tex. App. 225; *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575; *Latham v. State*, 19 Tex. App. 307; *Hoffman v. State*, 12 Tex. App. 407; *Vician v. State*, 16 Tex. App. 264; *Harrison v. State*, 8 Tex. App. 586.

There was no evidence that the agreement claimed by the state to constitute a wager or bet had any relation whatever to a public election as defined in the Penal Code, or to any such election as that alleged in the indictment herein.

Penal Code, arts. 395, 396; *Temple v. State*, 15 Tex. App. 304, 49 Am. Rep. 200; *Patterson*

v. State, 12 Tex. App. 222; *Latham v. State*, 19 Tex. App. 307.

Mr. Mann Trice for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of betting on the result of a public election, and his punishment assessed at a fine of \$25; hence this appeal.

The statement of facts is as follows: Dick Wright testified for the state: "My name is Dick Wright. I know the defendant Abe Rich. I did not bet with him upon the election. I did agree to bet \$25 with Abe Rich in Anderson county, Texas, on the result of a public election to be held in the city of Palestine on the 6th day of April, 1897, and put up \$5 of the money, and agreed to put the balance in the stakeholder's hands by 12 o'clock that day, which was one or two days before the election. Abe Rich did offer to bet \$25 upon Mr. Bowers. I was in a crowd, in which he made the offer, and, being a Burkitt man, I did not like to see his offer go unchallenged, though I had found out that Mr. Burkitt was probably going to be beaten, and I was not willing to put \$25 up on him; so I agreed to put up \$5 as a guaranty that I would take the bet by 12 o'clock, the arrangement being that by putting up the \$5 I was to have an option on the bet until 12 o'clock—that is, the bet was to be mine if I put up the other \$20 by 12 o'clock, and, if I did not, the \$5 was to belong to Mr. Rich. The \$25 of Mr. Rich and my \$5 were put in the hands of Mr. John D. Grigsby, with the understanding that, if I did not put up the full \$25 by 12 o'clock, then he was to pay over the \$30 in his hands to Mr. Rich. I did not put up any more than the \$5, and told Mr. Grigsby to pay the \$5 over to Mr. Rich, which he did. The \$5 I put up was a sort of security for my taking the bet, and it gave me the preference over all others. The offer by Mr. Rich was an even bet, and he was not offering any odds. The money was turned over to Mr.

NOTE.—As to the legality of betting, see also *Bernard v. Taylor* (Or.) 18 L. R. A. 859, and *note*.
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Rich by Mr. Grigsby before the election was held, and under our arrangement it was Mr. Rich's when I failed to put up the \$20, no matter how the election might have gone." John D. Grigsby testified for the state: "I know the defendant, Abe Rich. He and Dick Wright came to me on the day before the city election and placed \$30 in my hands, of which Mr. Rich put up \$25 and Mr. Wright \$5. They told me that, if Mr. Wright did not put up \$20 more by 12 o'clock, to pay it all over to Mr. Rich. Before 12 o'clock, Mr. Wright told me he was not going to put up the \$20, and to turn over the \$30 to Mr. Rich, which I did. This was before the election, and under my instructions the \$30 was to be paid Rich upon Wright's default to put up \$20 more, without reference to the election results."

On this statement of facts, appellant presents two questions: First, that there was no actual bet made between the parties appellant and Wright; and, second, no venue is shown by the testimony. "A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them on the happening in the future of an event, at the present uncertain, or upon the ascertainment of a fact in dispute. The term is applied both to the contract of betting or wagering, and to the thing or sum bet or wagered." 4 Am. & Eng. Enc. Law, new ed. p. 5. "Betting upon a game is the mutual agreement and tender of a gift of something valuable, which is to belong to the one or to the other of the contending parties, according to the result of such trial." See *Stearnes v. State*, 21 Tex. 604, and *Long v. State*, 22 Tex. App. 194, 58 Am. Rep. 638. The usual signification of "to bet" "is, to put to hazard a sum ascertained upon a future happening of some event then uncertain." *Martin v. State*, 71 Miss. 87. "A bet is a wager, and the betting is complete when the offer to bet is accepted." *State v. Welch*, 7 Port. (Ala.) 465. Now, the question here presents itself, Did the parties make a completed bet on the result of the election? There is no controversy about the testimony on this point. Both of the witnesses agree, in effect, as to what was done. Rich, the defendant, proposed to bet on the witness Dick Wright \$25 on the result of a public election to be held in the city of Palestine, on the 6th of April, 1897. It seems that Rich offered to bet that Bowers would beat Burkitt. (What office they were running for is not stated.) Wright agreed to take his bet. Defendant put by his money, \$25, but Wright put up \$5 as a guaranty that he would take the bet by 12

o'clock; the arrangement being that, by putting up \$5, he could close the bet by putting up the remaining \$20 by 12 o'clock of that day, and if he did not put up the balance, the \$5 was forfeited. He did not put up the remainder by the time stipulated, and forfeited the \$5, which was paid by the stakeholder over to the defendant. From this we gather that the understanding of the parties was that it should be a cash bet, all the money on both sides to be put up in cash, and the \$5 put up by Wright was to be forfeited if he did not put up the remainder. It was so forfeited before the result, and regardless of the result. Under this state of facts, was there a betting between the parties? The bet, when completed, was to be \$25. That was to be on a certain result. The putting up of the \$5 did not complete the bet. It was not staked on the result of the election, but was to become a forfeit to defendant in case Wright did not put up the balance of the \$25; and it was claimed as a forfeit, because the bet was not completed. So that the most that can be said is that there was an executory agreement to make a bet of \$25 between the parties, but this was never consummated. The statute does not seem to authorize a conviction on account of such an executory agreement, but only authorizes a conviction where there is an absolute bet made upon the result of a public election. We do not think, under the proof in this case, that such a bet was made between the parties. It is true, the parties could have bet without putting up any money at all, but that does not seem to be the character of bet they undertook to make; but it was a cash bet, in which each of the parties should put up a certain amount of money, and one of the parties put up all the money that he was to bet, and the other only put up \$5, which by the terms of the agreement he was to forfeit if he did not complete the bet.

In the view we have taken above, it is not necessary to discuss the other question raised by the appellant, as to whether or not the venue was sufficiently proved, or the effect of the recent law on that subject (this case having been tried before said law went into effect). We would observe, however, that the proof on the subject is exceedingly meager. Moreover, the evidence fails to show us what the character of the election was—whether it was for city officers, county officers, or a special election, or its character,—or for what office Bowers and Burkitt were candidates. The evidence should have shown these matters.

Because, in our opinion, the evidence does not support the verdict, *the judgment is reversed*, and the cause remanded.

GEORGIA SUPREME COURT.

W. L. RYDER, *Ptff. in Err.*,
v.
STATE of Georgia.

(.....Ga.....)

*1. Where an application for the con-

*Headnotes by COBB, J.

NOTE.—Nonexpert opinions as to sanity or insanity.

- I. The general rule as to admissibility.
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I. The general rule as to admissibility.

a. When admissible.

The unsupported opinions of witnesses other than physicians and the subscribing witnesses to a will as to the capacity of a person, considered merely as opinions, are not admissible in evidence. *State v. Brinyea*, 5 Ala. 241; *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *McDaniel v. Crosby*, 19 Ark. 533; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Kenworthy v. Williams*, 5 Ind. 375; *Turner v. Cook*, 36 Ind. 123; *State v. Geddis*, 42 Iowa 268; *Godden v. Burke*, 35 La. Ann. 160; *Eloi v. Eloi*, 36 La. Ann. 563; *Stewart v. Redditt*, 3 Md. 67; *Townshend v. Townshend*, 7 Gill, 10; *Re Pinney*, 27 Minn. 280; *Hycr v. Little*, 20 N. J. Eq. 443; *Crowell v. Kirk*, 3 Dev. L. 355; *Puryear v. Reese*, 6 Coldw. 21; *Gibson v. Gibson*, 9 Yerg. 329.

An exception exists to the general rule of evidence that witnesses can only speak as to facts, and cannot be permitted to state their belief or opinions, however, where the issue is as to sanity or insanity. *Carr v. State*, 24 Tex. App. 562, *dictum*; *Crane v. Northfield*, 33 Vt. 123, *dictum*.

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tinuance of a criminal case on the ground of the absence of witnesses complied strictly with all the requirements of § 962 of the Penal Code, and it appeared that the proof which the accused expected to make by the absent witnesses was not only material upon the controlling issue in the case, but was also such as he could not as fully and satisfactorily make by any other witness or witnesses, it was error not to

And what is mental capacity to make a contract or will or to deliver truthful testimony is a question which must depend very greatly upon the opinions of those who have had opportunities for observing the conduct of the party and the development of the intellectual faculties. *Bricker v. Lightner*, 40 Pa. 199.

And proof of insanity by ordinary witnesses is not restricted to proof of facts coming within the knowledge of witnesses, and from which the jury may draw an inference of sanity or insanity, but may include the belief of such witnesses founded on opportunities of personal observation, which may be given to the jury to aid them in forming a correct conclusion. *Baldwin v. State*, 12 Mo. 231.

And the rule is laid down generally that opinions of nonexpert witnesses on the question of sanity or insanity are admissible in evidence where they state the facts and circumstances upon which the opinions expressed by them are predicated. *Ford v. State*, 71 Ala. 385; *Burney v. Torrey*, 100 Ala. 157; *People v. Sanford*, 43 Cal. 29; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Dunham's Appeal*, 27 Conn. 182; *Maxwell v. Harrison*, 8 Ga. 67, 62 Am. Dec. 385; *Berry v. State*, 10 Ga. 512; *Choice v. State*, 31 Ga. 424; *Welch v. Stipe*, 95 Ga. 762; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Hutchinson v. Hutchinson*, 50 Ill. App. 67; *State, Nave, v. Newlin*, 69 Ind. 108; *Mills v. Winter*, 94 Ind. 329; *Johnson v. Culver*, 116 Ind. 278; *Parsons v. Parsons*, 66 Iowa, 754; *Butler v. St. Louis L. Ins. Co.* 45 Iowa, 98; *State v. Stickley*, 41 Iowa, 232; *Baughman v. Baughman*, 32 Kan. 538; *Massele v. Com.* 15 Ky. L. Rep. 562; *Stewart v. Redditt*, 3 Md. 67; *Chase v. Winans*, 69 Md. 475; *Cannaday v. Lynch*, 27 Minn. 436; *Re Pinney*, 27 Minn. 284; *State v. Bryant*, 93 Mo. 273; *State v. Williamson*, 106 Mo. 162; *Farrell v. Brennan*, 32 Mo. 328; *Sharp v. Kansas City Cable R. Co.* 114 Mo. 94; *Hay v. Miller*, 48 Neb. 156; *Carpenter v. Hatch*, 64 N. H. 573; *DeWitt v. Barly*, 17 N. Y. 340; *State v. Ketcher*, 70 N. C. 621; *Price v. Richmond & D. R. Co.* 38 S. C. 199; *Clary v. Clary*, 2 Ired. L. 78; *Thomas v. State*, 40 Tex. 60; *Cockrill v. Cox*, 65 Tex. 609; *Scalf v. Collin County*, 80 Tex. 514; *Carr v. State*, 24 Tex. App. 562; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687; *Harris v. State*, 18 Tex. App. 287; *Morse v. Crawford*, 17 Vt. 502, 44 Am. Dec. 349; *Cram v. Cram*, 33 Vt. 15; *Hathaway v. National L. Ins. Co.* 48 Vt. 33; *Foster v. Dickerson*, 64 Vt. 233.

This is the doctrine of the principal case.

They may announce the result impressed upon their minds by the occurrences specifically testified to by them. *Godden v. Burke*, 35 La. Ann. 160; *Gibson v. Gibson*, 9 Yerg. 329.

There is no difference in the rule permitting an expert or a nonexpert to give his opinion as to the mental capacity of the testator, except that the former is allowed to give his opinion upon facts testified to by other witnesses and which are assumed to be true, while the latter is limited to giving his opinion based upon the facts to which he has himself deposed. *Foster v. Dickerson*, 64 Vt. 233.

Thus, nonprofessional witnesses should be allowed to state their opinions as to the sanity of the accused in a criminal prosecution, derived from

grant the continuance, or at least postpone the trial until the attendance of these witnesses could be had.

2. The rule above announced is specially applicable to a case in which the accused was indicted for murder, and the main defense was that at the time of the homicide he was afflicted with insanity, alleged to have been

produced by a chronic disease originating at an early period of his life, the absent witnesses being persons who had exceptional opportunities for knowing the accused and his mental and physical condition,—two of them being his brothers, with whom he had for years associated more intimately than with other relatives; another a witness who had been acquainted with him from

their acquaintance with him and observation of his conduct, appearance, and actions. *Norris v. State*, 16 Ala. 778; *Upetone v. People*, 109 Ill. 169; *Phelps v. Com.* 17 Ky. L. Rep. 708; *Genz v. State*, 58 N. J. L. 482; *Schlenker v. State*, 9 Neb. 241; *State v. Potts*, 100 N. C. 457; *McClackey v. State*, 5 Tex. App. 320; *Webb v. State*, 5 Tex. App. 596; *State v. Maier*, 36 W. Va. 787.

And nonexpert witnesses in a trial for murder may give their opinions as to the sanity or insanity of the accused, accompanied by the facts upon which they are founded. *People v. Wreden*, 59 Cal. 302; *Choice v. State*, 31 Ga. 424; *Jamison v. People*, 145 Ill. 357; *State v. Klinger*, 46 Mo. 224; *State v. Erb*, 74 Mo. 199; *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481; *Territory v. Hart*, 7 Mont. 489; *Taylor v. Com.* 109 Pa. 262; *State v. Leehman*, 2 S. D. 171; *Dove v. State*, 8 Heisk. 343; *Ellis v. State*, 33 Tex. Crim. Rep. 86; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

And nonexpert witnesses as well as experts may give their opinion as to whether a person accused of theft is afflicted with kleptomania, where most of the symptoms of the disease are testified to by them, and his thefts and propensities to steal were notorious among those who knew him and associated with him. *Harris v. State*, 18 Tex. App. 287.

Where the conduct and language of the accused after the commission of a crime, not forming a part of the *res gestæ*, are admissible in evidence, it is competent for the witness, after stating them, to give his opinion, based upon them, as to the sanity of the accused. *Bolling v. State*, 54 Ark. 533.

And a sheriff in charge of a person accused of crime and under arrest, who warns the accused, may testify to anything which the defendant said to him, and, after having stated detailed conversations, facts, acts, and his observations of the accused, may give an opinion as to his sanity or insanity. *Burt v. State* (Tex. Crim. App.) 40 S. W. 1000.

So, the opinion of nonexpert witnesses as to the capacity of a party to make a contract at the time it was made is admissible in evidence in an action upon the contract when given in connection with the facts upon which it is predicated. *Cram v. Cram*, 38 Vt. 15; *Kilgore v. Cross*, 1 Fed. Rep. 573; *Stewart v. Spedden*, 5 Md. 433.

And the opinions of witnesses, who, from habits of daily or common intercourse with or observation of the person whose sanity is in question, could make an intelligent comparison of his mental manifestations with his conduct when he was admitted to be sane, are admissible in evidence on the question of his mental capacity to make a contract, when given with the facts upon which they are founded. *Beller v. Jones*, 22 Ark. 92.

And the opinion of a nonexpert witness as to the mental capacity of a person signing a release, who had stated the opportunities he had had for judging, and detailed his conversations with her for a period of about three years with reference to the matter in question, are admissible in evidence on a question involving the validity of the release, when confined to the question of mental capacity. *Chickering v. Brooks*, 61 Vt. 554.

So, the opinions of witnesses as to the sanity of a grantor may be given in evidence in an action involving the validity of his deed, but the facts upon which they are founded must also be given. *Doe, Sutton, v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 466; *Frizzell v. Reed*, 77 Ga. 724; *Stumph v. Miller*, 142 38 L. R. A.

Ind. 442; *Woodcock v. Johnson*, 36 Minn. 217; *Culver v. Haslam*, 7 Barb. 314; *De Witt v. Barley*, 13 Barb. 550; *Brand v. Brand*, 39 How. Pr. 193; *Barker v. Pope*, 31 N. C. 165; *Eicessor v. Eicessor*, 146 Pa. 359; *Doe, McDougald, v. McLean, Winst. L. pt. 1*, p. 120; *Parkhurst v. Hosford*, 21 Fed. Rep. 823.

And a nonexpert witness is competent to express an opinion as to the mental capacity of a grantor whose deed is sought to be set aside for undue influence and fraud founded upon association with the grantor. *Smith v. Smith*, 117 N. C. 323.

So, nonexpert witnesses in a will contest may give their opinions as to the capacity or incapacity of the testator where the facts or circumstances upon which they are founded are disclosed. *Abraham v. Wilkins*, 17 Ark. 222; *Brooks's Estate*, 54 Cal. 471; *Re Taylor*, 92 Cal. 564; *Dunham's Appeal*, 27 Conn. 192; *Shanley's Appeal*, 62 Conn. 325; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Walker v. Walker*, 14 Ga. 243; *Dennis v. Weekes*, 61 Ga. 24; *Roe v. Taylor*, 45 Ill. 485; *American Bible Soc. v. Price*, 115 Ill. 622; *Pittard v. Foster*, 12 Ill. App. 122; *Kenworthy v. Williams*, 5 Ind. 315; *Leach v. Prebster*, 39 Ind. 422; *Re Norman*, 72 Iowa, 84; *Wise v. Foote*, 81 Ky. 10; *Williams v. Lee*, 47 Md. 221; *Townshend v. Townshend*, 7 Gill, 10; *Carpenter v. Hatch*, 64 N. H. 573; *Bost v. Bost*, 37 N. C. 477; *Shaver v. McCarthy*, 110 Pa. 339; *Blocher v. Hostetter*, 2 Grant. Cas. 238; *Piddcock v. Potter*, 69 Pa. 342, 5 Am. Rep. 181; *Eicessor v. Eicessor*, 146 Pa. 359; *Newhardt v. Yundt*, 132 Pa. 324; *Titlow v. Titlow*, 54 Pa. 216, 33 Am. Dec. 601; *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Gibson v. Gibson*, 9 Yerg. 329; *Puryear v. Reese*, 6 Coldw. 21; *Jamison v. Jamison*, 3 Houst. (Del.) 109; *Ethridge v. Bennett*, 9 Houst. (Del.) 295; *Garrison v. Blanton*, 48 Tex. 299; *Brown v. Mitchell*, 75 Tex. 9; *Foster v. Dickerson*, 64 Vt. 233; *Fishburne v. Ferguson*, 84 Va. 37; *Tatham v. Wright*, 2 Russ. & M. 1.

The right to give opinions as to the capacity of a testator is not confined to subscribing witnesses to a will, though execution thereof must be proved by them. *Martin v. Perkins*, 56 Miss. 304; *Morton v. Heidorn*, 135 Mo. 608.

The opinions of witnesses having peculiar advantages of knowing as to the capacity of the testator are admissible in evidence in a will contest without reference to the weight which may attach to them. *Whitelaw v. Sims*, 90 Va. 583.

So, witnesses who have been long acquainted with a person whose sanity is in question upon an inquiry of lunacy may give their opinions as to the soundness of his mind where they detail the facts and circumstances within their own knowledge upon which such opinions are based. *Re Vanauken*, 10 N. J. Eq. 190.

And the opinions of nonexpert witnesses as to the mental condition of the insured upon an issue in an action upon an insurance policy as to his sanity at the time of committing suicide are admissible in evidence in connection with a statement of the facts and circumstances within their personal knowledge upon which their opinions are based. *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536; *Mutual L. Ins. Co. v. Leubrie*, 38 U. S. App. 37, 71 Fed. Rep. 843, 15 C. C. A. 332; *Charter Oak L. Ins. Co. v. Rodall*, 95 U. S. 235, 24 L. ed. 433.

And nonexpert witnesses in an action for a personal injury based upon negligence, who have stated their observations and the facts attendant

his childhood; and the remaining one a physician, who had known the accused all his life, and was professionally familiar with the nature of his alleged disease,—and the application for a continuance averring that all these witnesses would swear to his insanity, and setting forth in detail the facts upon which their testimony to this effect would be based.

upon the condition of the person injured before any mental impairment, and such observations and facts after the alleged impairment, may be permitted to state their conclusions or opinions based on such facts or observations, and may make comparison of the mental condition of such person before and after the injury alleged to have resulted in affecting his mind. *New York, C. & St. L. R. Co. v. Luebeck*, 157 Ill. 595; *West Chicago Street R. Co. v. Fishman*, 169 Ill. 195.

So, the absence of witnesses in a criminal prosecution in which insanity is alleged as a defense, who would give their opinions as to the sanity of the accused gathered from their association with him and their observation of his conduct, language, and appearance for some weeks prior to and including the day of the commission of the criminal act, is a sufficient ground for a continuance. *Webb v. State*, 5 Tex. App. 598.

And that the opinion of a nonexpert witness on the question of sanity or insanity would be but cumulative is not sufficient reason for its exclusion, and is not a good ground for overruling an application for continuance otherwise sufficient for the purpose of procuring such evidence. *Harris v. State*, 18 Tex. App. 287.

In *Garrison v. Blanton*, 48 Tex. 292, it was held that it is not material whether the witness detailed the describable facts upon which his conclusions are founded before or after the expression of his opinion.

But the rule has been repeatedly stated to be that the opinion is admissible after the witness has stated the facts and reasons upon which it is based. *People v. Wreden*, 59 Cal. 392; *American Bible Soc. v. Price*, 115 Ill. 623; *Re Norman*, 72 Iowa, 84; *State v. Stickley*, 41 Iowa, 232; *Parsons v. Parsons*, 66 Iowa, 754; *Baughman v. Baughman*, 82 Kan. 538; *Territory v. Hart*, 7 Mont. 489; *Sheehan v. Kearney (Mia)*, 85 L. R. A. 102; *Wood v. State*, 58 Mia. 743; *Hay v. Miller*, 48 Neb. 156; *State v. Leehman*, 2 S. D. 171; *Dove v. State*, 3 Heisk. 348; *Cockrill v. Cox*, 65 Tex. 669; *Foster v. Dickerson*, 64 Vt. 238; *Hathaway v. National L. Ins. Co.* 48 Vt. 336.

In *Re Norman*, 72 Iowa, 84, *State v. Stickley*, 41 Iowa, 232, *infra*, V. b. 1, was distinguished upon the ground that in that case the witness had not detailed the conversations and actions of the defendant at the time, and his opinion was excluded upon the ground that it did not appear that he was in a position to form a correct one.

And that a nonexpert witness will not be permitted to give an opinion as to the mental condition of another without first stating the facts upon which the opinion is based. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *State v. Pennyman*, 68 Iowa, 216; *Shaeffer v. State*, 61 Ark. 241; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 637; *Rariok v. Ulmer*, 144 Ind. 26; *Roberts v. Trawick*, 18 Ala. 68; *Grubb v. State*, 117 Ind. 277; *Sheehan v. Kearney (Mia)*, 85 L. R. A. 102; *State v. Abrams*, 11 Or. 169; *Dickinson v. Dickinson*, 61 Pa. 401; *First Nat. Bank v. Wirebach*, 106 Pa. 87, 12 W. N. C. 150; *Eilessor v. Eilessor*, 146 Pa. 350; *Adams v. State*, 34 Tex. Crim. Rep. 470; *Yankre v. State*, 51 Wis. 464. And see *infra*, VI. b.

And that where the testimony of nonexperts is relied upon to prove insanity as a defense in a criminal prosecution their opinions may be given, but the facts and circumstances upon which they

3. Such a showing was good, and ought to have been so held, although it appeared by way of counter showing that there were other witnesses, including near relatives, by whom many of the facts within the knowledge of the absent witnesses could have been proved, and although it appeared also that none of the latter had actually seen the accused for some time pre-

are based must be stated by the witnesses as a prerequisite to their admissibility. *Ellis v. State*, 33 Tex. Crim. Rep. 86.

The admissibility of the opinions of nonexpert witnesses as to testamentary capacity in a will contest is a question for the court. *Commonwealth Title Ins. & T. Co. v. Gray*, 150 Pa. 255.

And it is the duty of the court to decide whether such a knowledge is shown on the part of the nonexpert witness, and such facts are stated as to entitle him to express an opinion as to the sanity of a person accused of crime. *Cole v. State*, 75 Ind. 513.

In *Berry v. State*, 10 Ga. 512, however, it was questioned whether it is best to draw a line of demarcation, and to state distinctly in what class of cases the opinions of the witnesses may be embraced, and when they must be excluded.

b. Grounds of admissibility.

The ground upon which the opinions of nonexpert witnesses on the issue of insanity are admitted is that, from the nature of the subject to be investigated, it cannot be so described in language as to enable persons not eye witnesses to form a correct judgment in regard to it. *Dewitt v. Barly*, 17 N. Y. 840; *Culver v. Haslam*, 7 Barb. 814.

And the opinions of witnesses in a will contest as to the capacity of a testator are received in evidence because their observation may have conveyed to them little, indefinable, and almost imperceptible actions and perceptions which language cannot adequately describe. *Clifton v. Clifton*, 47 N. J. Eq. 237.

The admission of opinions in evidence on an issue of insanity is necessary for the reason that it may be impossible to convey to the mind of the jury from the medium of language a distinct idea of the true condition of the party by a statement of the facts alone. *Powell v. State*, 25 Ala. 81.

And they are admissible when based upon facts and circumstances which from their nature and number it would be impossible to bring before the jury. *Pelamouree v. Clark*, 9 Iowa, 1.

A nonexpert witness may state facts on the issue of insanity including the looks and actions of the person whose sanity is in question, and it is frequently necessary that he should be permitted to tell what they indicate, or, in other words, be permitted to express an opinion, as he cannot convey to the mind distinctly the condition which such acts and looks betray. *Re Vanauken*, 10 N. J. Eq. 190.

And the opinions of witnesses on the question of mental soundness derived from observation are admissible in evidence when from the nature of the subject under investigation no better evidence can be obtained. *Brown v. Com.* 14 Bush, 400.

The opinion of an intelligent nonexpert witness having adequate opportunity of observing and judging as to the mental condition of another is the best testimony which can be adduced, for no mere description of the act, or of words or tone of voice, or glance of the eye, or general expression of the face, or manner or bearing of the person, can convey to the jury the same impressions or indications of insanity or mental debility which they will create in the mind of a competent observer. *Appleby v. Brock*, 78 Mo. 814.

But nonexpert opinions as to mental capacity

vions to the homicide. The main question being whether he was or was not insane when the killing was done, it was his right, not only to put in evidence the facts he could prove by the absent witnesses, but also to have their opinions, based on such facts, passed upon by the jury. This right certainly ought not to have been denied in the present case, there being much evi-

dence for the state to show sanity, and the burden being upon the accused to prove insanity.

4. It is the right of the accused in a criminal case to introduce his witnesses in the order which he or his counsel may deem best; and the fact that a witness is compelled to leave the court for providential cause does not constrain the accused, for the pur-

are competent only upon the theory that it is necessary to admit them to get before the jury impressions of witnesses derived from association such as would form the basis of a belief in the mind of a juror if he had had the same opportunity the witnesses had. *Smith v. Smith*, 117 N. C. 330.

The opinions of witnesses not qualified to speak as experts, when so connected with the *res gestæ*, and so interwoven therewith, that they inseparably become a part thereof, however, are admissible in evidence in a criminal prosecution on the question of mental capacity, and may be rebutted or explained in the same way as any other legal and competent testimony. *United States v. Holmes*, 1 Cliff. 98.

II. Exceptions.

a. States adopting different rules.

In Massachusetts experts and subscribing witnesses to wills only are permitted to give opinions upon questions of sanity or mental condition and capacity, and only persons of scientific training upon the subject, and physicians, have been regarded as experts. *Com. v. Brayman*, 136 Mass. 438.

Opinions on the subject of insanity, as on any other subject, cannot be laid before the jury except by the testimony of persons skilled in such matters. *Com. v. Wilson*, 1 Gray, 337.

Ordinary witnesses, whatever their opportunities of observation may have been, cannot give mere opinions as to the mental condition of another. *Williams v. Spencer*, 150 Mass. 346, 5 L. R. A. 790; *Cowles v. Merchants*, 140 Mass. 377; *Com. v. Fairbanks*, 2 Allen, 511; *Townsend v. Pepperell*, 90 Mass. 40; *Poole v. Richardson*, 3 Mass. 330; *Needham v. Ide*, 5 Pick. 510.

Nonexpert witnesses are not permitted to state their opinions as to the sanity or insanity of another, even if they first state the facts and circumstances upon which they are founded. *Com. v. Wilson*, 1 Gray, 337.

And a nonexpert witness in a prosecution for homicide, who has testified as to the appearance and conversation of the accused at certain interviews, cannot be asked to give his opinion therefrom as to his mental condition. *Com. v. Wilson*, 1 Gray, 339.

In *Com. v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401, however, it was held that nonexpert witnesses having special opportunity for observing may give their opinions as conclusions of fact if the subject-matter upon which their testimony depends cannot be reproduced or described precisely as it appeared to the witness, and the facts upon which his opinion is based are such as men in general are capable of comprehending and understanding, and the question was one of sanity or insanity.

So, in Maine mental incapacity is not to be proved directly by witnesses in the form of an opinion. *Hewett v. Hurley*, 88 Me. 431.

A question as to how a designated person appeared at a certain date with reference to soundness or unsoundness of mind cannot properly be put except to a medical expert. *Wyman v. Gould*, 47 Me. 150.

But a nonexpert may state negatively that he did not observe anything peculiar about the mental condition of the person whose sanity is in question. *Robinson v. Adams*, 62 Me. 309, 16 Am. Rep. 473.

And the opinion of a witness testifying to facts

showing incapacity, who had been impeached by proof of declarations made at other times that in his opinion the testator was sane, may be considered with the other evidence in chief as tending to prove capacity. *Ware v. Ware*, 8 Me. 42.

So, in New Hampshire the rule formerly was the opinions of witnesses who were not experts as to the mental soundness or unsoundness of a person accused of crime were not admissible in evidence in a prosecution therefor. *State v. Archer*, 54 N. H. 463; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

And that the opinions of nonexpert witnesses who were not witnesses to the will, concerning the sanity or insanity of the testator, were not admissible in evidence in a will contest. *Boardman v. Woodman*, 47 N. H. 120; *Hamblett v. Hamblett*, 6 N. H. 333.

Witnesses who were not experts could not give their opinions on the question of sanity; they could only describe the appearance and conduct of the party, leaving it to the jury to say what inference should be drawn from the facts described. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, *Doe, J.*, dissenting.

This rule has been changed, however, and it is now held, that nonexpert witnesses who are not subscribing witnesses to a will may testify as to their opinions in regard to the sanity of the testator when founded upon their knowledge and observation of his appearance and conduct. *Hardy v. Merrill*, 66 N. H. 227, 22 Am. Rep. 441, overruling previous New Hampshire cases as to that point.

So, in New York a nonexpert witness cannot be asked for his opinion as to the general soundness or unsoundness of mind of a person whose sanity is in question. *Brady v. Smith*, 8 Misc. 465; *People v. Strait*, 148 N. Y. 566; *Re Folts*, 71 Hun. 422; *Johnson v. Cochrane*, 91 Hun. 165; *White v. Davis*, 42 N. Y. S. R. 901; *Bell v. McMaster*, 29 Hun. 272; *Hewlett v. Wood*, 55 N. Y. 634; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *O'Brien v. People*, 36 N. Y. 276.

Or say whether he was rational or irrational. *Johnson v. Cochrane*, 91 Hun. 165.

The opinions of nonexpert witnesses are not admissible as evidence on the question of the capacity of another, though given in connection with the facts and circumstances relied on to prove the incapacity, and though the witness had personal acquaintance and intercourse with the party. *Dewitt v. Barley*, 9 N. Y. 371, *Denio, J.*, dissenting; *Holcomb v. Holcomb*, 95 N. Y. 316.

And nonexpert witnesses who have testified to the facts tending to show mental unsoundness upon the part of a person cannot give an opinion as to whether such facts so testified to by them indicated such unsoundness. *Real v. People*, 42 N. Y. 270.

Nor can they give their opinions upon the issue of the sanity or insanity of another, as to his being crazy at any time. *Goodell v. Harrington*, 3 Thomp. & C. 345.

And they cannot be permitted to state that a person whose sanity is in question acted like a man that was not right, and that he acted queer. *White v. Davis*, 42 N. Y. S. R. 901.

And they cannot be asked if from their conversation with him, and from his acts, he would say that he was in his right mind, where neither the conversations nor acts had been given in evidence, and the witness's attention was not confined to

pose of getting the benefit of his testimony, to put him on the stand at an earlier period of the trial than was otherwise contemplated and intended.

5. In order to render the distinctive defense of insanity available as a basis for an acquittal, the burden is upon the accused to show affirmatively by a preponder-

ance of the evidence introduced at the trial that he was insane at the time the act for which he is indicted was committed. Though this burden may not be successfully carried so as to authorize a verdict of not guilty on this particular ground, it is nevertheless the duty of the jury to consider the evidence touching the alleged insanity in connection with the other evidence in the

his apparent rationality or irrationality at the time. *Brady v. Smith*, 8 Misc. 466.

This rule applies to criminal prosecutions, and a nonexpert witness cannot give his opinion as to whether the accused was insane or delirious; he can only state the facts within his knowledge. *O'Brien v. People*, 33 N. Y. 276; *Real v. People*, 42 N. Y. 270.

And the police justice before whom a person accused of crime was brought cannot be asked upon the trial of the prosecution therefor if from what he observed of the defendant he believed he was in a condition to fully comprehend the situation and what was transpiring, where he is not asked for any facts. *People v. Fish*, 125 N. Y. 136.

So, opinions of witnesses who are nonexperts are not admissible in evidence on a question involving the validity of a deed on the question of the capacity of the grantor, though given in connection with the facts and circumstances relied on to prove the incapacity, and though the witnesses had personal acquaintance and intercourse with the party. *Dewitt v. Barley*, 9 N. Y. 371; *Sears v. Shafer*, 1 Barb. 408.

Even when such opinion might be based upon specific acts and conversations and his personal observation. *Paine v. Aldrich*, 133 N. Y. 544.

The evidence must consist of the acts and declarations of the parties evincing a want of capacity, and it is for the court, and not the witnesses, to form an opinion from the facts. *Sears v. Shafer*, 1 Barb. 408.

Nor can they be allowed to testify that the mind of an assignor was gone, or that he was imbecile, in an action to set aside an assignment. *Holcomb v. Holcomb*, 95 N. Y. 816.

And a nonexpert witness in a will contest cannot testify as to the impression made upon him by the acts and sayings of the testator, and as to whether his mind or memory was failing. *Lawrence v. Lawrence*, 4 N. Y. Week. Dig. 299.

And witnesses in a will contest upon the ground of mental and physical incapacity of the testator cannot state their opinions and conclusions drawn from the testator's acts and motions, but must confine their testimony to the acts and motions themselves. *Rollwagen v. Rollwagen*, 3 Hun. 121.

Nor can nonexpert witnesses who had been acquainted with and conversed with a testator be asked to state upon the facts to which they had testified, and from what they had observed, what opinion they had formed of his soundness or unsoundness of mind, or as to his being *compos mentis* or otherwise, and whether in their judgment he was of sound mind and memory. *Re Arnold*, 14 Hun. 525.

Nor are they competent to testify from the acts and declaration of such testator related and testified to and observed by them, as to what impression they made upon their minds as to his mental condition, the question calling for an opinion which such witnesses are not competent to give. *Sisson v. Conger*, 1 Thomp. & C. 564.

And an expression of opinion by witnesses in a will contest that a certain act is irrational and indicates unsoundness of mind is not evidence thereof; facts must be given from which it may be judicially determined that the unsoundness of mind existed, before the legal presumption of sanity and of a disposing mind can be overcome. *Re Happlee*, 66 Hun. 568.

So, a nonexpert witness in a hearing before a

commissioner and a jury appointed to inquire as to the unsoundness of mind of a party, who has testified that the party's mind was weak but that he could not call it rational or irrational, cannot be asked to state his impression as to whether such party was failing very fast physically as well as mentally. *Re Klook*, 49 Hun. 450.

Nonexpert witnesses may testify to facts, declarations, and incidents in relation to the person tending to show soundness or unsoundness of mind, however, and to the impression produced upon them thereby, as to whether the acts and declarations testified to impress them as rational or irrational. *People v. Strait*, 148 N. Y. 668; *Paine v. Aldrich*, 133 N. Y. 544; *People v. Taylor*, 138 N. Y. 396; *People v. Conroy*, 97 N. Y. 62; *Holcomb v. Holcomb*, 95 N. Y. 316; *Re Ross*, 87 N. Y. 514; *Rider v. Miller*, 86 N. Y. 507; *Hewlett v. Wood*, 65 N. Y. 684; *Clapp v. Fullerton*, 84 N. Y. 190, 90 Am. Dec. 681; *O'Brien v. People*, 33 N. Y. 276; *Johnson v. Cochrane*, 91 Hun. 165; *Re Folts*, 71 Hun. 492; *Petrie v. Petrie*, 2 Silve. S. C. 438; *Howell v. Taylor*, 11 Hun. 214; *Higbee v. Guardian Mut. L. Ins. Co.* 66 Barb. 466; *White v. Davis*, 42 N. Y. S. R. 901; *Re Klock*, 3 N. Y. Supp. 478.

But they can only state the acts and conversations of which they had personal knowledge. *Paine v. Aldrich*, 133 N. Y. 544.

And the testimony must be limited to the witness's conclusion from the facts testified to by him. *Re Folts*, 71 Hun. 492; *Re Ross*, 87 N. Y. 514; *Clapp v. Fullerton*, 84 N. Y. 190, 90 Am. Dec. 681.

Thus, a witness in a criminal prosecution who saw the accused just before he had testified that he appeared to be sober but looked as though he had been getting over the effects of a drunk, but answered questions responsively, may, from what he saw and what he heard him say at that time, give an opinion as to whether he was rational or irrational, the testimony relating to the appearance and conduct of the accused and not to the mental condition. *People v. Packenham*, 115 N. Y. 200.

But the inquiry addressed to a nonexpert witness on the question of sanity or insanity should be, not whether the person was absolutely rational or otherwise, but as to his opinion or impression derived from his acts and conversations at the time; but where it is proved that the witness stated nothing more than his opinion and impressions derived from such acts and conversations, error in admitting evidence as to whether such person was absolutely rational or otherwise will not be deemed prejudicial. *People v. Youngs*, 151 N. Y. 210.

So, a question addressed to a nonexpert witness in a will contest, as to whether he ever saw the testator act rational from a designated date until the last time he saw him, though properly inadmissible is not a ground for a reversal where it appears to the appellate court that the result would have been the same if the testimony had been excluded. *Johnson v. Cochrane*, 91 Hun. 166.

And while nonexpert witnesses are not allowed to give their opinions upon the general question of a person's sanity or insanity the admission in evidence in a will contest of a deposition taken in another state containing such evidence is not error where the parties had agreed that they would not object to evidence taken under the commission except as noted on the return, and no objections are noted to such evidence. *Re Bull*, 2 N. Y. Supp. 52, 14 Daly, 510.

case, and then, in view of it all, determine whether or not a reasonable doubt of the guilt of the accused exists in their minds.

6. In instructing the jury as to the nature of expert and nonexpert testimony, and explaining the rules under which witnesses belonging to each class might give their opinions as to the sanity or insanity of the

So, inquiries by the proponent of a will of the contestant's witnesses examined for the purpose of proving facts exhibiting the bodily and mental condition of the testator as to whether or not he appeared or acted rational do not fall within the province of mere cross-examination. *Rollwagen v. Rollwagen*, 5 Thomp. & C. 402.

And witnesses in a will contest who have testified to acts and conduct of the testator and their intercourse with him, and that their impression was that he was rational, cannot be asked on cross-examination if, had they known of his breaking out in prayer meeting with obscene language, wanting to go to an infants' school after he was seventy years of age, and claiming to be in love with a young girl, that knowledge would have influenced the impression received by them, where none of them testified to such facts, though they appeared in the evidence of other witnesses. *Bell v. McMaster*, 20 Hun, 272.

But evidence in a prosecution for homicide of the brother of the accused as to whether he would regard the actions of the accused as irrational, if he were nervous and irritable after divorce papers had been served upon him, is admissible as tending to characterize and develop the weight to be given the evidence given by him on his direct examination. *People v. Osmond*, 138 N. Y. 80.

For cross-examination with relation to opinion evidence under the general rule, see *infra*, IX.

In *De Witt v. Barly*, 17 N. Y. 840, a departure from the above rule was made, and it was held that an unprofessional witness might give his opinion in regard to the mental imbecility of another, confined to facts alone founded upon personal observation of his appearance and conduct.

And this rule was reasserted in *Culver v. Haslam*, 7 Barb. 314.

And in *Gardiner v. Gardiner*, 84 N. Y. 155, it was held that the testimony of a nonexpert witness in a will contest as to what he thought of the capacity of the testatrix to do business is not objectionable as calling for the opinion of the witness as to the testamentary capacity of the testatrix, as it is directed to her capacity for business only, and does not necessarily establish or deny her testamentary capacity.

In *De Witt v. Barly*, 17 N. Y. 840, the former decision in the same case reported in 9 N. Y. 371, set forth *supra*, was limited and explained and said to be authoritative only for the doctrine that upon a trial involving the question of mental imbecility a nonprofessional witness cannot be asked the broad question whether he considered the party *non compos mentis* or incapable of managing his affairs, and that though the abstract question whether opinions can be received at all was elaborately discussed, it was not before the court in its broad aspect.

But it will be seen by the long line of decisions subsequently made on the question set forth above that the rule therein laid down is not now regarded as law, or at least that it is too broadly stated.

So, in *Hickman v. State*, 38 Tex. 190, it was said that in the opinion of the court it would be better practice as a general rule to confine nonexpert witnesses to a statement of those demonstrations which indicate insanity, and leave the jury to form their own opinion as to the cause; but that in the case at hand facts proved rendered the ruling of 38 L. R. A.

accused, it was error to charge that the testimony of expert witnesses was entitled to great weight, and to add: "The same way with parties who associated with defendant, lived with him, lived in the same community," etc. It is safer and better to leave all these matters to be weighed by the jury, and to let them determine the probative value of the testimony of each witness.

the court quite immaterial, as other evidence in the case clearly established the fact of sanity.

It will be seen, however, by examination of the Texas cases set forth *supra*, I. that the contrary rule is established in that state.

b. Privilege of witness.

Indiana Rev. Stat. 1881, § 496, prohibiting certain persons from testifying against a deceased person, applies to cases where a claim is asserted against a decedent's estate, or where a claim asserted by the representative of the decedent is resisted; but does not prohibit heirs from testifying in a suit to set aside a will as to the mental capacity of the testator, although his executor is a party to the action. *Lamb v. Lamb*, 106 Ind. 454.

So, the trustee in a deed of trust and the party whose debt is secured thereby are not competent, under W. Va. Code, chap. 130, § 23, subd. 2, to testify in an action to set aside the deed, as to their opinions of the soundness of mind of the grantor, basing their opinions upon his conduct and conversations at and before the time of its execution. *Auderson v. Cramer*, 11 W. Va. 562.

But the testimony of a daughter of a person who had made a promissory note to take effect after death, in an action upon the note, that she had known him and lived with him all her life, and had seen him make contracts, and saw him after he returned after the note in suit was executed, and that his mind was bright and he had in her opinion mental capacity sufficient to make a contract, is not inadmissible under N. C. Code, § 540, as testimony in relation to a present transaction or communication with him. *Ducker v. Whitson*, 112 N. C. 44.

And neither of the litigants in a will contest can be permitted to invoke the rule respecting privileged communication for the purpose of excluding material and important evidence by a witness who had been the attorney for the testator, where such evidence is necessary as a basis for the witness's opinion as to his mental condition, and the disclosures in no way reflect upon his character or reputation, and the testimony when given serves to protect the estate and aid in the proper disposition of it. *Re Layman*, 40 Minn. 371.

And the opinion of a contestant of a will as to the mental capacity of the testator is admissible in evidence on a contest of the will where it is based upon observation and facts independent of any conversation or communication with the testator. *Re Goldthorp*, 94 Iowa, 336.

So, legatees under a will are not incompetent witnesses as to the mental capacity of the testatrix as parties to the issue. *Foster v. Dickerson*, 64 Vt. 233.

And a legatee under a will in giving his opinion as to the mental condition of a testator may testify in an action to set it aside as to the conduct and conversation of the testator in his family. *Burkhart v. Gladish*, 123 Ind. 333.

And evidence in a will contest given by a testator's counsel, that the testator was too imbecile to make communications to him, is not incompetent within the rule that communications between client and counsel are privileged. *Daniel v. Daniel*, 89 Pa. 191.

But testimony by attorneys as to conversations had with them by a testator at the time of giving

7. There was, in the present case, no violation of the well-settled rule that nonexpert witnesses may testify to their opinions concerning the sanity or insanity of a given person, it appearing that in each instance where objection was made to testimony of this kind the witness had stated sufficient reasons as the foundation of his opinion to render it proper for the same to be heard and passed upon by the jury.

8. When a juror who has qualified upon his *voir dire* is put upon the judge as a *trior*, the latter, in the absence of any extrinsic evidence impeaching or attacking the juror's competency, is not required to enter upon an investigation as to the same; and in no event is the court bound to ask, or to permit counsel to ask, the juror any question the answer to which would tend to incriminate or disgrace him. The

instructions for the will offered for probate and another will previously drawn, is incompetent as in violation of the New York prohibition against disclosing communications made by a client to his attorney under sanction of professional employment. *Re Coleman*, 111 N. Y. 220.

So, the observation of a legatee under a will as to the demeanor, gait, expression, or appearance of the testator is not a personal transaction with the deceased which will render her evidence inadmissible upon a will contest under Iowa Code, § 3639, excluding such transactions. *Denning v. Butcher*, 91 Iowa, 425.

And a witness in an action to set aside a deed, who has testified to the grantor's want of mental capacity to make a deed, and that her opinion was formed from conversations and communications between them, is not thereby rendered incompetent to prove such conversations and communications in order that the jury might see whether the opinion was well founded, by a statutory provision forbidding a witness who has a legal or equitable interest which may be affected by the event of the action to be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as the conversations are offered, not to prove any fact stated or implied, but the mental condition of the party, and the declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect of which they are the outward manifestations. *McLeary v. Norment*, 84 N. C. 235.

A request by a testator to his attorney to sign his will as a subscribing witness, however, is a waiver of objection to his competency which leaves him free to perform the duties of a witness and testify to any matter in relation to the will and its execution, of which he acquired knowledge by virtue of his personal relation, including the mental condition of the testator at the time. *McMaster v. Scriven*, 85 Wis. 162; *Re Coleman*, 111 N. Y. 220; *Denning v. Butcher*, 91 Iowa, 425.

And an executor may waive such privilege. *Denning v. Butcher*, 91 Iowa, 425.

Under the New York statute, however, it is held, with reference to expert witnesses, that the privilege of the witness cannot be waived by an executor or administrator. *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 55, 53 Am. Rep. 1.

III. What constitutes opinion evidence.

The impression made upon the mind of a witness by the conduct, manner, bearing, conversations, appearance, and acts of a testator in various business transactions for a long series of years is not mere opinion which is inadmissible in evidence in a will contest; it is knowledge and strictly analogous to cases of personal identity and handwriting. *Townsend v. Townsend*, 7 Gill, 10.

And sanity being the normal condition, while insanity is abnormal, when it is once shown that a witness has a sufficient acquaintance with a person alleged to be insane to give a reasonable opportunity for judging, he may testify that he saw nothing unusual or abnormal, without stating the circumstances upon which his opinion is based. *People v. Borgetto*, 99 Mich. 336.

Or he may state that he did not observe anything

peculiar about his mental condition. *Robinson v. Adams*, 62 Me. 399, 18 Am. Rep. 473.

And evidence as to the peculiar conduct and language of a party whose sanity is in question is admissible though the witnesses giving it are not experts and are not intimate acquaintances within the meaning of Cal. Code Civ. Proc. § 1870, subd. 10. *Marceau v. Travelers' Ins. Co.*, 101 Cal. 388.

And evidence as to the feeling manifested by a testator towards his brother is of fact rather than an opinion, and is admissible in a will contest as bearing upon the question of the testator's insanity. *Pelamoures v. Clark*, 9 Iowa, 1.

So, the right to testify as to whether a person appeared to be rational or irrational is not confined to expert witnesses and intimate acquaintances, as this does not constitute giving an opinion as to his mental sanity, but is the statement of an open patent fact indicated to all alike. *Holland v. Zollner*, 102 Cal. 635.

And a witness in a prosecution for assault with intent to kill who was present at the time may testify as to the appearance of the defendant with reference to his being rational or irrational, though he is not shown to have been an intimate acquaintance. *People v. Lavelle*, 71 Cal. 351; *People v. McCarthy*, 115 Cal. 255.

And a person who has engaged in a business transaction with another whose sanity is in question may be asked how he conducted himself in such transaction, as the question does not call for an opinion as to his sanity, but for a statement of his conduct and appearance. *Re Wax*, 108 Cal. 843.

So, nonexpert witnesses other than subscribing witnesses to a will may testify on the contest thereof to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred. *Poole v. Richardson*, 3 Mass. 380.

And a witness in an action involving the validity of a deed in which insanity is alleged may be asked whether from his general appearance he considered the grantor capable of making a contract or transacting important business, the question as to what his appearance was being subject to inquiry by either party. *Wilkinson v. Pearson*, 23 Pa. 117.

And evidence in a will contest that the testator acted strangely or in a childish manner may be given by anyone without stating facts upon which the opinion is based. *Parsons v. Parsons*, 66 Iowa, 754.

A nonexpert witness in a will contest may testify to impressions produced upon him by what he witnessed, but he is not legally competent, under the New York practice, to express an opinion on the general question whether the mind of the testator was sound or unsound. *Clapp v. Fullerton*, 84 N. Y. 190, 90 Am. Dec. 681.

So, a question in a will contest in which insanity is alleged, as to whether or not the testator was an eccentric man, is not objectionable as calling for a conclusion instead of a fact. *Fraser v. Jennison*, 42 Mich. 208.

And evidence by a nonexpert witness in a will contest that he observed no incoherence of thought in the testator, or anything unusual or singular with respect to his mental condition, is admissible, as it is not the giving of an opinion as to the condi-

scope of the inquiry in such matters is to be left largely in the discretion of the trial judge.

9. The court in some of its instructions referred to the homicide as "the act which the accused had committed," and thus at least intimated an opinion that the killing was done by him; and, although many of the requests to charge practically conceded that this was true,

yet, as it was not distinctly admitted that the accused did commit the homicide, expressions embracing such language as that above quoted should not have been used.

10. The instructions as to the law of insanity were, in the main, correct, and appropriate, and the charge as a whole, except as above indicated, was free from material error.

tion of his mind, but only a statement of its manifestation as observed by him. *Nash v. Hunt*, 116 Mass. 237.

And questions asked the plaintiff in an action involving the validity of a paper signed by him calling for a description of his physical and mental and nervous condition at the time are not objectionable as calling for the opinion of the witness as to his mental condition. *O'Brien v. Chicago, M. & St. P. R. Co.* 89 Iowa, 644.

So, evidence is competent on behalf of the contestants of a will that a testator a short time before making the will was insensible and unconscious of what was going on around him, and that he was prostrated by sickness and did not appear to know an intimate acquaintance, and that efforts to converse with him proved ineffectual, such evidence not being a mere matter of opinion, but matters of fact combining many minute particulars. *Halley v. Webster*, 21 Me. 461.

And testimony of a widow of a deceased person whose sanity is in question as to what was the condition of her husband's health up to the time of his death, is not objectionable as calling for a mere opinion upon a matter as to which she was not an expert, as it merely calls for her knowledge and observation as a matter of fact. *Higbee v. Guardian Mut. L. Ins. Co.* 68 Barb. 486.

So, any witness of ordinary intelligence who is familiarly acquainted with another may testify whether within a given time he has failed mentally or physically. *Com. v. Brayman*, 136 Mass. 438.

And a nonexpert witness in a will contest who had been guardian of the testator for many years while he was under guardianship as an insane person may be asked whether he had ever observed any facts which led him to infer that there was any derangement of intellect on the part of the testator. *May v. Bradlee*, 127 Mass. 414.

And an executor in a will who was not an expert, who had several interviews with the testator, may be asked the same question. *McConnell v. Wildes*, 153 Mass. 457.

And permitting a witness to add to his negative answers to certain questions put to him in regard to whether he had made certain statements about the mental condition of the testator in a will contest, "because I never thought of such a thing as his not being sane," and "because it was not true," furnishes no ground for exception. *Nash v. Hunt*, 116 Mass. 237.

So, the character and quality of the defendant's mind, as to whether it is weak or strong, is a material fact in a prosecution for homicide in which the defense was insanity. *People v. Worthington*, 105 Cal. 160.

And the question whether there was an apparent change in a man's intelligence or understanding, or a want of coherence in his remarks, is a matter, not of opinion, but of fact, as to which any witness who has had an opportunity to observe him may testify. *Barker v. Comins*, 110 Mass. 477.

And a nonexpert witness may be asked whether he noticed any difference in the mode of doing business of a person whose sanity is in question at that time and at a previous time. *Com. v. Brayman*, 136 Mass. 438.

But a nonexpert witness who was not an attesting witness, who had known him many years and had testified in a will contest upon an issue of the soundness of mind of the testator, that he be-

gan to fail about twenty years before, and had failed mentally and physically, and that he had noticed a decided change in his intelligence, cannot be asked whether from his general appearance he considered him capable of making a contract or of transacting important business. *Smith v. Smith*, 157 Mass. 339.

So, a nonexpert witness in a will contest, who had testified that he saw the testator shortly before and again after he had been prostrated by a shock of paralysis which was alleged to have caused his incompetency, cannot be asked what were his condition and appearance as regarding his conduct and conversation at the latter interview as compared with his conduct and conversation at the former interview, as it might be understood by the witness as calling for his opinion as to the mental condition of the testator. *Ellis v. Ellis*, 133 Mass. 469.

And a statement by a witness that a wife treated her husband as a parent would a child is inadmissible to prove the insanity of the husband, being ambiguous and a mere expression of opinion. *Waters v. Waters*, 35 Md. 531.

Error in excluding evidence upon the issue of the sanity of a party at the time of making a promissory note, as to whether he talked coherently or incoherently, is rendered immaterial where the witness was subsequently allowed to tell how he talked and acted. *Hodges v. Scott*, 118 Mass. 520.

IV. Who may give.

The general rule is that anyone who had an opportunity of knowing and observing a person whose sanity is impeached may give an opinion as to his mental capacity, whether he was an attesting witness or not. *Doe, McDougald, v. McLean*, *Winst. L.* pt. 1, p. 120.

This rule applies to persons who were parties to the suit where parties are permitted to testify. *Severin v. Zack*, 55 Iowa, 23.

And a legatee under a will is a competent witness in an action to set aside the will, as to the mental condition of the testator, and not being an expert he may be required to state the facts upon which such opinion is based. *Staser v. Hogan*, 120 Ind. 227; *Burkhardt v. Gladish*, 123 Ind. 333; *Denning v. Butcher*, 91 Iowa, 425.

So, the contestants of a will are competent to testify in the will contest as to the conduct, conversation, and character of the testator as bearing upon the question of his mental capacity. *Williams v. Williams*, 90 Ky. 23.

And an opinion may be expressed by a caveatrix as to the sanity of a testatrix. *Dennis v. Weekes*, 51 Ga. 24.

And the guardian of a testatrix is a competent witness to prove her capacity to make a will. *Howard v. Coke*, 7 B. Mon. 655.

And a brother of a testator has been permitted to give his opinion as to his mental capacity upon a proper showing of intimacy. *Weems v. Weems*, 19 Md. 334.

And so has a daughter. *Moore v. Moore*, 67 Mo. 192.

So, a wife may testify as to the mental condition of her husband, and give an opinion as to his sanity, when accompanied by a statement of facts upon which it is based. *Haney v. Clark*, 65 Tex. 93; *Denning v. Butcher*, 91 Iowa, 425.

And the wife of a party to a settlement may give

11. Whether this court has the power so to do or not, it is not now essential to deal with the court's action upon the motion for a change of venue, for the reason that the circumstances and surroundings when the accused is again put upon trial may be essentially different.

her opinion as to whether or not he comprehended it in an action involving its validity, where she gives a detailed account of his habits of life before and after the paralysis claimed to have rendered him incompetent, stating how he became changed in his acts, conduct, and disposition by his sickness. *Burnham v. Mitchell*, 84 Wis. 117.

And the divorced wife of a person accused of crime may testify as to whether from her association with him she ever saw anything that would indicate that he was a man of unsound mind without violating the rule which protects the privacy and confidence of the marriage relation. *United States v. Guiteau*, 1 Mackey, 493, 47 Am. Rep. 247.

So, an administrator who had been the family physician of a testator for years may testify as a witness for himself on the trial of an application to sell lands for the payment of debts in which the issue was the validity of a promissory note signed by the intestate, as to the general insanity of the intestate, and state the facts upon which his opinion is founded; but under Ala. Code, § 3068, forbidding testimony as to any transaction with or statement by the deceased, he cannot state what was the condition of his mind at the time the note was given. *Davis v. Tarver*, 65 Ala. 98.

It has been held, however, that one who would inherit a part of a testator's property but for his will is incompetent to give his opinion as to his capacity to make it. *Kerr v. Lunsford*, 81 W. Va. 690, 2 L. R. A. 688.

And the daughters of a testator are not competent witnesses on their own behalf to prove the insanity of their father at and prior to the time he executed his last will and testament, upon a bill in equity to contest its validity. *Brace v. Black*, 125 Ill. 33.

So, the previously expressed opinion of the person killed is not admissible in evidence on the question of the sanity of the accused upon a prosecution for such killing. *Lake v. People*, 1 Park. Crim. Rep. 495.

And the plaintiff in an action for a personal injury, who testifies that he fell from a building and was severely injured, is not competent to testify as to the effect of the injury upon his mind, or to give an opinion upon the question of the soundness or unsoundness of his own mind. *O'Connell v. Beecher*, 21 App. Div. 296.

V. Acquaintance necessary.

a. General rules.

It is impossible to lay down any precise rule as to the length or character of the acquaintance which will render the opinion of a witness admissible on the issue of sanity or insanity. *Powell v. State*, 25 Ala. 21.

It is generally stated that nonexpert witnesses may testify as to their opinions upon the question of the sanity or insanity of another where there has been long and intimate acquaintance to enable them to form a correct judgment as to the mental condition of such person. *Burney v. Torrey*, 100 Ala. 157; *Fountain v. Brown*, 38 Ala. 72; *Polin v. State*, 14 Neb. 540; *Culver v. Haslam*, 7 Barb. 814.

And where they formed their opinions from facts within their own knowledge. *Polin v. State*, 14 Neb. 540; *Culver v. Haslam*, 7 Barb. 814.

And that persons personally acquainted for a long time with another may give their opinions as
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12. Except as pointed out in the preceding notes, there was no substantial error at the trial relating to any matter or question which can arise when the case is tried again, and therefore it is unnecessary to deal specifically with a large majority of the seventy-two grounds of the motion for a new trial.

to his sanity in evidence, though they are not professional persons. *Phelps v. Com.* 17 Ky. L. Rep. 706; *Cotrell v. Com.* 13 Ky. L. Rep. 305.

Within this rule a nonexpert witness who is well acquainted with another may give his opinion as to whether or not he was a person of feeble mind, based upon facts to which he had testified. *Mills v. Winter*, 94 Ind. 320.

And he may be asked his opinion from the facts stated by him as to the health and mental condition of the party. *Price v. Richmond & D. R. Co.* 38 S. C. 199.

And a nonexpert witness who knew the person whose sanity was in question well and for a long time may give an opinion as to the state of his mind during certain periods, and at the time of the transactions in question. *State v. Ketcher*, 70 N. C. 621; *State v. Maier*, 36 W. Va. 757; *Schlencker v. State*, 9 Neb. 241.

And nonexpert witnesses may give their opinions as to the sanity or insanity of a person accused of crime, where they state as a reason for their opinions that they are well acquainted with him and had observed his conduct during the period in regard to which they testified. *Territory v. Roberts*, 9 Mont. 12.

So, the rule has been stated that nonexperts having favorable opportunities for ascertaining by observation the facts may testify as to their opinion respecting the sanity or insanity of another. *State v. Bryant*, 98 Mo. 273; *Jamison v. People*, 145 Ill. 357; *Keithley v. Stafford*, 126 Ill. 507; *Reed v. State*, 62 Miss. 408; *Woodcock v. Johnson*, 36 Minn. 217; *Clary v. Clary*, 2 Ired. L. 73; *Com. v. Gerade*, 145 Pa. 289.

Within the rule as thus stated, witnesses in a will contest who had known the testatrix personally, and had opportunities to frequently observe her, may be asked to state from what they saw of her and from their interviews with her what they should say as to her soundness of mind. *Shanley's Appeal*, 62 Conn. 335; *Wise v. Foote*, 81 Ky. 10; *State v. Potts*, 100 N. C. 457; *Doe, McDougald, v. McLean*, 1 Winsl. L. pt. 1, p. 120.

But a nonexpert witness cannot give his opinion as to the sanity or insanity of a person based on actual observation, where he has no particular acquaintance with him. *State v. Crisp*, 128 Mo. 505.

Or but a mere passing acquaintance. *Grand Lodge, I. O. of M. A. v. Weiting*, 168 Ill. 408.

Or where they appear to have had no opportunities for forming an opinion. *Holcomb v. State*, 41 Tex. 125.

The opinion of a witness upon the question of the competency of a testator is admissible only when it appears that the witness was sufficiently acquainted with him to be able to form an opinion. *O'Connor v. Madison*, 98 Mich. 183.

And where the witness has had adequate opportunity to observe the conduct or appearance of the party to whom insanity is imputed, and whose judgment is based upon personal observation of his appearance, habits, manner, and conduct. *Taylor v. United States*, 7 App. D. C. 27; *Turner v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12.

To render the opinion of a nonexpert witness admissible on an issue of mental soundness the circumstances must have been such as to have afforded the witness an opportunity of forming an accurate judgment as to the existence or nonexistence of mental disease considered with reference

(March 12, 1897.)

ERROR to the Superior Court for Talbot County to review a judgment convicting defendant of murder. *Reversed.*

The facts are stated in the opinion.

to the character or degree in which it is alleged to exist. *Powell v. State*, 25 Ala. 21.

And while the opinions of nonexpert witnesses are admissible in a criminal prosecution on the question of the sanity of the accused the court must be satisfied before admitting them that they had opportunity by association and observation to form an opinion as to the sanity of such person. *Brown v. Com.*, 14 Bush. 400.

Witnesses who are not medical experts should be required to show that their acquaintance with the testatrix had been sufficiently intimate and long to justify the formation of a correct judgment as to her mental status and habits, before testifying as to the condition of her mind at the time of making her will. *Moore v. Spier*, 80 Ala. 129.

The opinion of a witness upon the question of the competency of a testator is admissible only when it appears that the witness was sufficiently acquainted with him to be able to form an opinion, and the court may properly require him to state all the circumstances upon which his opinion is based before permitting him to state it. *O'Connor v. Madison*, 98 Mich. 188.

And the acquaintance with another which will qualify a witness on an inquisition of lunacy who is not a physician to give his opinion as to his sanity or insanity in connection with the facts upon which it was based must be something more than mere occasional brief interviews on general or indifferent subjects; it must be one which will enable him to affirm with some confidence that he has knowledge of the intellectual workings and mental states of the person in question. *Re Carmichael*, 36 Ala. 514.

The opinions of witnesses in connection with the facts on an issue as to mental capacity, however, are admissible in evidence where it is apparent that those who were called upon to testify occupied a position toward the person alleged to be insane which enabled them to form a correct judgment as to his mental condition. *Powell v. State*, 25 Ala. 21; *Ford v. State*, 71 Ala. 385; *Thomas v. State*, 40 Tex. 60; *Wood v. State*, 58 Miss. 741.

And they may not only depose to facts conducing to establish the unsoundness of his mind, but also give their opinions in connection with such facts as to his sanity or insanity. *Florey v. Florey*, 24 Ala. 241; *Norris v. State*, 16 Ala. 778.

And the opinions as to the mental capacity of a person, of those who from habits or daily or common intercourse with or observation of him can make an intelligent comparison of the mental manifestations with his conduct when he enjoyed the full use of his natural faculties, are competent evidence when the facts upon which they are founded are given. *Beller v. Jones*, 22 Ark. 92.

But the acquaintance of nonexpert witnesses with the person whose mental condition is in question need not be extensive or intimate; it is enough if it is such as to enable the witness to form some opinion, the value of the opinion depending upon the facts upon which it rests. *Johnson v. Culver*, 116 Ind. 278.

And if a nonexpert witness in a criminal prosecution in which the question of insanity is involved shows, by way of acquaintance with the accused that he has had conversations with him or business dealings or social intercourse, or any other material facts warranting an inference that he has sufficient knowledge to form an opinion, it is the duty of the court to permit the opinion to go to the

Meurs. J. H. Worrill, C. J. Thornton, Dupont Guerry, J. J. Bull, and Albert A. Carson, for plaintiff in error:

The court committed error in overruling the motion to change the venue.

Acts 1895, p. 70; *Seams v. State*, 84 Ala. 410;

jury for whatever it may be worth. *Goodwin v. State*, 96 Ind. 550.

So, the term "intimate acquaintance" as used in Oregon Civil Code, § 606, providing that the opinion of an intimate acquaintance respecting the mental sanity of a person may be given where the reason for the opinion is given, requires that the witness should be more than a casual and ordinary acquaintance, and requires close friendship and familiarity. *State v. Murray*, 11 Or. 413.

And the opinion of a nonprofessional witness in a criminal prosecution concerning the sanity or insanity of the accused, and as to whether his conduct at the time of the commission of the crime was that of a rational man, is not admissible unless the witness is an intimate acquaintance and the reason for his opinion is given. *State v. Murray*, 11 Or. 413.

And Cal. Code Civ. Proc. § 1870, making competent the opinion of an intimate acquaintance respecting the mental sanity of a person, excludes all evidence of others than intimate acquaintances who are by unreserved intercourse familiar with the varying moods and temperament of the person whose soundness is questioned. *Carpenter v. Bailey*, 94 Cal. 406.

But a witness in a will contest may be permitted to give his opinion as to the mental capacity of the testator where there was considerable evidence on the question of his intimate acquaintance with him, though the showing of intimacy was not very strong. *Carpenter v. Bailey*, 79 Cal. 382.

The same degree of intimacy is not necessary to render the opinion of a witness admissible on the question of the mental condition of another in case of general insanity, where there is total incapacity to distinguish right from wrong on any question as in cases of monomania or partial derangement. *Powell v. State*, 25 Ala. 21.

And the objection that a person called upon for an opinion as to the sanity or insanity of another is not an intimate acquaintance is not avoided by varying the form of the question and asking the witness how such person appeared mentally. *Carpenter v. Bailey*, 94 Cal. 406.

And if the witness is an intimate acquaintance his opinion is admissible though he did not in express words state the fact of such intimate acquaintance. *Farley v. Parker*, 6 Or. 106, 25 Am. Rep. 504.

b. Application in particular cases.

1. In criminal proceedings.

Nonexpert witnesses may give their opinions upon the question of the sanity of the accused in a criminal prosecution where they were acquainted with him and had seen him frequently and under different circumstances, and their opinions were founded upon such acquaintance and knowledge. *State v. Hayden*, 51 Vt. 226.

That a witness had an acquaintance with the accused in a prosecution for homicide, and had had conversation with him or had had business dealings or social intercourse with him, is sufficient to justify the expression of an opinion as to his sanity. *Goodwin v. State*, 96 Ind. 550.

And a proper predicate for the admission of the opinions of nonexpert witnesses in a criminal prosecution in which insanity is interposed as a defense is made where they are shown to have had an intimate acquaintance with the defendant for

Blackman v. State, 80 Ga. 785; *Hunter v. State*, 43 Ga. 519; 1 Bishop, Crim. Proc. 8d ed. § 70; Kerr, Homicide, 882; *Johnson v. Com.* 82 Ky. 116; 8 Am. & Eng. Enc. Law, pp. 96, 97, and notes; 4 Am. & Eng. Enc. Law, p. 118.

The court committed error in overruling the

years and up to the time of the criminal act. *State v. Hurst* (Idaho) 89 Pac. 564.

So, a nonexpert witness in a criminal prosecution who had known the accused for fifteen years and met and observed him almost daily for six weeks immediately preceding the commission of the offense, his attention being particularly directed to his mental condition, is admissible upon the question of his sanity. *Pfueger v. State*, 46 Neb. 493.

And a witness in a criminal case who testifies that she has been acquainted with the defendant for two years, and that she lived near her and had frequently seen her at work, and when she passed the witness's house, sufficiently qualifies herself to give her opinion as to the defendant's sanity or insanity. *Sage v. State*, 91 Ind. 141.

And a witness who was acquainted with a person accused of crime, and who had conversed with him twice or more during the year just previous to its commission, is competent to give evidence as to his opinion as to whether the prisoner was entirely insane and could not distinguish right from wrong, though he would not be competent to testify as to the mere existence of an insane delusion. *Powell v. State*, 25 Ala. 31.

So, a nonexpert witness in a criminal prosecution who had known the defendant for about four months prior to the criminal act, and saw him every day during the latter part of that time, and sat at the same table and ate with him once or twice and noticed him and observed his manner of speech and conversation, and saw him the evening before the act, and went with him to a neighboring village on the morning after it, and had considerable conversation with him on the way, is qualified to form and express an opinion as to his sanity or insanity. *State v. Lewis*, 20 Nev. 363.

But evidence that a nonexpert witness had known the accused in a criminal prosecution for five or six years, and that he had seen him often on the street but that he had not worked with him, does not show sufficient information to warrant his giving an opinion as to the sanity or insanity of the accused. *Shaeffer v. State*, 61 Ark. 241.

And it has been held that only such intimate acquaintances of the accused in a criminal prosecution as have seen him almost daily for several months preceding the alleged crime are competent as nonexpert witnesses to testify as to his sanity or insanity. *Shults v. State*, 37 Neb. 481.

So, a witness who arrested a person accused of crime, taking him some distance and turning him over to the authorities, cannot testify as to whether he saw anything in the conduct, appearance, manner, or conversation of the accused that indicated that he appreciated the character of his act. *Bolling v. State*, 54 Ark. 538.

But the opinion of the jailer who had charge of the person accused of crime, as to his sanity or insanity, may be given in evidence though he had no previous acquaintance with him, where it was formed upon his subsequent acquaintance with and knowledge of the accused, acquired during several months that the latter remained under his charge, rather than upon his mere appearance when he was first brought to the jail, and he had an excellent opportunity, of which he availed himself, to acquire an intimate knowledge and form an intelligent judgment as to his mental condition. *People v. McCarthy*, 115 Cal. 256.

And the rule is the same with reference to an 38 L. R. A.

motion of the plaintiff in error to continue the case.

Copenhagen v. State, 14 Ga. 22; *Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307; *Bishop v. State*, 9 Ga. 121; 1 Bishop, Crim. L. 7th ed. p. 377, note 2; *Coz v. State*, 64 Ga. 408, 37

officer who had charge of the prisoner for four months prior to the trial. *State v. Feister* (Or.) 50 Pac. 561.

The question whether the evidence of the sheriff who took the defendant into custody the day after a murder committed by him that in his opinion he was perfectly sane on that day, where he had known him for five or six years and saw him every month or so, is admissible upon a prosecution for the homicide, is within the discretion of the court, and will not be reversed except in case of abuse. *State v. Hansen*, 25 Or. 391.

A nonexpert witness in a criminal prosecution cannot give his opinion as to the sanity of the accused, however, where it is not shown that he knew anything in regard to his condition except what he learned as foreman of the jury by which he was previously tried. *State v. Klinger*, 46 Mo. 224.

And a witness is not qualified to give an opinion as to the sanity of the defendant in a criminal prosecution by testimony that he presided as district judge during a former trial of the offense and observed him during that and the present trial, and that he examined his eyes as he sat in court, and that he had been a good deal with insane persons and noticed their eyes and observed their difference from ordinary eyes. *McLeod v. State*, 31 Tex. Crim. Rep. 331.

Or by proof that he was on the grand jury after the indictment was found, and that the grand jury visited the jail, and that he called the defendant out of his cell and asked him some questions and felt of his head and took some interest in him and afterwards went back to see him. *State v. Klinger*, 46 Mo. 224.

So, a witness on a prosecution for homicide who has described the appearance of the defendant and claimed to have heard her talk, but to have paid little attention to what she said, and does not undertake to detail it, cannot be asked to give his opinion from her appearance and conversation as to whether she was of sound mind. *State v. Stickley*, 41 Iowa, 232.

And a nonexpert witness in a criminal case cannot give her opinion as to the mental condition of the defendant from what she saw of him during the week preceding the criminal act and from her conversation with him, where it does not appear how long she had known him or how frequently she had seen him, or that she had ever seen him at all before that week. *Taylor v. United States*, 7 App. D. C. 27.

And witnesses in a prosecution for homicide are not competent to express an opinion as to the prisoner's mental condition at the time of the act when for months they had not seen him, merely because on some occasions when they had seen him he gave evidence of mental unsoundness, where his mental aberrations were fitful or rare, and in the interval his mind was lucid. *Com. v. Buccieri*, 153 Pa. 535.

2. In civil actions.

Persons who grew up with a testator, and who marked his conduct in infancy, in the prime of life and in his decline, may give their opinions as to his sanity or insanity in a proceeding involving the validity of his will, where they state the grounds of their opinions. *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

And evidence that persons were intimately acquainted with a testator, and that they had fre-

Am. Rep. 76; *Whitworth v. State*, 80 Ga. 10; *Reid v. State*, 28 Ga. 190; *Varnadoe v. State*, 67 Ga. 768; *Barnard v. State*, 78 Ga. 804; *Wortly v. State*, 44 Ga. 449; *Cunneen v. State*, 95 Ga. 830; *Andrews v. State*, 84 Ga. 82; *Thomas v. State*, 27 Ga. 287; *Maynard v. Cleveland*, 76 Ga. 52.

The court committed error in refusing to allow counsel for the plaintiff in error to propound only questions to the jurors, other than those prescribed by statute, while the juror was upon the court as a trier, they having qualified upon their *voir dire*.

Woolfolk v. State, 85 Ga. 69; *Copenhagen v.*

quent and friendly intercourse with him and abundant opportunity to observe his condition and note the changes in it during the last year of his life, furnishes a sufficient foundation to justify them in expressing their opinion with respect to his sanity. Commonwealth Title Ins. & T. Co. v. Gray, 150 Pa. 255.

So, acquaintance with the testatrix before and after a time when she had a severe sickness, and opportunities to see her after that time and observe what changes there were in her conduct and appearance, are facts of the highest significance with relation to the question of her soundness or unsoundness of mind which will warrant the giving of an opinion where the question was not the simple one of mental unsoundness, but mental unsoundness beginning at a certain time and indicated by certain changes in her appearance and conduct. Shanley's Appeal, 62 Conn. 325.

And a witness on the contested probate of a will who had known the testator from childhood and been intimate with him may give his opinion as to the latter's mental status generally, though he saw but little of him during the two or three months immediately preceding the execution of the will. Stubbs v. Houston, 38 Ala. 555.

And the opinions of neighbors who had known a testator for many years, and who had been in the habit of visiting him and were acquainted with his former condition, and could mark the change at the time of their interview with him, are admissible in a will contest upon the question of testamentary capacity. Swails v. White, 149 Pa. 261.

And neighbors of a testator who had known him well for twenty-five years, and had often had dealings with him, and would never have hesitated to buy from or sell to him, may give their opinions in a proceeding to contest his will that he was of sound and disposing mind and capable of executing a valid deed or contract during the period of their acquaintance with him. Townshend v. Townshend, 7 Gill, 10.

So, a nonexpert witness in a will contest, who testifies that he has long known the testator and was a neighbor and had often dealt with him and conversed with him both before and after the execution of his will, is competent to give an opinion as to his soundness of mind. Ryman v. Crawford, 86 Ind. 265.

And so is a witness who has been intimately acquainted with a testator for thirteen years, and has frequently been at his house for weeks together. Florey v. Florey, 24 Ala. 241.

And witnesses who were more or less intimate with the testator for many years before his death may testify to their knowledge of his business and social acts, and express their opinion as to his mental condition on the question of testamentary capacity. Brooks's Estate, 54 Cal. 471.

So, the opinions of nonexpert witnesses who knew a testator intimately, and who approached him on matters of business as to his mental capacity, are admissible in a will contest. Fishburne v. Ferguson, 84 Va. 87.

And a daughter of a grantor who knew the habits and state of mind of her father and often heard him speak of business affairs may be asked to state, in an action to set aside his deed upon the ground of mental incapacity, if he talked sensibly or otherwise, and the condition of his mind at about

the time of making the deed. Moore v. Moore, 67 Mo. 192.

And the brother of a testator with whom he had been engaged in conducting a joint business, their intimacy having continued during the whole of the life of the testator, affording him many opportunities for judging of the testator's mind, may give his opinion as to his mental capacity in a will contest, though he had not stated facts in his testimony upon which he based his opinions. Weems v. Weems, 19 Md. 324.

So, a legatee under a will which was contested on the ground of mental incapacity, who had seen the testator for thirty-five years, may testify, excluding any personal transaction or conversation with him, as to how he ate his meals, what she heard him say to others, and what he did, how he acted, and how he appeared, and upon this testimony state her opinion as to his mental condition. Denning v. Butcher, 91 Iowa, 425.

And a stenographer who officiated at the taking of the depositions of a testatrix which consumed two hours shortly before the time of the execution of her will, and who observed her in the meantime, may be asked on a contest of her will to state from his observation of her at that time, and her answer, conduct, and actions, whether or not she was of sound mind. Re Fenton, 97 Iowa, 192.

So, a witness may give her opinion as to the mental capacity of a testatrix at the time her will was made in a proceeding to contest it, where she was present when it was executed and states fully the condition of the testatrix and her appearance and conversations at that time. Brown v. Mitchell, 75 Tex. 9.

And a witness who was with the decedent and assisted in caring for him during the last three days of his life, who details to some extent his appearance and condition at the time, is sufficiently qualified to express an opinion as to whether he was of sound or unsound mind at that time. Mull v. Carr, 5 Ind. App. 491.

And a witness who had interviews with the testator during his last illness, and opportunities for ascertaining his mental condition, may give his opinion as to whether at the time the will was executed the testator had mind and intelligence sufficient to enable him to have a reasonable judgment of the kind and value of the property he proposed to dispose of and to whom he was willing it. Best v. Boat, 87 N. C. 477.

And the opinions of witnesses who were with the testator during his last illness, accompanied with the facts on which they are founded, are competent on the question of his physical power to execute his will or to request another to sign it for him. Blocher v. Hostetter, 2 Grant, Cas. 283.

But evidence of a witness in a will contest that he had lived in the same house with the testatrix, and that he saw her act strangely, does not show a sufficiently long and intimate acquaintance with her to authorize him to give his opinion as to her mental capacity without stating the facts upon which it was based. Murphree v. Senn, 107 Ala. 424.

And a witness in a will contest who had been away for three years, and who had not conversed with the testator for two years before he died, is not competent to give an opinion as to his sanity during the year when he did not see him. Denning v. Butcher, 91 Iowa, 425.

State, 14 Ga. 23; *People v. Damon*, 18 Wend. 351; *Bristow v. Com.* 15 Gratt. 648; *Dilworth v. Com.* 12 Gratt. 689, 65 Am. Dec. 264; *Ben- net v. State*, 24 Wis. 59; *McGuire v. State*, 37 Miss. 369, 72 Am. Dec. 124; *Sweeney v. Baker*, 13 W. Va. 228, 31 Am. Rep. 757; *State v. McDonald*, 9 W. Va. 465; *Parmelo v. Guthery*,

2 Root, 185, 1 Am. Dec. 65; *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432.

W. F. Culpepper was related to Mr. Bickley, and Mr. Bickley was the agent of the prosecutrix, and of her stepmother, who was also the aunt of the prosecutrix, and employed counsel to prosecute the defendant for them,

Nor is a witness who had not conversed with the testator for several years, and who had only observed how he moved about and looked. *Denning v. Butcher*, 91 Iowa, 425.

And evidence that a witness in a will contest visited the testatrix about twenty years before, and that during such visit she acted like a crazy woman, does not show a sufficiently long and intimate acquaintance with her to authorize the witness to give an opinion as to her mental capacity without stating the facts upon which it is based. *Murphree v. Senn*, 107 Ala. 424.

So, a witness in an action involving the validity of a deed attacked on the ground of mental incapacity of the grantor, who has testified to his acts and declarations showing an opportunity to form an opinion, may give his opinion as to mental capacity based on such facts. *Woodcock v. Johnson*, 36 Minn. 217.

And witnesses in an action to cancel a deed, who know the grantor, saw her, and heard her talk, may give their opinions as to her sanity, and it is for the jury to determine whether the reasons of the witnesses for their opinions were satisfactory or not. *Frizzell v. Reed*, 77 Ga. 724.

And a witness who had been acquainted with a person whose sanity is in question for several years previous to the execution of the bond sued on, a part of which time he had been a law student in witness's office, is not incompetent to state an opinion as to his mental condition. *State v. Geddis*, 42 Iowa, 288.

And a witness in a contest over a gift made by a person since deceased, who was a relative of and intimate with deceased and had stayed at his house for some time, is competent to testify as to his mental capacity. *Stuckey v. Bellah*, 41 Ala. 700.

So, the wife of a party to a settlement of a claim who was suffering from a stroke of paralysis is competent to give her opinion as to whether or not he comprehended the facts concerning it in an action involving its validity when she was constantly with him and had the principal care of him, and dressed him, and was the means of communication between him and the world. *Burnham v. Mitchell*, 34 Wis. 117.

c. A question for the trial court.

The question whether the opinions of nonexpert witnesses as to the sanity of the accused in a criminal prosecution were based upon sufficient observation to entitle them to testify, is addressed to the discretion of the trial judge. *Hite v. Com.* 14 Ky. L. Rep. 308; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Grand Lodge, I. O. of M. A. v. Welting*, 183 Ill. 408.

So, the trial judge is to be accorded wide discretion on the question who is "an intimate acquaintance" who may give an opinion as to the sanity or insanity of another within the meaning of a statute permitting such opinions to be given by intimate acquaintances. *People v. McCarthy*, 115 Cal. 255; *People v. Schmitt*, 106 Cal. 48; *Re Wax*, 106 Cal. 343; *Wheelock v. Godfrey*, 100 Cal. 578; *Carpenter v. Bailey*, 94 Cal. 406; *People, Clough, v. Levy*, 71 Cal. 618; *People v. Pico*, 62 Cal. 50; *People v. Hill*, 118 Cal. 562; *State v. Hansen*, 25 Or. 391.

And the determination as to whether a witness called to testify as to the mental condition of a person had a sufficiently intimate acquaintance with him to render his opinion admissible, will not 38 L. R. A.

be interfered with on appeal where there was no abuse. *People, Clough, v. Levy*, 71 Cal. 618; *People v. McCarthy*, 115 Cal. 255; *Re Wax*, 106 Cal. 343; *Wheelock v. Godfrey*, 100 Cal. 578; *People v. Fine*, 77 Cal. 147; *People v. Pico*, 62 Cal. 50; *People v. Hill*, 118 Cal. 562; *State v. Hansen*, 25 Or. 391.

While the appellate court has the right to review the determination, it will not be held erroneous upon a mere difference of opinion; it must clearly appear that the decision below was wrong. *People v. Schmitt*, 106 Cal. 48.

And if the conclusion reached is one which can be reasonably entertained consistently with the idea that the intimacy must be such that the witness would appreciate the varying moods and temperament of the other, and be able to judge his acts with full knowledge of his peculiarities, the ruling will not be reviewed on appeal. *Carpenter v. Bailey*, 94 Cal. 406.

And the discretion of the trial court in a criminal case permitting witnesses to give their opinions as to the mental condition of the defendant will not be disturbed on appeal, where it appears that they were acquainted with the defendant, and had more or less opportunity for acquiring knowledge on which to base an opinion. *People v. Lane*, 101 Cal. 513; *People v. McCarthy*, 115 Cal. 255.

A refusal to allow a witness in a will contest to give his opinion as to the mental capacity of the testator where the showing of intimacy is sufficient, however, is error, and ground for reversal on appeal. *Re Carpenter*, 79 Cal. 382.

In *Re Carpenter*, 79 Cal. 382, *People v. Pico*, 62 Cal. 53, *People, Clough, v. Levy*, 71 Cal. 623, and *People v. Fine*, 77 Cal. 147, *supra*, were distinguished upon the ground that in all those cases the evidence had been admitted instead of rejected.

So, a statement by a witness that he did not regard himself as intimately acquainted with the person whose sanity is in question does not render him incompetent to give an opinion as to his sanity or insanity, as the question of their intimacy is one for the judge and not for the witnesses. *People v. McCarthy*, 115 Cal. 255.

VI. Facts and reasons as a basis for an opinion.

a. General rules as to statement of.

Facts and circumstances are the primary evidence on which a jury must rely upon the question of mental capacity, and not the opinions of witnesses as to the soundness or capacity of a party. *Browne v. Molliston*, 3 Whart. 129; *McCullough's Will*, 35 Pittsb. L. J. 160; *Clarke v. Cartwright*, 1 Phillim. Eccl. Rep. 90.

And the opinions of witnesses as to the competency of a testator to make a will are not evidence unless they state the facts on which such opinions are predicated, as it is the facts rather than the opinions that constitute evidence. *Hunt v. Hunt*, 3 B. Mon. 575.

Neither the opinion of an expert nor of a nonexpert on the question of the mental capacity of a testator is evidence unless the jury find the facts proved upon which the opinions are based, and when such facts are found the opinion is a fact for the jury to consider in connection with the other evidence. *Foster v. Dickerson*, 64 Vt. 233.

And the court in forming its opinions as to the soundness of mind of a testator will look to the facts upon which the witnesses based their opinions,

took great interest in the case, took an active part and interest in the prosecution.

Dumas v. State, 62 Ga. 58; *Smith v. Lovejoy*, 62 Ga. 874; *Georgia R. Co. v. Hart*, 60 Ga. 550; *Rust v. Shackelford*, 47 Ga. 538; *Bishop v. State*, 9 Ga. 121; *Maddox v. State*, 32 Ga. 581, 79 Am. Dec. 307; *Springer v. State*, 34 Ga.

379; *Brown v. State*, 28 Ga. 439; *Almand v. Rockdale County*, 78 Ga. 199; *Ledford v. State*, 75 Ga. 856; *Hudgins v. State*, 2 Ga. 176; *Willis v. State*, 12 Ga. 448; *Garlits v. State*, 71 Md. 293, 4 L. R. A. 601.

The court committed error in allowing the opinion of nonexpert witnesses to go to the

rather than to the opinions themselves; but will form its opinion from the whole evidence consisting of facts and opinions. *Newton v. Carbery*, 5 Cranch, C. C. 626.

The extent to which nonexpert opinions on the question of incompetency may be received depends upon the familiarity of the witness with the person whose sanity is in question, the character of the disqualification, the nature and number of the extraordinary circumstances detailed, and their proximity to the act involved in point of time. *O'Connor v. Madison*, 98 Mich. 183.

And the opinion of a person not of the medical profession is not evidence of sanity or insanity unless the facts upon which it is based have come under his own observation, and unless he states such facts to the jury. *Doe, Sutton, v. Reagan*, 5 Blackf. 217, 38 Am. Dec. 466.

And a contestant who attacks a will on the ground of mental incapacity cannot be asked whether the testator was weak minded where the question did not limit the opinion to what he had observed, but embraced what he knew, which might include what he had ascertained from personal transaction and communications. *Re Goldthorp*, 94 Iowa, 366; *Roe v. Taylor*, 45 Ill. 485; *Schlenker v. State*, 9 Neb. 241; *Genz v. State*, 58 N. J. L. 482; *DeWitt v. Barley*, 13 Barb. 550; *Parkhurst v. Hosford*, 21 Fed. Rep. 829.

So, in *State v. Maler*, 35 W. Va. 757, it was held that a nonexpert witness may give his opinion on the question of the insanity of the accused in a criminal prosecution, where he has personal knowledge of the facts on which his opinion is based.

Before the opinion of a nonexpert witness on the question of sanity or insanity can be considered, it must appear, not only that the witness had the opportunity of learning the facts upon which the opinion is predicated, but that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture. *Welch v. Stipe*, 95 Ga. 762.

So, the rule has been laid down that a nonexpert witness in a will contest cannot give an opinion as to the sanity or insanity of a testator based on her own observation, and what she had heard the testator say, and not confined to facts to which she had testified. *Parsons v. Parsons*, 66 Iowa, 754.

Before permitting a nonexpert witness to express his opinion as to the competency of a testator in a will contest the court may properly require the witness to state all of the circumstances upon which his opinion is based, and it would not be a great stretch of discretion to permit cross-examination before allowing the opinion to be given. *O'Connor v. Madison*, 98 Mich. 183.

A nonexpert witness is competent to give evidence as to the sanity or insanity of a person where he states all the facts upon which he founds his opinion on the trial of an issue of insanity respecting the testimony which has been introduced, but the inquiry should be limited to his conclusion with respect to the facts. *Butler v. St. Louis L. Ins. Co.*, 45 Iowa, 98.

Before the opinions of nonexpert witnesses can be admitted upon the question of sanity or insanity the specific facts upon which they are based must be stated by the witnesses, or their testimony must show that such intimate and close relations have existed between the party alleged to be insane and themselves as fairly to lead to the conclusion 88 L. R. A.

that their opinions are justified by their opportunities for observation. *Sbaeffer v. State*, 61 Ark. 541.

It is not correct to say that the opinion of a witness is entitled to consideration only so far as the facts stated by him sustain the opinion, however, unless the proposition is understood to include among facts referred to the acquaintance of the witness with the subject-matter, and his opportunities for observation. *Shanley's Appeal*, 62 Conn. 825.

And the opinion of a nonexpert witness as to the sanity or insanity of another is admissible in evidence, though he is unable to state all the facts upon which he bases his opinion, where he shows acquaintance with such person and opportunity for observation, and that he had observed him. *Stumph v. Miller*, 142 Ind. 442; *Farley v. Parker*, 6 Or. 105, 25 Am. Rep. 504.

And nonexpert witnesses may give their opinions in a will contest as to the sanity or insanity of a testator without making a statement of facts upon which the opinions are based, where it is shown that they had an opportunity by association and observation to form such opinion. *Newcomb v. Newcomb*, 95 Ky. 120; *Cotrell v. Com.*, 13 Ky. L. Rep. 306.

The jury being left to judge as to its value. *Cotrell v. Com.*, 13 Ky. L. Rep. 305.

And the fact that a witness in a will contest, who had an opportunity to form a correct judgment as to the testator's sanity, is unable to state the circumstances upon which his opinion is based, or that the circumstances stated by him do not justify his opinion, does not warrant the court in excluding it as evidence, or in instructing the jury to disregard it. *Stubbs v. Houston*, 33 Ala. 555.

So, the rule that witnesses in a will contest must state the facts upon which their opinions as to mental capacity are based does not require them to describe what is not susceptible of description or to relate facts enough to enable the jury to form an opinion from them alone; it is sufficient if they state facts which are visible and intelligible appearances and acts. *Beaubien v. Cicotte*, 12 Mich. 459.

And the rule has been laid down that the opinion of a witness who had an adequate opportunity for observing is admissible when he states some of the facts upon which it is based. *Turner v. Kansas City, St. J. & C. B. R. Co.*, 23 Mo. App. 12; *Cruve v. Peters*, 68 Mo. 429.

Or where he states such facts as he is able to give, or so far as he is able. *Williams v. Lee*, 47 Md. 321; *Beaubien v. Cicotte*, 12 Mich. 469; *De Witt v. Barley*, 17 N. Y. 840.

Where there are any material facts stated by a witness in a trial for homicide warranting an inference that he has sufficient knowledge to form an opinion as to the sanity of the accused, it is the duty of the court to permit it to go to the jury for whatever it may be worth. *Goodwin v. State*, 95 Ind. 550.

All that is necessary is that the witness shall describe the conversation, conduct, and manner of the person whose sanity is in question. *State v. Murray*, 11 Or. 413.

So, there is a difference in the nature of the testimony requisite as a basis for an opinion in the two cases of sanity or insanity; the former is the normal condition and the latter abnormal, and when

jury as testimony as to the sanity of the defendant.

Code, § 8867; Penal Code, vol. 3, § 1021; *Atlanta Street R. Co. v. Walker*, 98 Ga. 465; *Berry v. State*, 10 Ga. 518; *Choice v. State*, 81 Ga. 424; *Wright v. State*, 91 Ga. 80; *Patterson v. State*, 86 Ga. 70.

It is shown that the witness has sufficient acquaintance to give a reasonable opportunity for judging, testimony that he saw nothing unusual or abnormal is competent. *People v. Borgetto*, 99 Mich. 386.

And while witnesses who are not experts should, when testifying that a person is insane, accompany their opinions with the facts upon which they are based, this is not necessary where they testify to the sanity of the party, as there may then be no such abnormal facts to be stated. *Ford v. State*, 71 Ala. 385.

So, a witness in a prosecution for homicide in which insanity is alleged as a defense, whose attention had been called to observe the condition of the prisoner's mind, may be asked whether he saw enough in his intercourse with him to warrant him in expressing an opinion as to his sanity or insanity. *Pannell v. Com.* 88 Pa. 260.

And a question asked a witness in a criminal prosecution in which insanity is alleged as defense, whether, taking into consideration conversations had with him, and their character and his actions at the time, he was sane or insane, is not subject to objection that it should have included all his observations during the entire period of his acquaintance, where the opposing counsel did not take the trouble to attempt to modify the evidence by cross-examination. *People v. Borgetto*, 99 Mich. 386.

So, a witness who is competent to give an opinion as to the mental capacity of a person may consider, in forming such opinion, things which he saw and of which he had a personal knowledge, although he did not describe them to the jury. *Mull v. Carr*, 5 Ind. App. 491.

And in forming an opinion on the subject of the insanity of a testator whose will was made during her last sickness, a nonexpert witness may take into consideration any fact or circumstance within his knowledge or observation which to him appears to afford evidence of her mental condition at the time in question, whether it occurred during her last sickness or at a time prior thereto. *Re Norman*, 72 Iowa, 84.

b. Effect of failure to state.

A witness who is not an expert cannot testify as to his opinion with reference to the mental capacity of another without stating the facts or reasons upon which his opinion is based. *Roberts v. Tra-wick*, 13 Ala. 68; *Burney v. Torrey*, 100 Ala. 157; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Jamison v. Jamison*, 8 Houst. (Del.) 108; *Ethridge v. Bennett*, 9 Houst. (Del.) 296; *Bowden v. Achor*, 95 Ga. 243; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Dicken v. Johnson*, 7 Ga. 484; *Welch v. Stipe*, 95 Ga. 762; *Doe, Sutton v. Reagan*, 5 Blackf. 217, 83 Am. Dec. 466; *Sutherland v. Hankins*, 56 Ind. 343; *Grubb v. State*, 117 Ind. 277; *Burkhart v. Gladish*, 123 Ind. 388; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *Rarick v. Ulmer*, 144 Ind. 26; *Pelamourges v. Clark*, 9 Iowa, 1; *State v. Pennyman*, 68 Iowa, 216; *Parsons v. Parsons*, 66 Iowa, 754; *Furlong v. Carragher* (Iowa) 71 N. W. 210; *Shirleys v. Taylor*, 5 B. Mon. 99; *Eloi v. Eloi*, 36 La. Ann. 553; *Dorsey v. Warfield*, 7 Md. 65; *Waters v. Waters*, 95 Md. 531; *Lynch v. Doran*, 95 Mich. 295; *O'Connor v. Madison*, 98 Mich. 183; *Re Pluney*, 27 Minn. 280; *State v. Klunger*, 46 Mo. 224; *Turner v. Kansas City, St. J. & C. B. R. Co.* 23 Mo. App. 12; *Re Vanauken*, 10 N. J. Eq. 190; *State v. Abrams*, 11 Or. 169; *Dickinson v. Dickinson*, 61 Pa. 401; *First Nat. Bank v. Wirebach*, 106 Pa. 37; *Doran* 88 L. R. A.

If the defendant committed the homicide, and at the time of the commission he was afflicted with a mental disease, and by reason of said mental disease had lost the power of will to control his actions and choose between right and wrong, he would not be guilty.

Roberts v. State, 3 Ga. 310; *Parsons v. State*,

v. McConlogue, 150 Pa. 98; *Stokes v. Miller*, 10 W. N. C. 241; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Adams v. State*, 34 Tex. Crim. Rep. 470; *Yanke v. State*, 51 Wis. 464.

Opinions must be founded on facts which must be given to the jury that they may determine the weight to be given to the opinions. *Elicessor v. Elicessor*, 146 Pa. 359; *Titlow v. Titlow*, 54 Pa. 216, 98 Am. Dec. 691; *Burney v. Torrey*, 100 Ala. 157; *Shaver v. McCarthy*, 110 Pa. 339; *Shaeffer v. State*, 61 Ark. 241; *Goodwin v. State*, 96 Ind. 550; *Colee v. State*, 75 Ind. 513; *State v. Mewberter*, 46 Iowa, 68; *Godden v. Burke*, 35 La. Ann. 160; *Beaubien v. Ciotte*, 12 Mich. 469; *Hoover v. State*, 48 Neb. 184; *De Witt v. Barly*, 17 N. Y. 340; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

And the opinion of witnesses as to the sanity or insanity of a person will not be received where grounds for such opinion are not stated. *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444; *Rice v. Rice*, 50 Mich. 448, 53 Mich. 432.

Or where no reason is assigned for considering him of unsound mind. *Shirleys v. Taylor*, 5 B. Mon. 299.

And an opinion of a witness that a testator was insane at the time of making his will is not competent where he admits that he knew no facts or circumstances on which to found such opinion. *Bowling v. Bowling*, 8 Ala. 538.

And the exclusion of the opinions of physicians in a prosecution for homicide, who were not experts in insanity, and who had not had sufficient opportunity for examination to express an opinion upon the question of insanity, is not error. *State v. Crisp*, 126 Mo. 605.

Nonexpert witnesses as to the soundness of mind of a person should be preceded by testimony as to the facts, acts, declarations, etc., of the subject of inquiry. *Sheehan v. Kearney* (Miss.) 35 L. R. A. 102, and see *supra*, I., a.

Before the opinions of nonexpert witnesses can be received on the question of sanity or insanity of another, they should disclose, not only their opportunity for observation, but should also state the facts which they observed which are the basis of their opinions. *Moore v. Sanford*, 2 Kan. App. 242.

Witnesses who are not experts may be permitted to state their opinions as to the sanity or insanity of a person, but it can only be done in connection with their statements of the particular conduct and expressions which form the basis of their judgment. *State v. Williamson*, 100 Mo. 162.

And the opinion of a nonexpert witness is not admissible in evidence to prove the mental condition of another, although formed from personal observation of the appearance and conduct of the individual, where it is not accompanied by a statement of the facts within his own knowledge upon which he bases it. *Yanke v. State*, 51 Wis. 464.

And the mother of a testatrix cannot testify as to her opinion as to the soundness of mind of the testatrix where she neither states the facts coming under her observation nor that the opinion expressed is the result of such observation, though it is shown by the testimony of the other witnesses that the testatrix had lived with her mother all her life. *Welch v. Stipe*, 95 Ga. 762.

So, the grantee in a trust deed, and the party whose debt is secured thereby, are not competent to give their opinions as to the grantor's sanity in an action to set aside the deed based on neither

81 Ala. 577, 60 Am. Rep. 193; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 490; *Choice v. State*, 81 Ga. 424; *Carr v. State*, 96 Ga. 284.

Mr. J. M. Terrell, Attorney General, for the State:

The motions to continue were addressed to the discretion of the court.

As there was no abuse of discretion, there exists no error.

Thompson v. State, 24 Ga. 297; *Maddox v. State*, 32 Ga. 582, 79 Am. Dec. 307; *Johnson v. State*, 48 Ga. 116; *Brinkley v. State*, 54 Ga. 371; *Lovett v. State*, 60 Ga. 257; *Cox v. State*, 64 Ga. 403, 37 Am. Rep. 76.

transactions or conversations had with him previously or at any time. *Anderson v. Cranmer*, 11 W. Va. 532.

And a witness on a prosecution for crime cannot give his opinion as to whether the accused could discriminate between right and wrong or had sufficient mental power to control his actions, where no evidence had been given tending to show that he could not so discriminate, or that from mental disorder as distinguished from overmastering anger or revenge he could not control his actions. *Smith v. State*, 59 Ark. 139.

But the opinion of nonexpert witnesses in a criminal prosecution that the accused was not insane after a conflict with a designated person is not rendered incompetent by the fact that they had not, before expressing their opinions, detailed the facts and circumstances upon which they were formed, where they testified that they had been well acquainted with him before the conflict, and had observed his manner and conduct, and had seen him frequently after that and observed his manner, conduct, and conversations, and had observed nothing different in his conduct, the theory sought to be established being that he became insane after the conflict. *State v. Winter*, 72 Iowa, 627.

So, an affidavit on an application for a continuance in a criminal case stating that the witnesses named will testify that the defendant was of unsound mind, is insufficient where they are not expert witnesses and it does not state the specific facts indicating insanity upon which their opinions are based. *Warner v. State*, 114 Ind. 137.

And a continuance will not be granted for the purpose of procuring the testimony of a witness in a criminal prosecution in which insanity is alleged, to the effect that the accused was of weak mind and subject to fits of such mental derangement and aberration of mind as to incapacitate him from distinguishing right from wrong, where no fact or act of the accused is given upon which his opinion is to be based. *Mendiola v. State*, 18 Tex. App. 463.

Nor will a new trial be granted on the ground of the erroneous exclusion of the opinion of a witness as to the mental condition of a person alleged to be of unsound mind, unless it alleges that such witness had testified to facts showing him to be qualified to give such opinion. *Sutherland v. Hankins*, 58 Ind. 343.

But where witnesses had previously given testimony of circumstances showing an opportunity to judge as to the soundness or unsoundness of a person whose sanity is in question, they may properly testify as to their opinion on the question without repeating the circumstances in connection with the opinion. *People v. Borgetto*, 99 Mich. 336; *Van Hues v. Rainbolt*, 2 Coldw. 139.

And an objection to the admission of the opinion of witnesses as to the sanity of the accused in a criminal prosecution on the ground that the reasons upon which they were based were not given, cannot be first taken on appeal where it was not made on the trial and witnesses were not required to give their reasons and their refusal made a special ground of objection. *State v. Murray*, 11 Or. 418.

Some of the cases, however, have not gone so far as to hold opinions entirely inadmissible when facts are not given to support them, the absence of such

facts being regarded as affecting the weight rather than the admissibility.

Thus, under the general pleading witnesses must set forth particular facts and expressions to show insanity, otherwise their evidence would be of no weight. *Sheafe v. Rowe*, 2 Lee, Ecol. Rep. 415.

So, mere expressions of opinion by nonexpert witnesses as to whether or not a designated person was incompetent for the transaction of business, not founded upon any facts stated by the witness from which the court may judge of the soundness of the opinions, if evidence at all, are of the slightest possible value. *Doughty v. Doughty*, 7 N. J. Eq. 643.

c. What facts may be stated.

A witness in giving the facts upon which he bases his opinion on the question of sanity or insanity should be permitted to state every fact which could be reasonably made the foundation of an opinion as to the mental condition of the person in question. *Burkhart v. Gladish*, 123 Ind. 338.

One who is competent to give an opinion as to the mental capacity of the testator in a will contest may state all she knows about him both before and after it is claimed that his mind failed, together with what he did and said, and the change, if any, in his manner. *Staser v. Hogan*, 120 Ind. 227.

And a legatee under a will is a competent witness in an action to set aside the will as to the mental condition of the testator, and not being an expert she may be required to state the facts upon which such opinion was based, including the conduct of the testator, what he said, the manner in which he conducted himself, his appearance, and his full history up to the time of his death. *Staser v. Hogan*, 120 Ind. 227.

And a petition to the probate court for an allowance to a testatrix as widow from her husband's estate is admissible in evidence in a proceeding to contest her will as a part of the *res gestae* forming the basis of the opinion of her attorney as to her insanity, where he detailed the conversations and business transactions which he had with her at the time and the making of the petition was one of the transactions forming the basis of his opinion. *Foster v. Dickerson*, 64 Vt. 233.

And a master in chancery before whom a testatrix had appeared as a witness may testify as to the circumstances under which she gave her testimony, her appearance and deportment at the time, and state what questions were asked and the answers which she gave, for the purpose of establishing a basis for his opinion as to her mental condition at the time. *Foster v. Dickerson*, 64 Vt. 233.

So, nonexpert witnesses may testify in a will contest to the behavior of the testator, his conduct and conversation and appearance, and to particular facts tending to throw light on the state of his mind and from which its condition may be fairly inferred, and give their own individual opinions as to what they thought of his capacity. *Ethridge v. Bennett*, 9 Houst. (Del.) 235.

And a witness should be permitted to state in what manner the testator's conversation was disconnected as tending to show his qualifications as a nonexpert and as bearing upon the question of mental capacity. *Re Goldthorp*, 94 Iowa, 333.

So, the acts and conduct of a person accused of crime while in jail under arrest therefor may be given as a basis for the opinion of the witness upon

Juror Culpepper was not disqualified. He was not shown to be related, either by consanguinity or affinity, to the deceased or to the prosecutrix. The fact that he was related to Bickley, the agent of the prosecutrix, would not disqualify him.

Bickley himself might not have been a competent juror, but as he had no contingent fee

in the case and was under no liability contingent on the result thereof, no good reason exists why his cousin, juror Culpepper, should not be adjudged a competent juror.

1 *Thomp. Trials*, § 62; 1 *Bishop, New Crim. Proc.* § 919, and authorities cited.

Mearns, S. P. Gilbert and J. H. Martin also for the State.

the prosecution as to his sanity, though the accused was not warned that his acts and expressions would be used against him. *Adams v. State*, 34 *Tex. Crim. Rep.* 470.

And where evidence of a conversation is given for the mere purpose of laying a foundation for the admission of the witness's opinion as to the sanity of a person accused of crime the entire conversation must be given in evidence, so far, at least, as it formed a part of the ground upon which the witness's opinion was based. *Jamison v. People*, 145 *Ill.* 357.

But a nonexpert witness in a criminal case who has testified that on the day before the criminal act was committed the defendant had come to her house and talked at random and looked so much like a maniac that she was afraid of him, cannot be required to state the conversation she had with him at that time, when such conversation constitutes no part of the transaction for which the defendant is on trial. *Taylor v. United States*, 7 *App. D. C.* 27.

And the statute permitting the opinion of an intimate acquaintance to be given in a criminal prosecution respecting the mental sanity of the accused does not authorize him as a matter of right to call out statements made by himself to witnesses in various conversations had with them. *State v. Murray*, 11 *Or.* 413.

So, a witness in a will contest cannot narrate communications from the testator to her and base her opinion on them as to his sanity. *Turner v. Cook*, 35 *Ind.* 129.

And a witness testifying as to the mental capacity of a testator cannot be permitted to detail conversations between himself and a third person with relation to the testator and his eccentricities. *Hughes v. Hughes*, 31 *Ala.* 519; *Hutchinson v. Hutchinson*, 50 *Ill.* App. 87.

And a justice of the peace before whom a testator who was a lawyer conducted a trial cannot be permitted to testify that he managed the case well and shrewdly where he did not detail all that he said or did in the management of the cause. *Staser v. Hogan*, 120 *Ind.* 207.

And evidence as to the contents of a letter upon which a nonexpert witness based his opinion as to the sanity of the accused is not admissible in a criminal prosecution unless the loss or destruction of such letter had been previously shown. *Adams v. State*, 34 *Tex. Crim. Rep.* 470.

So, to authorize expressions of an opinion by a nonexpert witness on the question of the mental condition of another he must state facts which have some significance upon the question of such mental condition. *State v. Leehman*, 2 *S. D.* 171; *Burney v. Torrey*, 100 *Ala.* 157; *Sutherland v. Hanks*, 56 *Ind.* 343; *Waters v. Waters*, 35 *Md.* 531; *People v. Borgetto*, 99 *Mich.* 238; *O'Connor v. Madison*, 78 *Mich.* 183; *Lynch v. Doran*, 95 *Mich.* 386; *Elicessor v. Elicessor*, 146 *Pa.* 359; *First Nat. Bank v. Wirebach*, 106 *Pa.* 37, 12 *W. N. C.* 150; *Stokes v. Miller*, 10 *W. N. C.* 241; *State v. Brooks*, 4 *Wash.* 323.

The rule is that such opinions may be given in connection with the facts upon which they are formed where such facts are of such a nature as to enable him to form a knowledge of the person's intellect. *Stewart v. Redditt*, 3 *Md.* 67; *Jamison v. Jamison*, 8 *Houst. (Del.)* 108; *Potts v. House*, 6 *Ga.* 224, 50 *Am. Dec.* 329; *Pittard v. Foster*, 12 *Ill.* App. 34 *L. R. A.*

132; *Gibson v. Gibson*, 9 *Yerg.* 329; *Foster v. Dickerson*, 64 *Vt.* 238.

And it must appear that he had some knowledge of the acts and conduct of the person. *Colee v. State*, 75 *Ind.* 513.

Where the facts testified to by a nonexpert witness as a ground for his opinion on the issue of sanity or insanity are few or trivial or such as are common alike to sane and insane people, it is improper to ask for the opinion of a witness. *Ex parte Schneider*, 21 *D. C.* 438.

And a nonexpert witness cannot give an opinion as to the sanity or insanity of another where she had not testified to any acts of such person which would indicate that he was other than sane. *State v. Williamson*, 106 *Mo.* 162.

The facts upon which an opinion of a nonexpert witness as to testamentary capacity of another are founded must afford a fair foundation for an opinion on the particular point in dispute. *Elicessor v. Elicessor*, 146 *Pa.* 359.

And the evidence required to show sufficient opportunity upon the part of a witness to judge as to the mental capacity of a person alleged to be insane should be such as might properly move judicial discretion by apprising the court that the witness may believe in the competency of the person upon reasonable grounds, in order to justify his opinion that the person in question was sane, the testimony being more or less valuable as the circumstances are more or less convincing. *People v. Borgetto*, 99 *Mich.* 336; *O'Connor v. Madison*, 99 *Mich.* 183.

The opinions of nonexpert witnesses as to sanity or insanity of a testator are not admissible where the facts stated by them on which they base their opinions relate to the disease and sufferings of the testator and his inability to do business, but have no relation to his mental condition or testamentary capacity. *Karick v. Ulmer*, 144 *Ind.* 25.

And a continuance will not be granted in a criminal prosecution for the purpose of procuring the testimony of a witness who was expected to testify that she believed the defendant to be insane, based upon the facts shown by the evidence, and that he was a somnambulist, where it is not probable that the jury would have believed her conclusion and opinion to be correct in the face of other testimony to the effect that somnambulism is not a symptom or evidence of insanity. *Fisher v. State*, 30 *Tex.* App. 502.

So, an opinion is inadmissible when it is based on previous knowledge and is not derived from the immediate facts to which the witness has testified. *State v. Stickley*, 41 *Iowa*, 232.

But a witness in an action in which a party's sanity is in question, who has stated facts which lead him to believe that such party was foolish and simple, may give his opinion as to his capacity to transact business or enter into contract. *Stewart v. Spedden*, 5 *Md.* 433.

And associates and neighbors of a person accused of crime who alleged insanity and detailed instances and circumstances conducing, though slightly, to show that condition, may give their opinions as to his sanity at the time of the act, upon the facts shown and their knowledge of the man. *Massie v. Com.* 15 *Ky. L. Rep.* 562.

And the opinions of nonexpert witnesses on the question of testamentary capacity are not ren-

Cobb, J., delivered the opinion of the court:

W. L. Ryder was indicted for the offense of murder. His defense was that he did not commit the homicide charged in the indictment, and that, if he did, he was insane at the time the killing was done.

dered inadmissible by the fact that the opinions are not shown to be based on any correct understanding of the true criterion of mental capacity to make a will, where no objection was made to the introduction of opinions in evidence, and the witnesses were not required as they might have been to state the grounds of their belief. *Appleby v. Brook*, 76 Mo. 314.

So, the opinions of witnesses as to the mental capacity of a party should not be rejected in a proceeding before a master because based on facts which in the opinion of the master did not indicate any mental incapacity, though if based on conversations only they might with propriety be rejected. *Chickering v. Brooks*, 61 Vt. 554.

The particular facts stated by each of the several witnesses as to the testamentary capacity of another must be taken alone as the basis of the proposed opinion of that witness, however, and if they are found by themselves inconclusive in their nature, or of such neutral character as to be consistent either with soundness or unsoundness of mind, they cannot be assumed as the basis of an opinion. *Elcessor v. Elcessor*, 146 Pa. 369.

But the testimony of witnesses in an action upon a promissory note in which the insanity of the maker is alleged will not be stricken out as wholly irrelevant and immaterial to the issue of insanity merely because the facts testified to by each taken separately may not prove or tend to prove sanity or insanity to a sufficient extent to qualify the witness to express his individual opinion on the question. *First Nat. Bank v. Wirebach*, 106 Pa. 37.

d. What facts warrant an opinion.

What statement of facts would show a sufficient foundation to warrant the giving of an opinion by a nonexpert witness as to the sanity of a testator depends upon the circumstances of each case, and must be left for the trial court to determine in the exercise of a wise, legal discretion, and its ruling will not be disturbed unless it clearly appears that it has not properly exercised its discretion. *Denning v. Butcher*, 91 Iowa, 425; *Shaeffer v. State*, 61 Ark. 241; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150; *Boorman v. Northwestern Mut. Relief Assn.*, 90 Wis. 144.

It is a question for the court to decide before the opinion can be admitted, but after its admission the weight to be given it is to be determined by the jury. *Shaeffer v. State*, 61 Ark. 241; *Denning v. Butcher*, 91 Iowa, 425.

And it is the right of the opposing party to cross-examine the witness before the court passes upon the question. *First Nat. Bank v. Wirebach*, 12 W. N. C. 150.

What is required to establish a sufficient opportunity for judging as to the soundness of another depends upon circumstances which may properly affect the judicial discretion, the testimony being more or less valuable as the circumstances are more or less convincing. *People v. Borgetto*, 90 Mich. 336.

The opinion of nonexpert witnesses as to the sanity of a testator are not evidence in a will contest, but where the witness has stated the appearance, conduct, and conversations of the testator, or other facts from which he draws his conclusions, he may then state his theory based upon such facts. *Puryear v. Reese*, 6 Coldw. 21.

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1, 2, 3. When the case of the accused was called for trial, he made a motion for a continuance on account of the absence of four witnesses. His motion complied strictly with the law regulating such matters. Penal Code, § 962. And the only matters about which there could be any question were whether

And nonexperts who have had opportunities to observe a person may give their opinions of his mental condition or capacity, at the same time stating their reason and the facts observed upon which they based their opinions, including conversations as a part of the facts observed. *Jamison v. People*, 145 Ill. 357; *Hutchinson v. Hutchinson*, 50 Ill. App. 87.

And a witness who details a conversation had between himself and another may also, in connection therewith, state his opinion or impression as to the state of the mind of such person as it appeared to him at that time. *People v. Sandford*, 43 Cal. 22.

Thus, testimony of a witness in an action to set aside a deed, that he knew the grantor, and that he was in the habit of drinking to excess, and that he appeared to be afraid that his own negroes would kill him, is sufficient to qualify him to give an opinion as to the grantor's insanity. *Dicken v. Johnson*, 7 Ga. 484.

And that witnesses in a criminal prosecution knew the defendant and had known him for a considerable length of time, and that he always acted like a sane man, is sufficient to warrant them in forming and giving an opinion as to his sanity. *Taylor v. State*, 28 Ga. 647.

And a witness in a will contest who had been a neighbor of the testator, and had known him well for twenty-five years, and had often had dealings with him, and would never during his acquaintance have hesitated to buy from him or sell to him to any amount, may be permitted to give his opinion based on such facts and his acquaintance with him, that he was of sound and disposing mind, and capable of executing a valid deed or contract. *Townshend v. Townshend*, 7 Gill, 110.

So, a nonexpert witness upon the question of the soundness of mind of another may describe the conduct and repeat the declarations of the persons whose mental capacity is in question, but the declarations are not themselves evidence against the adverse party except in so far as they constitute a part of the facts upon which the opinion of the witness is founded. *Johnson v. Culver*, 116 Ind. 278.

That a witness had known a person accused of the murder of his wife for six or seven years, and enjoyed the most friendly relations with him, and saw him two or three times a week after his separation from his wife extending over a period of several months, and at different times conversed with him about his separation, do not, however, authorize him to give an opinion as to his sanity. *State v. Brooks*, 4 Wash. 333.

And a nonexpert witness in a criminal prosecution cannot give his opinion whether the accused was of sound mind from her conversations and looks and from his knowledge of and acquaintance with her, where he had described her appearance and manner but had paid little attention to and does not undertake to detail what she said. *State v. Stickley*, 41 Iowa, 232.

And a nonexpert witness who testifies in a prosecution for burglary that he has known the accused for many years, and that he does not think that he can distinguish between right and wrong so as to know that it is wrong to commit burglary, does not show himself competent to give an opinion as to whether the accused would have sufficient mental power to keep from committing the crime if he

the facts sought to be proved by the absent witnesses were material to the defense, and whether or not he could prove the same facts as well by other witnesses. It was claimed that the accused was subject to fits of insanity, produced by a chronic disease of the ear, which originated at an early period of his

life; and that, when suffering from the effects of this disease, he was, and had been at various times in his life, insane and irresponsible. Two of the absent witnesses were his brothers, who, according to the showing made, had associated with him more intimately than his other relatives, and his

could distinguish between right and wrong *Sbaeffer v. State*, 61 Ark. 241.

And the opinion of a witness on a prosecution for murder in which insanity is alleged, who had stated that the accused had received injuries upon the head in his youth, and that his language and conduct were at times strange and extraordinary, as to whether his language and conduct were those of a rational man, is not admissible without detailing the facts in regard to such language and conduct which he thought strange and extraordinary. *State v. Coleman*, 27 La. Ann. 691.

So, witnesses in a will contest who simply testify to erratic behavior on the part of the testatrix, and that she was changeable and sometimes got angry, are not competent to give opinions as to her mental capacity. *Prentiss v. Bates*, 88 Mich. 567.

And that a testator was old and had failed in health, and was feeble, and that his mind was not so strong as formerly, and that he was deaf, do not raise a presumption of incompetency which will support the opinion of a nonexpert witness. *O'Connor v. Madison*, 98 Mich. 183.

And that the testator differed from the witnesses in political opinion; and that he had no knowledge of the good qualities of a horse, does not furnish a sufficient basis to warrant the witness in giving an opinion as to his sanity or insanity. *Dorsey v. Wardfield*, 7 Md. 65.

So, conversations held with a testatrix some time after the execution of her will do not qualify a witness to give an opinion as to her capacity to make it. *Eckert v. Flowry*, 43 Pa. 46.

And a witness in a will contest who testifies that she had known the testatrix for six years before she made her will, and was quite intimate with her during that time, and had frequent conversations with her about her children, her life, hardships which she had gone through, and other little family matters, states no facts or circumstances which justify the court in permitting her to give an opinion as to the mental capacity of the testatrix. *Buys v. Buys*, 99 Mich. 354.

So, evidence that an aged grantor lost his way in the city near his home, and that he sometimes addressed one of his daughters by the name of another, and that he sometimes seemed low spirited and cried and sat all day without talking unless someone spoke to him, is not sufficient proof of loss of memory or mental incapacity to justify the giving of an opinion based upon such facts. *Lynch v. Doran*, 95 Mich. 395.

And evidence that a witness knew a party whose sanity was in question when he was a small boy and lived near her, and had seen her at church, and that she did not eat with the family where she lived or speak to him or his family, and was in some respects peculiar in her habits, is not sufficient to form a foundation to authorize him to give an opinion as to such party's sanity. *Stewart v. Redditt*, 3 Md. 67.

And evidence that a witness had met a person whose sanity was in question frequently, that he was a man of active habits but had paralysis, and that after that there was a change in him,—his walk and activity and speech were affected and the expression of his countenance changed, and that it required an effort to speak, and that his face did not look intelligent, and that he looked like a man who was afflicted and distressed,—does not tend to prove insanity or delirium, and does not
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warrant the witness in expressing an opinion that the person was insane. *First Nat. Bank v. Wirebach*, 13 W. N. C. 150.

And a refusal to receive such an opinion as to the sanity of another is not error where the only foundation laid was that the witness worked with the party in question a few days cutting ice, and that he became quarrelsome and got mad at him because he claimed he did not drive the horse straight while the other was holding the plow. *Boorman v. Northwestern Mut. Relief Assn.* 90 Wis. 144.

In *First Nat. Bank v. Wirebach*, 13 W. N. C. 150, the rule in *Irish v. Smith*, 8 Serg. & R. 578, 11 Am. Dec. 643, *infra*, VII. d. 1, and *Wilkinson v. Pearson*, 23 Pa. 117, *supra*, III. which to some extent supports the doctrine that a witness may express an opinion on the question of sanity or insanity based upon the countenance alone, was said to be of doubtful application in a case in which the countenance was distorted by paralysis, and would not apply where it was not clear that the witnesses based their opinions upon the mere appearance of the face.

VII. Scope.

a. Confinement to conclusions from facts stated.

To render the opinions of nonexpert witnesses admissible on a question of sanity they must be limited to conclusions drawn from specific acts and facts testified to by them. *Jamison v. People*, 145 Ill. 367; *Re Rosa*, 87 N. Y. 514.

The opinions should be based only upon the facts testified to by the particular witnesses. *Ex parte Schnelder*, 21 D. C. 433. And see also *Elcessor v. Elcessor*, 146 Pa. 359, and *First Nat. Bank v. Wirebach*, 106 Pa. 37, *supra*, VI. c.

And must be founded upon their own observation. *Appley v. Brook*, 76 Mo. 314; *Morse v. Crawford*, 17 Vt. 502, 44 Am. Dec. 349.

And they must be confined to statements of facts or of their opinions formed from facts known to the witness and disclosed to the jury. *Re Blood*, 62 Vt. 359.

And a nonexpert witness on a question involving the validity of a deed is not competent to testify whether in his opinion the grantor would be easily persuaded to do any act dictated by any person he considered a friend, where any fear or difficulty might threaten him or his property, unless he became so in view of the acts and conduct of of such party which he had witnessed and to which he had testified. *Brand v. Brand*, 39 How. Pr. 193.

So, nonexpert witnesses in a criminal prosecution cannot give their opinions as to the sanity of the accused based on evidence which they have heard other witnesses detail. *State v. Klinger*, 46 Mo. 224; *State v. Brinyea*, 5 Ala. 241; *Appley v. Brook*, 76 Mo. 314.

Expert witnesses alone can give an opinion upon facts shown by others assuming them to be true. *State v. Potts*, 100 N. C. 457.

And nonexpert witnesses cannot give opinions upon the question whether a hypothetical state of facts would or would not if true be evidence of insanity. *State v. Klinger*, 46 Mo. 224; *Appley v. Brook*, 76 Mo. 314; *Dunham's Appeal*, 27 Conn. 192; *Pittard v. Foster*, 12 Ill. App. 182.

Even upon cross-examination. *Dunham's Appeal*, 27 Conn. 192.

And a nonexpert witness cannot be asked to state

physical and mental condition was more peculiarly within their knowledge than that of any other members of his family. Another witness was one who had been acquainted with him from his childhood and who knew of his infirmity, and of his periods of alleged insanity and irresponsibility. The remaining

to the jury if the symptoms and indications testified to by other witnesses were proved and they were satisfied of their truth whether in his opinion having heard all the symptoms and indications a designated person was of sound or unsound mind, and if of unsound mind what are the nature and character of such unsoundness, where conflicting symptoms and indications had been testified to, as it would serve virtually to put the witness in the jury box and require him to weigh the evidence. *Smith v. Hickenbottom*, 57 Iowa, 783.

So, a nonexpert witness cannot give his opinion as to the sanity or insanity of another witness. *Territory v. Padilla*, 8 N. M. 610.

And a witness by whom the weakness of intellect and failure of memory of another witness were sought to be shown, who is not an expert, is not competent to give his opinion as to the value of her testimony. *Howard v. Russell*, 75 Tex. 171.

And a witness in a will contest cannot give his opinion of the physical capacity of a testator to hold conversations testified to by another witness where he was not present at that time. *Higgins v. Carlton*, 28 Md. 115, 32 Am. Dec. 606.

So an opinion of a nonexpert witness as to mental capacity cannot be given where it is founded upon mere hearsay. *Appleby v. Brook*, 76 Mo. 314.

And letters sent to a testator are not admissible in evidence to show the opinions of the writers as to his capacity, such evidence offered being in the nature of hearsay. *Tatham v. Wright*, 2 Russ. & M. 1.

And a witness in a criminal prosecution cannot be asked whether the accused was considered partially deranged, as such a question does not call for his own opinion. *Yankee v. State*, 51 Wis. 464.

Nor can a witness in a will contest be asked if he ever heard anybody question the sanity of the testator, as the opinions of others not under oath as to sanity or insanity are not admissible. *Staser v. Hogan*, 120 Ind. 207.

And evidence in a trial for murder as to what certain persons who took the accused to the hospital for medical treatment previous to the offense thought as to his mental condition at that time is not competent, being merely hearsay. *State v. Gut*, 18 Minn. 343.

Nor is it competent to prove the effect of the conduct of a person accused of homicide upon the mind of another person on the day before the commission of the act on the question of sanity on a prosecution therefor. *Lake v. People*, 1 Park. Crim. Rep. 495.

b. Comparisons and conclusions from observation.

Neighbors of a testator who were well acquainted with him and competent to give opinions as to his sanity may testify on a contest of his will as to his appearance and why they thought he did not recognize them, and whether his mind was simply weakened or was impaired in some of its faculties, and whether he was worse or better, and whether he could or could not hold extended conversations. *Meeker v. Meeker*, 74 Iowa, 362.

And a nonexpert witness in a will contest, who was well acquainted with the testator both in sickness and in health and had the care of him in sickness, may be permitted to testify that he saw no difference between his mental condition in sickness and his mental condition in health. *Severin v. Zack*, 55 Iowa, 23.

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witness was a physician who had known the accused all his life, and was professionally familiar with the nature of the alleged disease. It further appeared in the showing for a continuance that all of these witnesses would swear to the insanity of the accused at times when his disease was at its worst. In the

So, questions by the contestant of a will as to whether the witness noticed during a designated time any weakening of the testator's mind, and whether during a specified time his mind had weakened, is not objectionable as leading. *Fraser v. Jennison*, 42 Mich. 206.

And evidence of a competent witness in a will contest that he saw no difference between the testator's mental condition in sickness and in health is not rendered inadmissible by Iowa Code, § 354, though he is a party to the suit. *Severin v. Zack*, 55 Iowa, 23.

And a witness on the contested probate of a will may compare the mind and memory of the testatrix, as regarding the amount of property she was worth and the disposition she wished to make of it, with that of an average child of a designated number of years of age. *Richmond's Appeal*, 39 Conn. 226.

But a witness in a will contest cannot be asked to contrast the testator's mental condition at a time not fixed or limited with his mental condition as it had been in prior years. *Denning v. Butcher*, 91 Iowa, 425.

In *Denning v. Butcher*, 91 Iowa, 425, *supra*, *Re Norman*, 72 Iowa, 84, *supra*, 1. a. and *Severin v. Zack*, 55 Iowa, 23, *supra*, were distinguished upon the ground that in neither of them was the question of the right of the court to pass upon the sufficiency of the foundation laid for the admission of the opinions of the witnesses raised or determined.

So, insanity cannot be shown in a criminal prosecution by evidence of a nonexpert witness comparing the accused with other insane persons whom the witness claims to know, stating that such persons are well known to be insane. *Gehrke v. State*, 13 Tex. 568.

But a nonexpert witness who was acquainted with a testator and had given facts from which a conclusion might be drawn as to the state of his mind, such as his manner, conversations, etc., at or near the time of the execution of the will, may be asked what impression the facts stated made upon him as to the soundness of the testator's mind. *Kenworthy v. Williams*, 5 Ind. 376.

And a witness in a will contest in which insanity is alleged may be asked if the deceased said or did anything showing a want of soundness of the mind, and if so what it was. *Watson v. Anderson*, 11 Ala. 43.

And a witness in a will contest who had had a business transaction with the testator which he detailed to the jury may testify whether anything occurred at the time which indicated a want of understanding on the part of the testator as to the business in which he was engaged, and whether he saw anything that indicated mental derangement, and as to his opinion as to the decedent's mental condition. *Rice v. Rice*, 53 Mich. 432.

And witnesses examined by the state in a criminal prosecution in rebuttal on the question of insanity, who have had transactions with the prisoner and known him well for a long time immediately preceding the commission of the criminal act, may be asked whether or not they had ever observed anything about the accused, or in what he said or did, that indicated insanity. *State v. Maier*, 36 W. Va. 707.

So, nonexpert witnesses in a will contest who had without objection testified to their acquaintance

showing the facts upon which their testimony would be based appeared in detail. The counter showing disclosed that there were other relatives, members of the immediate family of the accused, who were present at the trial, and could be called as witnesses; but it did not appear that any of these would

testify to the peculiar facts set out in the motion for a continuance, and upon which it was based. It is proper, however, to add that the four absent witnesses did not see the accused on the day of the homicide, or at any time immediately preceding that day. In a case like the present, where there has been a shocking

with the testator embracing details and particulars, and given their opinions founded upon such recited facts, as to the soundness of the testator's mind, may be asked whether they ever observed in his appearance or manner or conduct anything which indicated mental unsoundness, the questions calling for a simple affirmative or negative reply, with full opportunity for cross-examination to elicit how much in the answer was matter of fact and how much opinion as to what would indicate mental unsoundness. *Kimberly's Appeal*, 68 Conn. 428; 87 L. R. A. 261.

c. Conclusions of law and fact.

The inquiry as to the opinion of a nonexpert witness as to the sanity or insanity of another should be limited to his conclusion with respect to the facts. *Butler v. St. Louis L. Ins. Co.* 45 Iowa, 93.

And opinions embracing all the merits leaving nothing for the jury to decide cannot be given. *Struckey v. Bellah*, 41 Ala. 700; *Pelamoures v. Clark*, 9 Iowa, 1.

Thus, a statement by a nonexpert witness, in answer to a question as to how the person, whose mental condition was in question acted, that his acts were insanity, is neither a statement of facts as to such person's conduct nor the expression of an opinion that he was authorized to make, and its exclusion is not error. *State v. Leehman*, 2 S. D. 171.

And a nonexpert witness cannot give an opinion in an action to set aside a deed for undue influence and fraud that the grantor could not be influenced by any power on earth whether the effort to divert him from a fixed purpose was made by friend or foe, as such opinion would determine the very question of fact upon which the controversy depends. *Smith v. Smith*, 117 N. C. 326.

It has been held, however, that the right to express an opinion as to the sanity or insanity of another includes the right to give it as to the degree or extent of the mental infirmity, and to apply it to the particular matter in controversy. *Scalf v. Collin County*, 30 Tex. 514.

And that where an issue as to the sanity or insanity of a person is one upon which a witness may properly state his opinion he may do so notwithstanding the fact that his answer embraces the very issue on trial. *Scalf v. Collin County*, 30 Tex. 514.

And questions asked witnesses in a will contest, competent to give opinions as to the testator's sanity, as to his appearance and whether they thought he did not know them, and as to whether his mind was simply weakened or was impaired in some of its faculties, and whether he got worse or better, and whether he could or could not hold an extended conversation, are not objectionable as calling for opinions upon questions of which the jury was equally qualified to judge if possessed of the same facts as the witnesses. *Meeker v. Meeker*, 74 Iowa, 362.

And a question asked a nonexpert witness in a will contest as to his opinion based upon his knowledge and observation of the condition of her mind, whether when he last saw the testatrix before the date of the alleged will she was competent or of sufficient capacity to transact business or make a will, is not objectionable as embodying a rule for measuring and testing the legal capacity of the deceased to make a valid disposition of her estate 88 L. R. A.

by will, but is a valid method of ascertaining the degree and extent of the mental capabilities of the person and the vigor and strength of her will. *Horah v. Knox*, 87 N. C. 453.

On this subject, see also *note*, *Right of witness to give an opinion on the exact issue to be tried in respect to sanity or mental capacity*, to *Brown v. Mitchell* (Tex.) 86 L. R. A. 64.

d. As to particular statements

1. In criminal proceedings.

A nonprofessional witness, who has detailed what he has seen and observed in the conduct of a person accused of crime, may give his opinion as to whether the accused had sufficient mind to discriminate between right and wrong in reference to his act. *Smith v. State*, 59 Ark. 139; *Pfueger v. State*, 46 Neb. 493; *United States v. Guiteau*, 1 Mackey, 493, 47 Am. Rep. 247.

In *Pfueger v. State*, 46 Neb. 493, *Shults v. State*, 37 Neb. 481, *supra*, V. b. 1, was distinguished upon the ground that in that case the evidence objected to was whether the prisoner did in fact know the difference between right and wrong.

And the opinion of a witness as to whether a person accused of crime could distinguish between right and wrong, who had stated that he knew him some years since, will be taken as referring to the period of his acquaintance with him up to the time he last saw him before the offense, and not to the time of the trial. *Powell v. State*, 25 Ala. 21.

So, a witness who is competent to give his opinion as to the mental condition of the accused in a criminal action may state his opinion as to the degree of capacity or incapacity by reason of the disorder with which the accused is afflicted. *United States v. Guiteau*, 1 Mackey, 493, 47 Am. Rep. 247.

And a nonexpert witness may testify that the accused acted like a man of understanding and discretion, or that he had no idea that he was deranged, or that he appeared to be perfectly in possession of his faculties, or that there was no appearance of derangement, or that he was perfectly rational, or that he had not the use of his reason. *State v. Ryan*, cited in *Jarman on Wills*, p. 122 *note*.

And a witness who had arrested a person accused of crime and taken him to jail may, after describing the appearance and manner of the accused during that time and detailing what he said and did, give his opinion as to whether he was being controlled by or suffering under an insane delusion with reference to the alleged criminal act. *Bolling v. State*, 54 Ark. 568.

But refusal to permit a nonexpert witness to state from facts within his personal knowledge which he had related upon the witness stand what was his opinion as to the sanity or insanity of a person whose mental condition was in question, is not error where he is permitted to state that during the times he had seen him he had always considered him irrational when excited. *State v. Leehman*, 2 S. D. 171.

And refusal to permit a nonexpert witness, who had stated how the accused acted and talked, especially on the day of the homicide, to state whether or not he talked like a sane or insane man during the night, is not a violation of the rule that nonexpert witnesses may give their opinions as to the sanity of an individual after having first testi-

homicide, and where there can be scarcely a doubt that the accused committed it, although he does not expressly so admit in his plea, the defense mainly relied on being that of insanity at the time of the killing, it was depriving the accused of a very great right when he was forced to trial in the absence of these four wit-

nesses, who knew the facts that were material to his defense, and whose presence was important to the proper determination of the issue. It is especially so in the present case, when the record shows that there was much evidence for the state to show that the accused was sane. The large amount of evidence for the state

fied to his actions, declarations, general demeanor, and peculiarities. *Blanton v. State*, 1 Wash. 285.

So, evidence of the mental capacity of a person accused of crime is not admissible upon a prosecution therefor when offered, not for the purpose of proving him *non compos mentis*, but as a measure of his intellectual capacity. *Patterson v. People*, 46 Barb. 625.

And a nonexpert witness in a criminal prosecution cannot testify as to whether he had discovered the accused to be a man of very weak mind. *Gardiner v. People*, 6 Park. Crim. Rep. 155.

And vague, indefinite expressions of a nonexpert witness in a criminal prosecution, that the person looked and acted like an insane person, are not admissible upon the issue of insanity. *Gehrke v. State*, 13 Tex. 568.

So, a witness in a trial for murder in which insanity is alleged as a defense, who is not a medical man, cannot state what kind of fits the defendant was affected with. *McLean v. State*, 16 Ala. 672.

And a witness who has testified to his opinion that the accused was insane cannot be permitted to testify that he had expressed that opinion to his sister two years before the criminal act, and state what his sister said in reply, as that would be mere hearsay. *People v. Schmitt*, 106 Cal. 43.

2. In civil cases.

Witnesses who had known a testatrix personally, and had opportunities to frequently observe her, may be asked in a will contest to state from what they saw of her, her appearance, and the interviews had with her, what they would say as to her mental condition, and whether or not she was of sound and disposing mind. *Shanley's Appeal*, 62 Conn. 325.

And the opinions of witnesses as to the capacity of a testator to comprehend his property and make an intelligent disposition thereof by will, are admissible in evidence. *Re Pinney*, 27 Minn. 230.

And the witness may give his opinion as to whether the testator had mind and intelligence sufficient to enable him to have a reasonable judgment of the amount and value of the property he proposed to will and to whom he was willing it. *Bost v. Bost*, 87 N. C. 477.

So, a witness in a will contest may testify that when he visited the testator he would look at him with a vacant stare and after speaking with him and telling him who he was he would answer, and that his countenance and appearance indicated childishness. *Irish v. Smith*, 8 Serg. & R. 573, 11 Am. Dec. 642.

And he may be asked whether the eye-sight of the testator was good enough to have enabled him to recognize him when near him if his mind had been right. *Irish v. Smith*, 8 Serg. & R. 573, 11 Am. Dec. 642.

Where witnesses in a will contest have given an opinion of the capacity of the testator founded on facts known to them, and conduct within their own observation, however, they cannot be called on to say what their opinion would have been under a different state of affairs. *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

And they cannot testify as to what they had declared upon the subject to others. *Harrison v. Rowan*, 8 Wash. C. C. 580.

So, a witness upon the question of mental capacity should be required to state the measure of

capacity in his own language and by such ordinary terms or forms of expression as will best convey his own ideas, and should not be asked as to the party's capacity to transact business intelligently and understandingly. *Chickering v. Brooks*, 61 Vt. 554.

But a nonexpert witness in a will contest, who has testified fully as to all the facts within her knowledge in relation to the testator's testamentary capacity, may give her opinion as to whether he was of sound mind and able to understand what he was doing, and capable of transacting ordinary business. *Keithley v. Stafford*, 126 Ill. 507.

And testimony of a witness in a will contest that he would not willingly trust the testator to make an important trade for him is not competent upon the question whether the testator had sufficient mental capacity to make a codicil to his will. *Prather v. McClelland*, 76 Tex. 574.

So, a witness in an action involving the validity of a deed may be asked whether from the general appearance of the grantor he considered him at the time of the execution thereof capable of making a contract or of transacting important business. *Wilkinson v. Pearson*, 23 Pa. 117.

And evidence of witnesses in an action in which the issue was as to the soundness or unsoundness of the mind of one for whom a trust had been created, and whether the trust had been executed, to the effect that they had known him from his birth up to the time of testifying, and that he was not of sound mind and capable of managing his property, is competent and admissible. *Obeare v. Gray*, 73 Ga. 455.

And a witness may give an opinion as to the capacity of a donor to dispose of and manage property to the amount of several hundred dollars in one transaction on a question as to power to make a gift, and the question whether he could understandingly dispose of \$500 in government bonds is only objectionable as leading. *Melendy v. Spaulding*, Clark, 54 Vt. 517.

But refusal to permit a witness in a will contest to state whether the testator had mind enough to know what he was doing in bequeathing his property is not error where the witness was permitted to testify that he was fit to bequeath his things to specified legatees, giving his reason therefor. *Daniel v. Daniel*, 30 Pa. 191.

And refusal to permit nonexpert witnesses in a will contest to give their opinions as to whether the testatrix had mind enough to understand the paper in contest by reading it, or could have been brought to understand it, where the witnesses knew her well and detailed her conduct and peculiarities from their own observations, is not prejudicial error where the same witnesses testified in substance that she had not mind enough, in their opinion, to make a will and understand its nature and condition. *Overall v. Bland*, 11 Ky. L. Rep. 371.

So, a witness in an action involving the question of the mental capacity of a party to acquire a settlement may be asked whether he considered him *non compos mentis*. *Westmore v. Sheffield*, 56 Vt. 239.

But a question asked a witness in an action for a personal injury claimed to have affected the mind of the person injured, who met such person a few hours after the injury and conversed with him in relation to it, as to whether or not he appeared conscious of what he was talking about, is inadmis-

showing the sanity of the accused, instead of being a reason for overruling the motion for a new trial, is a stronger reason for granting one. The refusal of the court to continue his case deprived the accused of the benefit of the four witnesses who, above all others, were needed by him in his trial to meet the mass of evidence showing sanity. The court should

have either continued the case for the term, or postponed the trial until a later day, in order that the accused might have secured the attendance of these witnesses, in order that the jury might pass upon the question of their credibility, and the weight to be attached to their testimony.

4. The physician who was the absent wit-

ness as not conforming to the rule that a nonexpert witness may give an opinion as to the mental condition of another when he has first stated the facts upon which the opinion is based. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

VIII. Time to which opinion relates.

Nonexpert witnesses cannot give their opinions that another was insane without designating any particular time when in their judgment such insanity existed and without attempting to state any facts or circumstances or acts indicative of her mental condition. *Moors v. Sanford*, 2 Kan. App. 242.

And a witness in a will contest on the question of mental incapacity cannot be asked whether or not the testator was of sound mind, without fixing the time to which such question relates. *Denning v. Butcher*, 91 Iowa, 426.

So, the opinion of a witness as to the insanity of a testator must relate to the time of his examination, and he cannot be required to give his opinion as to capacity previous to that time. *Runyan v. Price*, 15 Ohio St. 1, 36 Am. Dec. 459.

And the opinion of a witness in a suit to set aside an alleged will on the question of insanity is not admissible where it was an opinion entertained, not at the time of the delivery of the testimony, but several years before, which subsequent consideration and reflection might have satisfied the witnesses to have been erroneous. *Runyan v. Price*, 15 Ohio St. 1, 36 Am. Dec. 459.

So, the testimony of nonexpert witnesses in a criminal prosecution upon the question of the sanity or insanity of the accused must be confined to occasions upon which the witness testifies to have observed his conduct and appearance. *Shults v. State*, 37 Neb. 481.

And a recital in a bill of exceptions that the state offered to prove by a witness who had known the prisoner two years before the commission of the alleged offense that the prisoner was in his opinion of sound mind and not insane will be considered to mean that the opinion of a witness referred to the prisoner's mental condition at the time of his previous acquaintance with him, and not at the time of the trial. *Powell v. State*, 25 Ala. 21.

So, nonexpert witnesses cannot give their opinion in a will contest as to the mental condition of the testator on the day of the execution of the will, when they did not see him on that day. *Blake v. Hourke*, 74 Iowa, 519.

And after a lapse of more than fifty years with the readiest opportunity at all times to contest a will in the ordinary way the door will not be opened to mere speculative opinion as to the mental condition of the testator. *Chase v. Wiens*, 59 Md. 475.

But witnesses in a prosecution for murder may give their opinions as to the state of the defendant's mind prior to and at the time of the commission of the act. *Baldwin v. State*, 12 Mo. 227.

And the fact that a nonexpert witness did not form his opinion at the time he saw and observed the facts testified to by him does not render his opinion upon the question of insanity inadmissible in evidence. *Hathaway v. National L. Ins. Co.* 43 Vt. 336; *New York, C. & St. L. R. Co. v. Luebeck*, 157 Ill. 595.

It may be the result of the observation of a con-

tinued condition or series of facts. *New York, C. & St. L. R. Co. v. Luebeck*, 157 Ill. 595.

And a nonexpert witness in an action involving the validity of a deed, who had testified without objection that the mind of the grantor was very weak, and that she did not know what she was about in making the deed, may be permitted to state that she was no more competent to make a deed two weeks after the date of the deed in question than she was before. *Goodman v. Sapp*, 108 N. C. 477.

IX. Cross-examination, rebuttal, and impeachment.

The fact that hypothetical questions based on facts not within the knowledge of the witness, who is not an expert, were asked on cross-examination, does not render them admissible in a will contest upon the question of testamentary capacity. *Pittard v. Foster*, 12 Ill. App. 133; *Dunham's Appeal*, 27 Conn. 192.

And witnesses in a will contest who had given an opinion of the capacity of the testator founded on facts known to them and conduct within their own observation cannot be called upon to say on cross-examination what their opinions would be in a different state of affairs. *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

So, a witness in an action to set aside a will upon the ground that the testator was of unsound mind cannot be asked on cross-examination if he would have taken the testator's note during the last years of his life, and if he heard anybody question his sanity. *Staver v. Hogan*, 120 Ind. 227.

And where a witness in a will contest on the part of the defense states upon cross-examination that he predicated his opinion of the testator's capacity upon what he saw or knew of him, and not particularly upon the evidence of another witness, the latter cannot be asked if he had stated in giving evidence that the testator was irrational and wandering in his conversations or otherwise. *Higgins v. Carlton*, 28 Md. 115, 32 Am. Dec. 666.

And the prosecuting witnesses in a prosecution for murder cannot be asked on cross-examination whether he believed the accused at the time the shot was fired intended to shoot him, where it does not appear that he had any means of judging as to his intention. *State v. Garvey*, 11 Minn. 154.

So, questions asked a witness on cross-examination in a will contest as to whether he thought the testator had mind sufficient at the time of making his will to give the directions required therefor are not competent for the purpose of ascertaining the degree of intelligence possessed by the witness in order to enable the court to determine what reliance should be placed on his evidence. *Re McCarthy*, 55 Hun. 7.

It is within the discretion of the court in a will contest, however, to permit the cross-examination of a witness before allowing his opinion as to the testator's mental capacity to be given. *O'Connor v. Madison*, 98 Mich. 133; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150.

And witnesses who detailed facts and expressed opinions upon direct examination touching the mental competency of another witness in the same cause without objection may be asked on cross-examination whether, from their observation and knowledge of her as to which they had testified, the character of her mind was such that she had not

ness in the motion above referred to subsequently appeared at the trial, but was compelled to leave the court for providential cause. Before leaving, he requested counsel for the accused to allow him to go upon the stand, and testify, so as not to be required to return to the court, to which request they de-

clined to accede. We do not think that the accused lost any of his rights to complain of the subsequent absence of this witness because his counsel failed to interrupt and change the line of his defense, and the manner in which it was being conducted, so as to place this witness upon the stand in advance

an accurate knowledge of facts, or fancied the existence of facts which did not exist. *Bricker v. Lightner*, 40 Pa. 199.

So, a witness in a prosecution for murder in which insanity was interposed as a defense who had stated at the instance of the defense that the defendant was never just right, may be asked by the state as to his opinion whether the defendant was not intelligent enough to know right from wrong. *State v. Porter*, 34 Iowa, 181.

And permitting a nonexpert witness to state from what he knew of a person whose sanity is in question, and from what he had seen of him, whether he would be apt to know right from wrong, on cross-examination, is not prejudicial error where he had testified that during the times he had seen him he had always considered him irrational when excited. *State v. Leehman*, 28 D. 171.

So, a nonexpert witness may be asked on cross-examination, upon an issue of testamentary capacity, whether from his observation and acquaintance he thought the testatrix was mentally incapable of transacting ordinary business, for the purpose of fathoming the extent of his knowledge of her business capacity. *Gardiner v. Gardiner*, 34 N. Y. 155.

And when he bases his opinion in part upon a contract he may be asked whether he regarded it as reasonable or unreasonable. *Pence v. Waugh*, 135 Ind. 143.

And a witness in an action in which the mental capacity of a person to select a place of abode was in question, with whom such person had lived for a long time, who had been examined as to such person's mental capacity, may be asked on cross-examination whether he considered him what they call a *non compos* person. *Westmore v. Sheffield*, 56 Vt. 239.

So, a witness in a will contest who has expressed a decided opinion as to the mental capacity of the testator may be asked on cross-examination as to any business transaction which he may have had with him at the time he claims to have formed such opinion, and as to the manner in which the testator then conducted himself. *Roe v. Taylor*, 45 Ill. 485.

And as to whether he thought he was of unsound mind at that time. *Pence v. Waugh*, 135 Ind. 143.

And where he had stated that he considered the testatrix insane when excited, basing his opinion in part upon what the testatrix said about her husband, he may be asked upon cross-examination what the complaint of the testatrix against her husband was. *Foster v. Dickerson*, 64 Vt. 233.

And one who bases his opinion in part upon the fact that the testator was an old man may be asked on cross-examination if it is not his belief that as a rule old men are of unsound mind because of failure of memory. *Pence v. Waugh*, 135 Ind. 143.

And a witness who had testified to facts and circumstances strongly tending to show that the testator was insane before the execution of the will, and that he had tried to buy a piece of land from him at about that time, may be asked on cross-examination if he would have taken the conveyance from him had his proposition to purchase the land been accepted. *Rush v. Megee*, 36 Ind. 60.

And one who had given his opinion that the testator was of sound mind may be asked upon cross-examination, by way of impeachment, if he had stated out of court that the testator was childish and was going crazy. *Staser v. Hogan*, 120 Ind. 237.

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And where nonexpert witnesses who are not subscribing witnesses are called upon in a will contest by the party opposing the will to testify to facts showing his insanity, and proof is made of declarations at other times that in their opinions the testator was insane, such opinions may be considered by the jury, with the other evidence in chief, to prove testator's insanity. *Ware v. Ware*, 8 Me. 42.

But a nonexpert witness in an action upon a contract who has testified to facts tending to show that a party to the contract was incompetent at the time of making it by reason of mental imbecility, but who had not given his opinion, cannot be contradicted by showing that he had done acts indicating that he considered such party to be of sound mind. *Hubbell v. Bissell*, 2 Allen, 156.

And declarations by a devisee showing that the testator was in his opinion of unsound mind are not admissible in evidence in a will contest when others are interested in the establishment of the will. *Phelps v. Hartwell*, 1 Mass. 71.

But a question asked a nonexpert witness on cross-examination in an action to enforce the provisions of an alleged trust in which the defense of insanity is interposed, who had testified on her examination in chief to many conversations she had had with the party whose sanity is questioned, as well as to many remarks she had heard him make tending to show the condition of his mind, as to what she had heard him say imputing that someone had stolen his tobacco, is not objectionable as calling for the expression of an opinion of the witnesses, and as an invasion of the province of the jury. *Haxton v. McClaren*, 132 Ind. 235.

So, it is competent to ask a witness upon an inquiry of lunacy on rebuttal whether in his opinion the subject is not of sound mind. *Re Vanauken*, 10 N. J. Eq. 190.

And the evidence of a jailer as to the conduct of a person accused of crime while in jail and the apparent condition of his mind during that time, is admissible in rebuttal of evidence in behalf of the accused tending to show a general and permanent state of dementia and a diseased condition of the mind. *People v. McCarthy*, 115 Cal. 255.

And witnesses for the state who knew the accused well for a long time immediately preceding the commission of the criminal act may be asked on rebuttal whether or not they had ever observed anything about him, or in what he said or did, that indicated insanity. *State v. Maler*, 36 W. Va. 767.

But a nonexpert witness cannot state upon redirect examination his opinion as to whether an irrational man can always know right from wrong, as he is not an expert from whom such an opinion would be competent. *State v. Leehman*, 28 D. 171.

So, a nonexpert witness introduced by the proponents in a will contest, who simply proves the execution of the will on direct examination, and gives his opinion as to the testator's capacity on cross-examination, cannot be asked for his opinion as to such capacity upon redirect examination upon a hypothetical case. *Sagar v. Hogmire* (Mich.) 2 Det. L. N. 894.

When a witness testifies in a will contest that the will was duly executed by a competent testator, however, a statement made by him in another action that the instrument was worthless is admissible in evidence for the purpose of impeachment. *Beaubien v. Clootte*, 12 Mich. 459.

of the time when they had contemplated so doing. It is an important right of the accused to be allowed to introduce his witnesses in the order in which he or his counsel think is to the best interest of his case; and witnesses should not be allowed to dictate to counsel as to when they should be put upon the stand. The fail-

ure of counsel to introduce the witness at a time which was inconsistent with the interest of the accused should not, generally, deprive him of his right to complain of the absence of a witness at a subsequent stage of the case, if that absence is in no way occasioned by the accused or his counsel.

But the exclusion of declarations of a witness in a will contest that the testatrix was not competent to make a will cannot be held erroneous on appeal where the objection was that it was necessarily inconsistent with his testimony in chief in which he stated that while she resided with him just after the execution of the will he had observed no change in her mental condition, and gave several accounts of acts and conversations tending to show soundness of mind. *Williams v. Spencer*, 150 Mass. 346, 5 L. R. A. 790.

As to cross-examination in states not adhering to the general rule as to the admissibility of nonexpert opinions, see *supra*, II. a.

X. Weight.

a. Generally.

The weight to be given the opinions of nonexpert witnesses as to the sanity of the person in question depends upon a consideration of all of the circumstances under which it was formed. *Moore v. Moore*, 67 Mo. 182.

And upon the extent and character of the impairment of the mind. *Burney v. Torrey*, 100 Ala. 157.

And where in an action to set aside a deed upon the ground of mental incapacity of the grantor the opinions of the witnesses seem evenly balanced the court will look to the circumstances concerning the transaction, the history and character of the man, the fairness of the transaction, and the probabilities that one in possession of his faculties would make a transfer of his property in such a case. *Hemphill v. Holford*, 88 Mich. 293.

It has been said that the opinions of ordinary witnesses as to the sanity of the insured, who committed suicide, in an action on an insurance policy conditioned against liability in case of death by his own hand, is not of great weight. *Charter Oak L. Ins. Co. v. Rodell*, 95 U. S. 236, 24 L. ed. 433.

And that little or no weight can be given to opinions of nonexpert witnesses as to the mental condition of the defendant in an action for his interdiction. *Eloi v. Eloi*, 36 La. Ann. 563.

And it has been held that evidence that the defendant had been confined in an insane hospital as an insane man, and the opinion of witnesses that he was still insane, is not sufficient to establish insanity to such an extent as to deprive him of capacity to distinguish between right and wrong. *Meyer v. People*, 166 Ill. 123.

And that the opinion of a witness who had known another for several years that his mind was rather weak at the time of making the contract in question but was improving, but that his mind was not sufficient for the witness to contract with him, does not prove him to be of unsound mind. *Darnell v. Rowland*, 30 Ind. 342.

And that the opinions of nonexpert witnesses that a testator's mind was not very strong, and that it had been weakened, and that perhaps it was not entirely sound, will not warrant a finding of testamentary incapacity where the other evidence in the case shows that the testator had mind enough to know the extent and value of his property, the names of all his children and those who might or ought to be the natural objects of his bounty, and was able to hold all these in his mind long enough to dictate and have his will prepared. *Barick v. Ulmer*, 144 Ind. 25.

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The jury in a will contest should not be told, however, that the opinions of persons on the question of insanity who are not experts, though ever so honestly formed, are most unsafe guides for the ascertainment of truth. *Burney v. Torrey*, 100 Ala. 157.

Neighbors and acquaintances of a person whose sanity is in question, who knew him well and formed their opinions from seeing and observing him for several months almost daily, may give such opinions in evidence, and they are entitled to respectful consideration although they are not medical men. *Schlenker v. State*, 9 Neb. 241; *Com. v. Helmbold*, v. Kirkbride, 11 Phila. 427.

But a person who has not been interdicted is not proved to be notoriously insane so that it could not but be known to the party dealing with him, within the provisions of La. Civil Code, art. 1788, by the opinions of five witnesses on the one side that he was feeble in intellect, where, on the other hand, seven witnesses testified as to his being of average intellect. *Martinez v. Moll*, 46 Fed. Rep. 734.

And where there is a great contrariety of evidence as to the feebleness of a grantor's mind, as, for instance, twelve witnesses for it and nine against it, an admission on the part of his grantee, who was his general agent, that such grantor was incapable of transacting his own business, corroborates the affirmative of the issue, and is sufficient to control the grantee's answer denying the fact of mental incapacity. *Brooke v. Berry*, 2 Gill, 83.

b. As affected by character, capacity, and opportunity.

The opinion of a witness as to the sanity of a person depends upon his capacity to judge and his opportunity to observe. *Burton v. Scott*, 3 Rand. (Va.) 399; *Burney v. Torrey*, 100 Ala. 157; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Sharp v. Merri-man (Mich.)*, 2 Det. L. N. 390; *Wood v. State*, 58 Miss 741; *Sharp v. Kansas City Cable R. Co.* 114 Mo. 94; *Clifton v. Clifton*, 47 N. J. Eq. 227; *Culver v. Haslam*, 7 Barb. 314; *State v. Kalb*, 2 Ohio Legal News, 361.

And the intelligence and honesty of the witness. *Clifton v. Clifton*, 47 N. J. Eq. 227.

And his freedom from interest and bias. *Culver v. Haslam*, 7 Barb. 314.

And upon the incidents actually observed. *Sharp v. Kansas City Cable R. Co.* 114 Mo. 94; *Culver v. Haslam*, 7 Barb. 314.

The opinions of witnesses as to the sanity of a person are of no value unless it appears that they had adequate means and opportunities for forming a conclusion, but no rule can be laid down declaring what kinds of acquaintances or what opportunities are necessary to entitle them to state an opinion. *Beaubien v. Cicotte*, 12 Mich. 459.

The testimony of witnesses present at the time of the execution of a contract respecting the capacity of the party is of greater weight than the opinions of other witnesses based upon facts which though true might not be the result of unsoundness of mind. *Beverley v. Walden*, 20 Gratt. 147.

And where evidence is heard on both sides in an action involving the question of the sanity or insanity of a party to a contract, affirmative testimony of those best acquainted with the person alleged to be insane should outweigh testimony of those who at or about the time of the contract had

5. Following the decision of this court in the case of *Carr v. State*, 96 Ga. 285, and the cases there cited, the propositions stated in the fifth headnote are too well settled to need further discussion.

6. Where the defense of insanity is relied on, and there is the evidence of expert and nonexpert witnesses who testify as to the sanity of the accused, and who were "parties

who associated with the defendant, lived with him, lived in the same community," it was error for the judge to charge the jury that the testimony of expert witnesses was entitled to great weight, and to add, in substance, that the testimony of intimate associates of the accused should be given similar weight. All this testimony is allowed for the purpose of informing the jury as to the truth of the issue.

interviews with him and testified that they saw nothing indicating an insane mind. *Emery v. Hoyt*, 46 Ill. 258.

So, evidence of witnesses present at the execution of a deed is entitled to particular weight upon the question of competency. *Jarrett v. Jarrett*, 11 W. Va. 584.

And evidence of notaries who took a grantor's acknowledgment to his deed that he was competent to make it is entitled to great weight. *Buckey v. Buckey*, 38 W. Va. 168.

And next to physicians and persons who were present at the time of the execution of a deed either as attesting witnesses or otherwise the evidence of persons whose intimacy in the family has given them an opportunity of seeing the grantor at all times and watching the operations of his mind is important upon the question of his capacity to make a deed. *Jarrett v. Jarrett*, 11 W. Va. 584.

So, where there is a conflict in the evidence in relation to the sanity of a grantor in an action to set aside his deed, the testimony of witnesses relating to the period of time nearest the date of the execution of the deed is entitled to the most weight. *Exum v. Canty*, 34 Miss. 533.

And in deciding as to the state of a grantor's mind at and before the time of the execution of his deed in an action involving its validity, evidence which contains facts upon which the jury may judge for themselves, given by witnesses who by frequently seeing and conversing with the grantor had full opportunity of forming a judgment as to his state of mind, ought to prevail over general opinions upon the same subject formed by persons who had fewer opportunities for judging. *Hoge v. Fisher*, Pet. C. C. 163.

So, evidence of witnesses who were present at the execution of a will is entitled to particular weight on the question of testamentary capacity, especially where they are attesting witnesses. *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 680, 2 L. R. A. 668.

And greater reliance is to be placed upon the testimony of an impartial and respectable lawyer in regard to the due execution of a will prepared by him than upon that of a nonprofessional witness. *Julke v. Adam*, 1 Redf. 454.

But the testimony of an attorney who drew a will, tending to show that the testator knew what he was about and comprehended the character of the instrument, cannot be said, as matter of law, to be controlling where there is evidence that the testator was eighty years of age, and of many circumstances occurring at, about, and before the time the will was made indicating an enfeebled mental condition, the force and weight of such circumstances being a question for the determination of the jury. *Petrie v. Petrie*, 2 Silv. S. C. 438.

And a will will not be set aside on the ground of testamentary incapacity upon the testimony of a number of witnesses, all of whom were related to the testator by blood or affinity, as to his unsoundness of mind, as against that of the three witnesses to the will who had no interest in the disposition, and were unconnected with his family and were apparently free from prejudice, and had abundant opportunity to form a judgment as to his mental condition, that he was of sound mind. *Sutton v. Morgan*, 30 N. J. Eq. 622.

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So, evidence of the neighbors of a party who are of sound judgment and fair powers of observation and who have known him long and well and have had occasion to observe and test the vigor of his mental faculties, and can give the facts upon which their impressions and opinions are based, is ordinarily the most reliable on the question of senile dementia. *Hiett v. Shull*, 36 W. Va. 563.

And knowledge of the habits of the insured with reference to intemperance, asserted by witnesses in an action upon an insurance policy who were not intimate with him and saw him only occasionally, amounts to no more than the assertion of an opinion, and will not be entitled to equal weight with less positive testimony of other witnesses founded upon a more extensive acquaintance. *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 350, 28 L. ed. 1056.

So, a continuance should be granted because of the absence of a material witness in a criminal prosecution who would testify as to the mental condition of the accused and give his opinion that he was afflicted with kleptomania, though there were other witnesses who gave their opinions upon the same question, where the absent witness was more friendly and intimate with the accused, and had better means of knowing his condition, and was better able to give an opinion as to his mental condition than anyone else. *Harris v. State*, 13 Tex. App. 287.

It cannot be said, as a matter of law, however, that witnesses in an action to set aside a will, who had less acquaintance with the testator and less opportunities, may not be as reliable witnesses as others who may have had special training, experience, or habits of closely observing people. *Cline v. Lindsey*, 110 Ind. 337.

In *Cline v. Lindsey*, 110 Ind. 337, *Rush v. Megee*, 36 Ind. 69, *supra*, IX. was distinguished, the court saying that the probability is that in that case the attention of the court was not called to the objection that the instruction invaded the province of the jury.

So, an instruction in an action to set aside a will that the opinion of a witness whose attention had been particularly called to the testatrix, who was familiarly acquainted with her and had frequent opportunities of observing her and the operations of her mind, is entitled to greater weight than that of a witness of equal sagacity, is erroneous as invading the province of the jury by directing them as to the weight of the evidence. *Durham v. Smith*, 120 Ind. 463; *Cline v. Lindsey*, 110 Ind. 337; *Fulwider v. Ingels*, 87 Ind. 414.

c. As affected by the facts and reasons stated.

The opinions of nonexpert witnesses on the question of mental capacity are to be weighed by the facts upon which they are based. *Ficus v. Turner*, 125 Ind. 48; *Rush v. Megee*, 36 Ind. 69; *Ex parte Schneider*, 21 D. C. 433; *Clarke v. Sawyer*, 3 Sandf. Ch. 351; *Wilcox v. State*, 34 Tenn. 106; *Kinleside v. Harrison*, 2 Phillim. Ecol. Rep. 449.

Such facts being of more importance than the opinions. *Clarke v. Sawyer*, 3 Sandf. Ch. 351; *McDaniel's Will*, 2 J. J. Marsh. 381.

More opinions of witnesses as to the sanity of a testator are entitled to little or no regard unless they are supported by good reasons founded on

and the weight to be given to it is for them. The judge should not intimate in any way to them how they should deal with any particular class of witnesses, but, under proper instructions, leave the entire matter to them. It may be that in certain cases the testimony of non-expert witnesses would, in the mind of an intelligent juror, outweigh the testimony of the alleged expert witnesses, and that in other cases the testimony of the expert would be

given the greater weight; but the jury are the sole judges of such things, and the judge should leave them untrammelled to pass upon the credibility of all witnesses, and give such weight to the testimony of each as they see proper.

7. "Where the question under examination, and to be decided by the jury, is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor." Penal

facts which warrant them in the opinion of the jury. *Harrison v. Howan*, 8 Wash. C. C. 580; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *McDaniel's Will*, 2 J. J. Marsh. 381; *Jones v. Perkins*, 5 B. Mon. 222; *Chase v. Winans*, 59 Md. 475; *Clifton v. Clifton*, 47 N. J. Eq. 227; *Sloan v. Maxwell*, 8 N. J. Eq. 563; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Doran v. McConlogue*, 150 Pa. 98; *Nexsen v. Nexsen*, 2 Keyes, 232; *Young v. Barner*, 27 Gratt. 36; *Jarrett v. Jarrett*, 11 W. Va. 584; *Kerr v. Lunsford*, 81 W. Va. 680, 2 L. R. A. 683.

And if such reasons are frivolous and inconclusive the opinions are worth nothing. *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Sloan v. Maxwell*, 8 N. J. Eq. 563.

The weight to be given to an opinion of a non-expert witness as to mental capacity when admissible will depend upon the extent and character of the impairments of the mind, the opportunity to know and intelligence of the witness, and the reasonableness of the conclusion from the facts stated and the accompanying opinion. *Burney v. Torrey*, 100 Ala. 157.

In *Burney v. Torrey*, 100 Ala. 157, *Roberts v. Trawick*, 13 Ala. 68, *supra*, VI. b, was distinguished upon the ground that in that case the court was laying down a rule for the trial court and giving the reasons for the admission or rejection of certain facts as evidence, and not a rule for the guidance of jurors after such evidence had been admitted.

So, the opinions of witnesses other than attesting witnesses as to the capacity of a testator are to be received in a will contest as the least kind of evidence of testamentary capacity except so far as they are based on facts and occurrences detailed by them; the witnesses are to state the facts, and it is the business of the court from these facts to pronounce the opinion, under settled rules and guides, whether the testator is competent or not. *Whitenack v. Stryker*, 2 N. J. Eq. 8.

And the opinions of witnesses as to a want of testamentary capacity are entitled to but little weight in a will contest as against proof of facts evincing sufficient testamentary capacity. *Carpenter v. Calvert*, 83 Ill. 62.

And evidence, consisting particularly of the testimony of nonexpert witnesses that the testatrix was not fit to make a will, many of whom seldom saw her and all of whom gave no facts upon which to base their opinions, or facts too weak and inconclusive to warrant it, is insufficient to warrant the submission of the issue of testamentary capacity to the jury. *Green's Estate*, 140 Pa. 137.

But it is not correct to say that the opinion of a witness as to the mental condition of the testatrix in a will contest is entitled to consideration only so far as the facts stated by him sustain the opinion, unless the proposition is understood to include among the facts referred to the acquaintance of the witness with the subject-matter and his opportunities for observation. *Shanley's Appeal*, 62 Conn. 325.

And an instruction in a prosecution for homicide in which insanity was interposed as a defense, that the conduct, language, and appearance of the accused should be considered for the double purpose

of testing the value of the opinions of witnesses based upon such facts and of determining whether the fact of insanity is established independently of such opinions, is not subject to the objection that it tells the jury that if they find the accused insane they must do so from facts independent from opinions, where they are elsewhere told that weight and credit should be given to opinions upon the question of insanity. *State v. Jones*, 64 Iowa, 356.

And the fact that a nonexpert witness in a will contest is unable to give conversations with the testator, and can only state the manner in which he conversed, and that the facts known to him were limited in their character, does not render his opinion on the question of mental capacity inadmissible, but it is for the jury to say what credit and weight should be given to the opinion in view of the character of the dealings and conversations upon which it is based. *Foster v. Dickerson*, 64 Vt. 233.

d. As compared with expert and other evidence.

See principal case; and see note, *Expert opinions as to sanity or insanity*, to *Burt v. State* (Tex. Crim. App.) 40 S. W. 1000, — L. R. A. —.

e. A question for the jury.

The weight and effect which shall be given the opinion of a nonexpert witness on a question as to mental soundness is a question of fact for the jury. *Colee v. State*, 75 Ind. 513; *Newhard v. Yundt*, 132 Pa. 324; *Foster v. Dickerson*, 64 Vt. 233.

Upon consideration of the facts testified to by them upon which such opinions are based. *State v. Hayden*, 51 Vt. 236.

So, whether the means of information or facts proved or the conclusions drawn by a nonexpert witness as to the sanity or insanity of a person are sufficient to base their conclusions upon, is a question for the consideration of the jury under proper instructions. *McClackey v. State*, 5 Tex. App. 330.

And the reasons of witnesses for their opinions on a question of mental soundness in a proceeding in which the question of sanity is involved are for the consideration of the jury, and not of the court. *Gray v. Obeare*, 59 Ga. 675.

Opinions of nonexpert witnesses upon the question of insanity are only to be received and weighed in the light of the facts and circumstances related by them and upon which their opinions are predicated, and the jury must judge of the reasonableness of their opinions and conclusions from these facts and circumstances. *Wilcox v. State*, 94 Tenn. 106; *Nexsen v. Nexsen*, 2 Keyes, 232.

And it is for the jury to consider the facts and ascertain if the opinions are sustained by them. *Nexsen v. Nexsen*, 2 Keyes, 232; *Petrie v. Petrie*, 2 Silv. S. C. 438.

The contrariety of opinion as to mental capacity and the veracity of the witnesses in a will contest are matters peculiarly within the province of the jury with which the court has nothing to do, and an instruction that the testimony of witnesses who depose that the testatrix was of perfect mind and memory is to be preferred to the testimony of those to the contrary, is properly refused. *Newhard v. Yundt*, 132 Pa. 324.

F. H. B.

Code, § 1021. There seems to have been no violation of this well-settled rule in regard to the nonexpert witnesses in this case. Each witness examined was allowed to state his opinion, and no one did so without giving his reasons therefor. The opinion and the reasons go to the jury together, that the jury may determine what the opinion is worth. It may be that a particular reason given for an opinion is not really a good one, and such a reason would most probably, in the mind of an intelligent juror, destroy the opinion at once; but, nevertheless, the opinion and the reason ought to be considered, that the jury may give the opinion such weight as they think proper.

8. When a jury is about to be impaneled for the trial of a felony case, and the panel is "put upon the accused," and the names of the individual jurors are being called, it is competent for the state or the accused to make certain objections to each juror as he is called. Penal Code, § 978. Upon such objections being made to a juror, it is the "duty of the court to hear immediately such evidence as may be submitted (the juror being a competent witness) in relation to the truth of these objections." On this issue the juror may be called as a witness, either by the party attacking his competency or the party seeking to establish it. If in this investigation the juror is held to be competent, the next step is to place him upon his *voir dire*, and ask him the questions prescribed in Penal Code, § 975. If he answers these questions so as to qualify himself as a juror, the judge is not required, when the juror is placed upon him as a trier, to ask the juror any question in regard to his competency, nor to permit counsel to do so. (Certainly neither the court nor counsel should ask any question which would involve a breach of the juror's privilege to refuse to answer on the ground that so doing would tend to incriminate, or otherwise disgrace, him; and neither the court itself should ask any question, nor should it permit counsel to ask any question, of the juror, until extrinsic evidence has been introduced tending to show that the juror has answered the questions, or some of them, falsely, thereby impeaching or attacking his competency. On this investigation the juror is not a competent witness in the broad sense in which the term is used when the challenge is for cause on one of the grounds stated in Penal Code, § 978. If the challenge for cause is overruled, and if the juror answers the statutory questions so as to qualify himself, he stands before the court as a competent juror, and he cannot be called upon to disqualify himself; and, if placed upon the court as a trier, and his disqualification is brought to the attention of the court by evidence other than that of the juror, then the court should determine the question as to whether he is a competent juror or not, and ask him such questions only as he, under the law, would be compelled to answer if

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called as an ordinary witness, and then determine his competency from the extrinsic evidence, as well as the statement of the juror. No fixed rule can be laid down to be followed in all cases. The inquiry which the judge should make after the juror's competency is attacked by extrinsic evidence is to be left largely to the discretion of the trial judge, according to the circumstances of each case.

9. While the accused mainly relied upon the defense of insanity, still, as he did not expressly admit that he committed the homicide, the court should not, in its instructions to the jury, have referred to the homicide, as "the act which the accused committed. But, as counsel for the accused, in numerous requests which were made to the judge to charge, used similar language, this error on the part of the judge would not have necessitated a new trial, even though the requests containing the language were not actually given by the judge. Counsel for the accused should not, in their communications with the court in requests to charge, use language which would be calculated to mislead the court as to the contentions of the accused, and then afterwards complain that the language used, upon being subsequently adopted by the court, was calculated to prejudice the case of the accused. Of course, if the requests containing the language had been given, there would be no question, but it seems to us that, where the requests gave to the judge language which he used in his charge, independently of the requests, the language ought not to be the subject of complaint at the instance of the accused. However, in cases where the accused does not expressly admit that he committed the act, it is not good practice for the judge to use such expressions as those above quoted.

10. The charge of the court was, in the main, correct and appropriate; and considering it as a whole, except as herein criticised, was free from material error. The instructions as to the law of insanity were in accord with the decisions of this court cited above.

11. It is not necessary to decide in this case whether this court has the power to review the decision of the judge of the superior court upon a motion to change the venue in a criminal case under the act of 1895 (Acts 1895, pp. 70, 71). Even if this court has the power to review such a decision, there is no present occasion for exercising it, as the circumstances and surroundings of the case when the accused is again put upon trial may, and probably will, be essentially different from what they were at the time the change of venue was requested.

12. We have dealt with all of the substantial errors committed at the trial relating to any matter or question that is the least likely to arise when the case is tried again, and hence we do not deal more specifically with the numerous grounds of the motion for a new trial.

Judgment reversed.

Mrs. J. C. MERRITT, *Plff. in Err.*,

v.

GATE CITY NATIONAL BANK.

(.....Ga.....)

*1. Under an act providing that all cases brought in a designated city court should be "returnable to and triable at the term next ensuing after twenty days have elapsed from the filing" a case in that court, the declaration in which was filed on the 12th day of June, 1894, was ripe for trial at the ensuing July term, which began on the 1st Monday of that month. This is true although the last of the twenty days prescribed by the statute in this instance fell upon the Sabbath day.

2. A plea to an action brought by the plaintiff as the Gate City National Bank, which alleged that "the said Gate City National Bank has been dissolved by a forfeiture of its charter, and by misuser of its franchises," was good against a general demurrer or mere motion to strike. It will be presumed, as against such a demurrer or motion, that the charter of the bank in question was forfeited in the manner prescribed by law.

3. The drawer of a check upon a bank is not absolved from liability thereon because of any delay in presenting the check for payment, when it does not appear that any loss resulted to the drawer from such delay; and in a suit upon such a check against the drawer, a plea by him, alleging the delay, but silent as to loss, was properly stricken on demurrer.

(January 21, 1897.)

ERROR to the City Court of Atlanta to review a judgment in favor of plaintiff in an action brought to hold the drawer of a check liable for its amount. *Reversed.*

The facts are stated in the opinion.

Mr. Robert L. Rodgers, for plaintiff in error:

The first, or filing day, is not to be counted, as the law prescribes that cases shall be returnable to and triable at the term next "ensuing after twenty days from the filing," etc.

It requires both days, the filing day, "12th day of June, 1894," and the 1st day of July, Sunday, the last day before the term, to make the twenty days; that is counting the first and last day, also counts Sunday the last day, and is not twenty days from the day of filing, June 12.

Sunday is not a judicial day.

Hales v. Owen, 2 Salk. 625; *Rex v. Elkins*, 4 Burr. 2129, cited in *National Bank of the Metropolis v. Williams*, 46 Mo. 17; *Bias v. Irvin*, 49 Ga. 436; *Weldon v. Colquitt*, 62 Ga. 432; *Sawyer v. Cargile*, 72 Ga. 290; *Burton v. Chicago*, 53 Ill. 87.

In computing the time, according to the rule recognized in *Cromlien v. Brink*, 30 Pa. 522, the day on which the payment was made must be excluded.

* Headnotes by SIMMONS, Ch. J.

NOTE.—For the computation of time by excluding the last day when it falls on Sunday, see note to *Brown v. Valles* (Colo.) 14 L. R. A. 120; also *Hanover F. Ins. Co. v. Shrader* (Tex.) 30 L. R. A. 498.

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Edmundson v. Wragg, 104 Pa. 500, 49 Am. Rep. 590; *Dennis v. Shorman*, 31 Ga. 607; *Hill v. Wilker*, 41 Ga. 449, 5 Am. Rep. 540; *Page v. Blackshear*, 75 Ga. 886; *Morgan v. Perkins*, 94 Ga. 353.

The day of filing must be excluded.

In computing the time from a day it cannot be counted on that day.

Georgia Southern R. Co. v. Bigelow, 68 Ga. 219; *Cressey v. Parks*, 75 Me. 887, 46 Am. Rep. 406; *Edmundson v. Wragg*, 104 Pa. 500, 49 Am. Rep. 590; *English v. Williamson*, 34 Kan. 212.

If the Gate City National Bank was no longer a corporation doing a regular banking business, but was in a state of dissolution, then it had no right to sue as a living corporation.

Code 1882, § 1688.

The transaction of giving defendant's check for her husband's debt, taking up his note, was "absolutely void" in law, and the parties cannot make valid by their wishes, or by suit at law, a transaction which the law declares to be "absolutely void."

Code 1754, 1783, 5087; *Morris v. Winkles*, 88 Ga. 721; *Freeman v. Holmes*, 62 Ga. 556; *Rushing v. Clancy*, 92 Ga. 769; *First Nat. Bank v. Bayless*, 96 Ga. 684; *Maddox v. Oxford*, 70 Ga. 179.

Mr. S. J. Hall, for defendant in error:

Original petitions in the city and superior court must be filed in the clerk's office at least twenty days before the term to which it is returnable.

Ga. Code 1882, § 8338.

The maker of an acceptance cannot plead the disability of the holder thereof to sue.

Southern Bank v. Williams, 25 Ga. 534.

There is nothing to show that the plaintiff in error was in any wise damaged by the check in question not having been presented for payment at an earlier date; therefore the plea that plaintiff in error was discharged from liability on account of the delay in presenting the check for payment was properly stricken.

Daniels v. Kyle, 1 Ga. 304; *Daniels v. Kyle*, 5 Ga. 245; *Prescott v. Bennett*, 50 Ga. 274.

SIMMONS, Ch. J., delivered the opinion of the court:

1. This was an action in the city court of Atlanta, filed June 12, 1894, and made returnable to the July term, 1894, which began on Monday, July 2. The act of November 30, 1892, establishing new terms for that court, provides that "all cases brought in said court shall be returnable to and triable at the term next ensuing after twenty days have elapsed from the filing, . . . the purpose of this act being to require a case to be filed twenty days before the term to which it is returnable." Acts 1892, p. 220. A plea to the jurisdiction on the ground that the suit was not filed twenty days before the term to which it was returnable was stricken by the court on demurrer, and to this the defendant excepted. The court was right in striking this plea. Counsel for the plaintiff in error relied upon that section of the Code which provides that, "when a number of days is prescribed for the exercise of any privilege or the discharge of

any duty, only the first or last day shall be counted; and if the last day shall fall on the Sabbath, another day shall be allowed in the computation." Code 1882, § 4. Here, however, there was nothing to be done on the last day, and it therefore made no difference that it fell on the Sabbath. The provision as to the time of filing suits in the city court of Atlanta is similar to that which regulates the time of filing in the superior court, the law requiring that actions in the latter court shall be filed at least twenty days before the term to which they are returnable (Civ. Code, § 4984); and the regular terms of the superior court begin, as do those of the city court of Atlanta, on Monday. For nearly a century the law with reference to the superior court has been the same in this respect as it is now; yet as far back as our knowledge extends it has been the practice in that court to treat Tuesday, twenty days before the term, as the last return day for the term; thus including Sunday as the last of the twenty days. The uniform practice of the courts in this respect for so long a period, if not controlling in the construction of the law, is at least entitled to great weight; and we are not disposed at this late day to question its legality; especially since a holding that the practice is wrong would result in widespread and incalculable harm.

2. The defendant further pleaded that "the alleged plaintiff, the Gate City National Bank, has gone into dissolution, and is not now in business, and was not so at the time of filing this suit; and as a dead and defunct corporation it has no right to be plaintiff in a suit. The said Gate City National Bank has been dissolved by a forfeiture of its charter and by misuser of its franchises." The

plaintiff demurred generally to this plea. The court sustained the demurrer, and struck the plea, and to this the defendant excepted. We think this plea was good as against a mere general demurrer. Although the plea does not allege in what manner the charter was forfeited, it will, as against a general demurrer, be presumed that it was forfeited in the manner prescribed by law; and, this being so, the action could not be maintained in the name of the corporation. The corporate right to sue, when not prolonged by statute for the purpose of winding up the affairs of the corporation, dies with the charter. There can be no suit by a dead person, whether natural or artificial. In this respect a dead corporation stands upon no better footing than a dead man. See *Van Pelt v. Home Bldg. & L. Assn.* 87 Ga. 370; 6 Thomp. Corp. §§ 6721, 6723, 7870.

3. The court did not err in striking the third plea of the defendant, which was that it was the fault of the plaintiff that the check sued upon was not paid, the reason why it was not paid being that the plaintiff negligently failed to present it in proper time at the bank upon which it was drawn. It does not appear from the plea that the defendant, the drawer of the check, was hurt by the delay; and it is well settled that the drawer of a check upon a bank is not absolved from liability thereon because of any delay in presenting it for payment, when it does not appear that loss resulted to the drawer. *Daniels v. Kyle*, 1 Ga. 304, 5 Ga. 245; *Carswell v. Ware*, 80 Ga. 267; *Comer v. Dufour*, 95 Ga. 378, 30 L. R. A. 800.

On account of the error in striking the plea dealt with in the second division of this opinion, the judgment of the court below is reversed.

ILLINOIS SUPREME COURT.

Charles H. ECKMAN, *App't.*
v.
CHICAGO, BURLINGTON, & QUINCY
RAILROAD COMPANY.

(189 Ill. 312.)

1. A contract by a railroad employee which gives him his election, after an injury, to take the benefits of a relief fund to which he as well as the railroad company has contributed, or to sue for damages in a court of law, and providing that his acceptance of such benefits will release the employer from liability, is not contrary to public policy.
2. An acceptance of benefits from a relief fund to which a railroad company has largely contributed, by an employee who knows that this, under his contract, will have the effect to release the railroad company from liability

NOTE.—As to contracts with railroad relief associations, see also *Pittsburg, C. C. & St. L. R. Co. v. Cox* (Ohio) 35 L. R. A. 507, and other cases cited in footnote thereto.

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for the injuries he has received, constitutes an accord and satisfaction.

(Magruder, J., dissents.)

(November 8, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by Carter, J.:

This was an action on the case in the superior court of Cook county, by Charles H. Eckman, the appellant, against the Chicago, Burlington, & Quincy Railroad Company, the appellee, for damages for injuries sustained while in the service of appellee at Buda, Illinois. The declaration charged that the injury was caused by the negligence and recklessness of the defendant. A plea of the general issue was en-

tered, and a trial had before a jury. The evidence showed that on August 29, 1891, while a freight train was standing on the main track, the appellant was directed by the foreman to crawl under the engine, and tighten up a valve, and while so under the engine another train ran into the rear end of the freight train, thereby forcing the engine forward, and dragging appellant quite a distance, breaking his leg and ankle, etc., whereby he was seriously injured. The railroad company relied upon the fact that the plaintiff was a member of the Burlington Voluntary Relief Department, and that he had received the benefits provided by that department, as a complete defense. The Burlington Relief Department was organized June 1, 1889, pursuant to a resolution of the board of directors of the appellee company, and its object is declared to be "the establishment and management of a fund, to be known as the 'Relief Fund,' for the payment of definite amounts to employees contributing thereto, who are to be known as 'members of the relief fund,' when, under the regulations, they are entitled to such payment, by reason of accident or sickness, or, in the event of their death, to the relative or other beneficiaries designated by them." This fund consists of voluntary contributions from the employees, income derived from investments and from interest paid by the company, and appropriations by the company, when necessary to make up deficiencies. The railroad company has general charge of the department, guarantees the fulfillment of its obligations, pays interest at 4 per cent per annum on monthly balances in its hands, supplies all the necessary facilities for conducting the business of the department, and pays all its operating expenses. There is also an advisory committee, having general supervision of the department, which consists of the general manager of the appellee as chairman, six members selected by the employees of the different divisions of the railroad company, and six members selected by the board of directors of the company; the chairman having no voice except in case of a tie. The company agrees to pay any deficiency in the amount required to meet the claims on the fund. No employee is required to become a member of the relief fund, and any member may withdraw altogether at the end of any month. The members are divided into different classes, depending upon the amount of their contributions. Each member contributes monthly a specified sum according to the class to which he belongs, which is deducted from his wages, and placed to the credit of the relief fund. All employees of the company who pass a satisfactory medical examination are eligible for membership. If a contributing member is under disability,—that is, if he is unable to work,—whether such a disability arises from an injury received while at work or from sickness, he is entitled to be paid from the fund a certain sum per day, varying according to the contribution which he is making. In case of his death, the beneficiary designated by him is entitled to be paid a specified sum as designated in the membership contract. The regulations also provide a form of application which was used by the appellant, in which the appellant agrees to be bound by the regulations of the relief department; that a certain speci-

fied portion of his wages shall be applied as a voluntary contribution for the purpose of securing the benefits provided; that this application, on approval by the superintendent of the relief department, shall make him a member of the relief fund, and constitute a contract between him and the company; that his leaving the employment of or discharge by the company shall terminate the contract, except as to benefits accrued and as to death benefits. It also appoints the beneficiaries in case of death, and contains the following agreement: "I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury." The regulations provide further that, should a member or his legal representative bring suit against the company for damages on account of injury or death of such member, payment of benefits on account of the same shall not be made until such suit is discontinued; and that, if the suit shall proceed to judgment, or be compromised, all claims on the relief fund for benefits on account of such injury or death shall be thereby precluded. The relief department, as we have seen, was organized on June 1, 1889. August 31, 1891, two days after the accident to the appellant, the appellee had paid for operating expenses alone of the relief department, \$83,958.98. It had also advanced towards the payment of benefits during such time, on account of the insufficiency of contributions of members, the sum of \$10,128.19. From June 1, 1889, to April 30, 1892 (this suit having been brought on May 4, 1892) the appellee paid for operating expenses of the relief department from its funds \$110,588.68. On December 31, 1891, in accordance with its regulations, it crossed off charges against the relief fund for deficiencies which occurred up to that time, amounting to \$20,275.55. It had advanced on account of further deficiencies occurring from January 1, 1892, to April 30, 1892, the sum of \$19,441.27,—making a total paid and advanced by the company from June 1, 1889, to April 30, 1892, of \$150,255.45. The amount paid on account of sickness and death from sickness from June 1, 1889, to April 30, 1892, was \$225,978, and the amount paid on account of accident and death from accident was \$240,261.49. This latter amount includes accident benefits, whether the injury was received while the employee was on or off duty. In addition, the appellee railroad company had given office rent to the department, and also the services of the officials and clerks of the operating department in transacting the relief-department business, for all of which no charge was made. The contributions of the members have never been applied to any other purpose than the payment of benefits. No part of it has ever been used for the payment of expenses. At the close of 1890 the membership of the relief department was 9,407; at the close of 1891 it was 10,386. At the close of 1892 it was 12,283. During those

periods the number of men employed was somewhere between 25,000 and 30,000. The appellant, Eckman, made application for membership in the Burlington Voluntary Relief Department, July 18, 1890, which application was approved August 4, 1890. It provided that \$2.10 should be deducted from his wages monthly for the purpose of securing the benefits provided for a member of the second class, with twice additional death benefit of the first class. These benefits, as shown by the book of regulations, were, for disability by reason of accident, \$1 for each day of a period not to exceed fifty-two weeks, with 50 cents a day thereafter during the continuance of the disability. Any bills for surgical attendance were to be paid by the relief department. The two additional death benefits of the first class were \$250 each, which with the \$500 belonging to the second class, made the total death benefit \$1,000 to which his beneficiary would have been entitled in case of death. The appellant received \$245 for benefits, being the amount he was entitled to under the regulations. There was also paid on account of the appellant for nurses, medicine, and surgical attendance the sum of \$121.90. The receipt of these amounts as benefits due him from the relief fund was not disputed. The appellant claims that he joined the relief department by coercion, and that when he received the first payment he was not conscious what he was doing, on account of being under the influence of opiates at the time, and that, therefore, he had not made a conscious election between the two alternatives offered him by the relief fund,—either to accept its benefits, or to abide the event of a suit for damages,—its rules precluding a member from doing both. The court instructed the jury to find for the defendant below, the appellee here. Appellant appealed to the appellate court for the first district, which court affirmed the judgment, from which judgment he has appealed to this court.

Messrs. Otto Gresham and Charles Al-ling, Jr., for appellant:

A railroad corporation of this state cannot by contract in advance exempt itself from liability to its employees for its gross negligence.

Chicago, R. I. & P. R. Co. v. Harmon, 17 Ill. App. 640; *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Illinois C. R. Co. v. Read*, 87 Ill. 435, 87 Am. Dec. 260.

The Burlington Voluntary Relief Association, as organized, conducted, and maintained, is merely for the purpose of evading whatever liability the Chicago, Burlington, & Quincy Railroad Company might incur by reason of injuries to its employees through its own negligence, and is therefore void.

Miller v. Chicago, B. & Q. R. Co. 65 Fed. Rep. 305.

The acceptance of benefits by the legal representatives of deceased member from the relief association does not bar an action against appellee for negligence.

Maney v. Chicago, B. & Q. R. Co. 49 Ill. App. 105.

What the public policy of the state is must be determined by the courts of the state, construing the Constitution of the state, and the legislative enactments.

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Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; *Starkweather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489.

A contract of a corporation may not be contrary to public policy, yet *ultra vires*.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 638, 4 L. ed. 659; *Distilling & Cattle Feeding v. People, Moloney*, 156 Ill. 448.

The Chicago, Burlington, & Quincy Railroad Company, appellee, can no more go into the insurance business than any insurance company, organized under the laws of this state, can go into the railroading or banking business.

The business of the Burlington Voluntary Relief Department was that of insurance.

Com. v. Wetherbee, 105 Mass. 149.

If it holds a charter authorizing it to maintain and operate a railroad and conduct the business of insurance, such a charter is void, and consequently all contracts made under it.

People, Peabody, v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 497; *Chicago Gaslight & C. Co. v. People's Gaslight & C. Co.* 121 Ill. 530; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 180 U. S. 1, 32 L. ed. 837; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 317, 30 L. ed. 95.

A void act can never become valid merely because it remains unquestioned.

Typpecanoe County Comrs. v. Lafayette, M. & B. R. Co. 50 Ind. 85

A void act cannot work an estoppel.

Chitty, Contr. 693; *Story, Agency*, 240, 241.

As the contract between appellant and appellee was a continuing contract, a part performance does not make it binding *in toto*.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; and *Oregon R. & Nav. Co. v. Oregonian R. Co.* 180 U. S. 1, 32 L. ed. 837.

If it is within the law for the appellee to go into the insurance business, the Burlington Voluntary Relief Association, as maintained and operated, is void, as it is not organized and conducted according to the insurance laws of the state.

Railway Pass. & Freight Conductors Mut. Aid & Ben. Assn. v. Robinson, 147 Ill. 123; *Rockhold v. Canton Masonic Mut. Benev. Soc.* 129 Ill. 440, and see 2 L. R. A. 420; *Golden Rule v. People, Swigert*, 118 Ill. 492.

It was not necessary that appellant pay back to the relief association and appellee what he had received as a condition precedent to his right to bring this action.

Union P. R. Co. v. Harris, 153 U. S. 327, 39 L. ed. 1003.

Messrs. Chester M. Dawes and Frank O. Lowden, for appellee:

The methods employed by the Burlington Relief Department do not contravene public policy.

Chicago, B. & Q. R. Co. v. Bell, 44 Neb. 44; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Lease v. Pennsylvania Co.* 10 Ind. App. 47; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492; *Ringle v. Pennsylvania R. Co.* 164 Pa. 529; *State, Black, v. Baltimore & O. R. Co.* 36 Fed. Rep. 655; *Fuller v. Baltimore & O. Employees' Relief Assn.* 67 Md. 433;

Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162; *Graft v. Baltimore & O. R. Co.* (Pa.) 6 Cent. Rep. 693; *Martin v. Baltimore & O. R. Co.* 41 Fed. Rep. 125; *Griffiths v. Earl Dudley*, L. R. 9 Q. B. Div. 857; *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. Rep. 139; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482; *Owens v. Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75.

The contract between the plaintiff and the defendant was not *ultra vires*.

Whatever may fairly be considered as incidental to the purposes for which a corporation was created is not to be taken as prohibited, but is as much granted as that which is expressed.

Pittsburgh, O. & St. L. R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157; *Green Bay & M. R. Co. v. Union S. B. Co.* 107 U. S. 98, 27 L. ed. 413; *Ellerman v. Chicago Junction R. & Union Stock Yards Co.* 49 N. J. Eq. 217; *Atty. Gen. v. Great Eastern R. Co.* L. R. 5 App. Cas. 473.

Even, however, if the contract is *ultra vires*, the plaintiff has received the benefits of it and will not now be heard to question its validity.

Kadish v. Garden City Equitable Loan & Bldg. Assn. 151 Ill. 531; *Fort Worth City Co. v. Smith Bridge Co.* 151 U. S. 294, 38 L. ed. 167; *Risell v. Michigan S. & N. I. R. Co.* 22 N. Y. 258; *Heims Brewing Co. v. Flannery*, 137 Ill. 369; *Daniels v. Tearney*, 103 U. S. 415, 26 L. ed. 187; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558; *Brown v. Scottish American Mortg. Co.* 110 Ill. 235; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Ward v. Johnson*, 95 Ill. 215; *State Board of Agriculture v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Denver F. Ins. Co. v. McClelland*, 9 Colo. 11, 59 Am. Rep. 134.

The defendant company was not engaged in an insurance business.

Donald v. Chicago, B. & Q. R. Co. 93 Iowa, 284, 33 L. R. A. 492; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127.

Membership in a relief department is wholly voluntary, and the plaintiff did not join under duress.

The relief department of the Baltimore & Ohio Railroad Company is compulsory, but it has been uniformly adjudicated that such fact does not militate against the defense here presented.

Fuller v. Baltimore & O. Employers' Relief Assn. 67 Md. 433; *State, Black, v. Baltimore & O. R. Co.* 36 Fed. Rep. 655; *Griffiths v. Earl Dudley*, L. R. 9 Q. B. Div. 357.

Even if it be conceded that the original contract was for any reason invalid, still there was an accord and satisfaction in fact and the trial court properly directed a verdict for the defendant.

Hinkle v. Minneapolis & St. L. R. Co. 81 Minn. 434.

38 L. R. A.

Carter, J., delivered the opinion of the court:

The real controversy in this case is not whether the injury to the appellant, complained of, was caused by the negligence of the appellee company, but whether the receipt by the appellant of the benefits provided by the company under its contract with the appellant through its relief department, mentioned in the record as the Burlington Voluntary Relief Department, after the happening of the injury, constituted a sufficient defense to the action. It was not disputed that after the happening of the injury appellant received through this department of the company in instalments, from time to time, the aggregate sum of \$245 as such benefits on account of the injury and under his contract of membership, and that there was also disbursed by said department for appellant for nurses, medicine, and surgical attendance the sum of \$131.90. But it is contended, in the first place, by appellant, that the company could not, by a contract in advance, exempt itself from liability to its employees for its gross negligence; that such a contract would be contrary to public policy, and void. The correctness of this position is undoubted, and it is not disputed on behalf of the appellee, but its contention is that the contract here in question is not of that character; that, on the contrary, it merely provided for an accord and satisfaction after the injury has been received, and at the election of the injured employee, and that after the injury in this case there was such accord and satisfaction, and that the same is a complete bar to a recovery in this suit. Contracts of this character have been the subject of judicial investigation in many cases in different states, and it has been almost uniformly held, where the question has arisen as in this case, that they are not void as being against a sound public policy. As said in *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 22 C. C. A. 264, 76 Fed. Rep. 489, by the United States circuit court of appeals for the eighth district: "The various courts which have had this question under consideration appear to agree that the stipulation in question is not opposed to sound public policy, but on the whole is conducive to the well-being of those whom it immediately affects, inasmuch as many railroad employees, owing to the dangerous character of their employment, are hurt without any culpable negligence on the part of their employer, and inasmuch as the employee retains, until after he sustains an injury, the right to elect whether he will sue his employer for negligence or accept benefits from the association. It also appears to be agreed that the obligation assumed by the employer to maintain and support such association by contributing the funds necessary for that purpose creates a privity of contract between the employer and all the members of the association, and at the same time furnishes a sufficient consideration to support such contract." Substantially the same language and reasoning have been used in the following cases, all of which tain the sufficiency of such a defense: *Maine v. Chicago, B. & Q. R. Co.* (Iowa) 70 N. W. 630; *Chicago, B. & Q. R. Co. v. Bell*, 41 Neb. 44; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa,

284, 33 L. R. A. 492; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645; *Vickers v. Chicago, B. & Q. R. Co.* 71 Fed. Rep. 139; *Leas v. Pennsylvania Co.* 10 Ind. App. 47; *King v. Pennsylvania R. Co.* 164 Pa. 529; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931; *Otis v. Pennsylvania Co.* 71 Fed. Rep. 136; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Spitze v. Baltimore & O. R. Co.* 75 Md. 162; *Fuller v. Baltimore & O. Employees' Relief Assn.* 87 Md. 433; *Graft v. Baltimore & O. R. Co. (Pa.)* 6 Cent. Rep. 693; *Martin v. Baltimore & O. R. Co.* 41 Fed. Rep. 125; *State, Black, v. Baltimore & O. R. Co.* 86 Fed. Rep. 655; *Owens v. Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75; *Griffiths v. Earl Dudley*, L. R. 9 Q. B. Div. 357; *Clements v. London & N.W. R. Co.* [1894] 2 Q. B. 482; *O'Neil v. Lake Superior Iron Co.* 63 Mich. 690.

The only case to which our attention has been called that is said to announce a contrary doctrine is *Miller v. Chicago, B. & Q. R. Co.* 65 Fed. Rep. 305. This case went out on a demurrer to the answer, and is the same case referred to above as *Chicago, B. & Q. R. Co. v. Miller*, 40 U. S. App. 448, 22 C. C. A. 264, 76 Fed. Rep. 439. On appeal to the circuit court of appeals that court used the language quoted above, conceding that such propositions were supported by adequate authority, but held the judgment of the lower court on the demurrer correct, and pointed out specifically wherein the answer was insufficient, although the lower court placed its decision on a different ground, holding the contract itself insufficient to bar the suit for damages. In the case at bar the appellee contributes largely to the fund under its agreement to make up or guarantee deficits, to furnish surgical aid and attendance, to pay all the expenses of the administration and management, and to become responsible for the safe-keeping of the funds of the relief department. Such contributions by the appellee to the relief department would be sufficient consideration for a discharge of the appellee's liability to appellant for the injury sustained, after he accepted the benefits of the fund so maintained. Nor does the fact that the fund was in part formed by his contributions to it alter the case. The agreement that the acceptance of the benefits for the injury from the relief fund should operate as a release and satisfaction of all claims against the company on account of such injury cannot be construed as a provision exempting the company from liability for its own negligence. As said in *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127: "The benefits, by the regulations of the relief association, become due to members whenever disabled by accident in the railroad company's service, or by sickness or injury other than in the company's service, without reference to the question of negligence at all. As these provisions include benefits in cases of accident pure and simple, of injury by the negligence of fellow workmen, and by the member's own contributory negligence, it is apparent that they cover a wide field, in which there is no liability of the railroad company at all. Such cases are probably a large majority of those occurring to railroad employees, and the association therefore is of the highest order of beneficial societies. But

even in cases of injury through the company's negligence there is no waiver of any right of action that the person injured may thereafter be entitled to. It is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. The injured party therefore is not stipulating for the future but settling for the past; he is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby. He may as well accept it in instalments as in a single sum, and from an appointed fund to which the company has contributed as from the company's treasury as a result of litigation. The substantial feature of the contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of litigation. Having accepted the former he cannot justly ask the latter in addition." In every case of injury the injured party has a right to compromise the damages for any valuable consideration, no matter how small; and, if he chooses to accept a smaller amount than he might have been able to secure at the hands of a jury, such settlement is nevertheless a full accord and satisfaction, and a bar to the prosecution of any suit for damages for such injuries. It is well known that railroad companies frequently compromise such suits out of court, and such compromises are always upheld, if honestly and fairly made. Here is an agreement made between the railroad company and the appellant that the acceptance of the benefits should release the railroad company from responding in damages as the result of an action at law. It is not this agreement alone that constitutes the release, but the acceptance of the benefits therein stipulated, well knowing that the acceptance of such benefits will have the effect of a release. That the appellant knew what the effect of the acceptance of the benefits was is not disputed. He was furnished with a handbook, which plainly stated that an injured member may either accept the benefits of the fund, or rely upon the issue of a suit; that he cannot do both. The agreement is not against public policy, as it merely puts the employee to his election, after an injury had been sustained by him, either to take the benefits of the relief fund, to which the appellee has materially contributed, or to sue for damages in a court at law.

Appellant's next contention is that the appellee had no right to go into the insurance business, and that the whole relief department scheme is both illegal under the insurance laws of this state, and *ultra vires* of a railroad corporation. The Burlington Voluntary Relief Department is not incorporated as such, but is managed, as has been stated, by some of the officials of the appellee, and the appellee contributes funds to it. The application was made to the superintendent of the relief department of the Chicago, Burlington, & Quincy Railroad Company. The relief department is composed of the appellee and six other railroad corporations and certain of the employees of the same. That such relief department is not an insur-

ance company has been held in *Donald v. Chicago, B. & Q. R. Co.* 98 Iowa, 284, 83 L. R. A. 492, and in *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127. The latter part of § 81 of chapter 82 of the Revised Statutes of Illinois of 1881, as amended in 1883, provides that "associations and societies which are intended to benefit the widows, orphans, heirs, and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies." While sick benefits, such as are usually paid by secret and fraternal societies, are not mentioned in express terms in the section quoted, we think they may be fairly construed to be within the spirit of the same. In fact, no mention of the payment of sick benefits occurs in any of our insurance statutes until the statute of 1893 on fraternal beneficiary societies. The business done by the relief department was not prohibited by the statutes relating to insurance companies in force at its organization, nor at the time of the injury to appellant; but whether the contract, where it had not been performed by the payment and receipt of the money, or whether the organization of the relief department would or not be held to be *ultra vires* the corporation, is a question not necessary to the decision of this case. Appellant cannot invoke that defense against appellee after having received the benefits secured to him by his contract. It is a general rule that a corporation cannot avail itself of the defense of *ultra vires* where a contract not immoral in itself, nor forbidden by any statute, has been in good faith fully performed by the other party, and the corporation has had the full benefit of its performance. *McNulta v. Corn Belt Bank*, 164 Ill. 427; *Kadish v. Garden City Equitable Loan & Bldg. Assn.* 151 Ill. 531. And this rule applies with equal force to the other party setting out that the contract was *ultra vires* the corporation. *Kadish v. Garden City Equitable Loan & Bldg. Assn.* 151 Ill. 531. Appellant was paid at the rate of \$1 a day after he was injured until he began this suit, and then, by the terms of the regulations, the payment of benefits ceased. The appellee paid as it agreed to do, and the appellant has accepted such payment, and the contract has been fully executed. It is therefore immaterial to inquire whether the contract or the organization of the relief department was *ultra vires* the corporation or not. That question does not properly arise in this case, and we do not, by anything hereinbefore said, intend to express any opinion as to whether or not it would appear, in a direct and proper proceeding on the part of the state, that the appellee corporation has exceeded its charter powers in organizing and maintaining its voluntary relief department.

Certain testimony was offered by appellant, which he contends would have tended to prove

that he was coerced into joining the relief department. The substance of this testimony was that he was advised on three different occasions by the superintendent or foreman who had power to discharge him to join the association, and that he did so, not because he desired to, but that, being in the presence of his superior, who had power to discharge him, he felt that he would stand better with the company by signing. It was not claimed or offered to be proved that he made any objection whatever to joining the association, or that anything more than mere advice was used in the premises. Plainly, this offered proof would not have shown coercion. Besides, by the very terms of the contract he was at liberty to withdraw at the end of any month, and was at liberty, after he was injured, to refuse to accept the benefits and sue the company for damages. Some contention is also made that when appellant received the first payment of benefits, which was \$2, he was under the influence of opiates, and, by reason thereof, unable to appreciate the full import and meaning of the reception of such benefits. In the first place, the evidence was insufficient to establish appellant's contention in this regard; and, in the second place, he continued to receive monthly instalments varying in the amounts from \$29 to \$31, for eight months thereafter, and it is not claimed that he did not at those times fully understand the consequences of his acts. Upon the whole record we are satisfied there was no evidence admitted or offered which would have authorized the jury to find a verdict against the company, and that the court properly directed a verdict in its favor.

The judgment of the Appellate Court affirming the judgment below is affirmed.

Magruder, J., dissenting:

It is not lawful for a railroad company to engage in the insurance business. A corporation can only exercise such powers as are expressly granted to it, or such implied powers as may be necessary to carry out or effectuate its express powers. A railroad company is authorized by its charter to carry freight and passengers. It is a common carrier, and nothing else. The insurance of its employees is not one of its implied powers. If it be true that a railroad company can insure its employees because they need insurance, then it can go into the tailoring or clothing business because its employees need clothes, or operate a farm to raise cattle and hogs and poultry and wheat and corn because its employees need food. Such an extension of the implied powers of a railroad company as is thus indicated would lead eventually to an absorption by the railroad companies of all the employments and all the business of the country. Monopolies, created by the gradual reaching out of railroads into the various departments of business in no way connected with the original purposes of their organization are dangerous to the liberties of the people.

KANSAS SUPREME COURT.

STATE of Kansas

v.

James McNASPY, Appt.

(.....Kan.....)

*1. A fugitive from the justice of this state, residing in another state, for whose arrest an officer has no other authority than a warrant issued by a justice of the peace of this state, and who is informed by such officer of his lack of authority, but who, at the officer's instigation, waives the necessity of requisition papers, and submits to arrest upon the justice's warrant, and is brought by the officer back to this state, will be held to have voluntarily come within the jurisdiction of the court, and may, immediately upon his arrival here, be prosecuted for another offense than the one described in the warrant, and to respond to which he agreed to return.

2. In prosecutions for forgery committed by the insertion in an instrument of additional words materially changing its terms, the information should set forth a copy of the instrument, so as to show the interpolated words and their materiality, or reasons for the failure to do so, other than mere lack of knowledge, should be stated in the information.

(Doster, Ch. J., dissents from Proposition 1.)

(November 6, 1897.)

APPEAL by defendant from a judgment of the District Court for Dickinson County convicting him of forgery. *Reversed.*

The facts are stated in the opinion.

Messrs. Stambaugh & Hurd, for appellant:

The defendant was arrested in the state of Missouri by virtue of a warrant charging a different offense, and incarcerated in the jail of Dickinson county, Kansas, and there remained until the filing of the motion to quash.

The defendant's presence within the jurisdiction of the court was obtained by virtue of the complaint and warrant issued in another case against him, and he ought not to be prosecuted for the offense charged in this case until after the other case is disposed of and he is given an opportunity to return to Missouri, notwithstanding his attendance was obtained without a requisition.

State v. Hall, 40 Kan. 840; *Van Horn v. Great Western Mfg. Co.* 37 Kan. 526; *Townsend v. Smith*, 47 Wis. 628, 82 Am. Rep. 798; *State v. Simmons*, 39 Kan. 262; *Ex parte Wilson*, 1 Ark. 152.

The motion to quash should have been sustained for the reason that the information is indefinite, uncertain, and bad for duplicity.

State v. Goodwin, 38 Kan. 538.

The facts as stated in this information would not be sufficient, with the evidence introduced on the trial, even in a civil action, to entitle

*Headnotes by the Court.

NOTE.—On the question what papers are necessary to obtain the surrender of a fugitive from another state, see *Ex parte Hart* (C. C. App. 4th C.) 23 L. R. A. 801 and note.
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the plaintiff to a judgment against the defendant.

School Dist. No. 67 v. Vedder, 19 Kan. 526; *State v. Tiltney*, 88 Kan. 714; 2 Bishop, Crim. Proc. 3d ed. §§ 403, 404.

Messrs. R. H. Kane and L. C. Boyle, Attorney General, for the State:

The defendant came voluntarily into the state of Kansas, and having come voluntarily he could invoke no right, privilege, or immunity from arrest for another criminal offense against the laws of the state of Kansas which might exist under the laws or the Constitution.

Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 550; *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283; *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934; *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388; *Williams v. Weber*, 1 Colo. App. 191.

It was not necessary in this case for the prosecution to set out a copy of the written instrument, as it clearly appears in the evidence that the note alleged to have been forged was not at any time since the commission of the crime of forgery in the possession or under the control of the prosecuting witness or the prosecuting attorney.

1 Bishop, Crim. Proc. §§ 553, 559; Bishop, Directions & Forms, § 468; 2 Bishop, Crim. L. § 589.

The allegation in the information, "a more particular description of which said instrument of writing, to wit, said promissory note, cannot now be given for want of sufficient knowledge," cures all defects of description.

State v. Oliver, 55 Kan. 711; *State v. Patterson*, 53 Kan. 825; *State v. O'Neil*, 51 Kan. 651, 24 L. R. A. 555; *State v. Schweiter*, 27 Kan. 507, and cases therein cited; *Byrne v. State*, 12 Wis. 519.

Doster, Ch. J., delivered the opinion of the court:

This is an appeal from a sentence of conviction. A complaint was filed by one Mina C. Hart with a justice of the peace of Dickinson county, charging the defendant with the forgery of a promissory note for \$163, purporting to have been made by one James M. Harmon, with the intent to defraud one H. M. Budd. A warrant of arrest was issued upon this complaint, and placed in the hands of a deputy sheriff. This officer proceeded to Thayer, Missouri, where the defendant was, and procured the marshal of that city to arrest him. He then informed him that he had a warrant for his arrest, but that, having no requisition by the Kansas authorities upon those of Missouri, he had no right to take him into custody and bring him back to this state, but asked him whether he would come back without a requisition, and would sign a stipulation to that effect. The defendant said he would do so, whereupon he and the deputy sheriff went to the office of a notary public, where, together, they read the warrant over, and the defendant agreed in writing that he would return to Kansas with the officer, in pursuance of the authority of the warrant. He was then put in the custody of the marshal

of Thayer, and confined in the city prison for several hours, until the arrival of a train for Kansas. He returned to Abilene in company with the deputy sheriff, and soon after his return another warrant for his arrest was issued and served upon him by the same officer. This warrant was based upon a complaint made by one Albert Wendlandt, charging the forgery of a promissory note purporting to be the note of said Wendlandt, by increasing it from \$30 to \$180, with intent to defraud said Wendlandt. This complaint and warrant constitute the basis of the present case. It does not appear that the deputy sheriff who went to Missouri for the defendant, or the city marshal there who arrested and confined him, used any coercive or deceptive measures to get him back into this state, or to induce him to consent to return. Since his first arrest he has been continuously in custody. Proper objections were made by the defendant to any proceedings upon the information filed against him, upon the ground that he had been fraudulently induced to return to the jurisdiction of this state to answer a different charge than that for which he was placed on trial. These objections were overruled. He was adjudged guilty, and from the sentence of conviction appeals to this court, upon the above-stated claim of error, and upon others presently to be noted.

A majority of the court are of the opinion that under the above-recited state of facts it must be adjudged that the defendant came voluntarily into the jurisdiction of the court, and that none of the principles upon which accused persons going or being carried from one state to another, to answer to charges of crime, are allowed immunity from prosecution upon other criminal charges, can be invoked by him. I am strongly of the opposite opinion for the reasons hereafter stated.

No copy of the note, either in its original or altered form, was set forth in the information, nor was any statement made of the substance of those parts in which the alteration of its amount occurred. The information, however, alleges that "a more particular description of which instrument of writing, to wit, said promissory note, cannot now be given, for want of sufficient knowledge," but no reason is given why knowledge could not be obtained. A motion to quash the information for failure to set forth the instrument so as to show wherein the forgery occurred was overruled. It should have been sustained. In cases of forgery, it is incumbent upon the prosecution to set out the forged instrument; but if such is not done, a sufficient reason for the omission should be given, as that it had been lost or destroyed, or is in the hands of the defendant, or is otherwise inaccessible. The authorities are agreed to this effect. 1 Whart. Crim. L. § 727 *et seq.*; Whart. Prec. of Ind. & Pl. § 264; 1 Bishop, Crim. Proc. § 553. In an indictment for forgery effected by interpolating words in a genuine instrument, as, in this case, by raising the amount of a note, the added words should be quoted, and the position given them in the instrument should be shown, so that it may appear how they affect its meaning. *State v. Bryant*, 17 N. H. 823. Other claims of error are made. We have examined all of them, and do not re-

gard them as meritorious; but for the defect in the information the *appeal is sustained, the sentence ordered vacated*, and direction given to sustain the motion to quash the information.

Recurring now to the question first discussed, I feel that this defendant should be discharged from custody upon the ground that he was fraudulently induced to come within our jurisdiction to answer a charge which was withdrawn immediately upon his arrival, and for which the present accusation was at once substituted. Whether the authorities of Dickinson county, in any of the steps taken to secure the apprehension and trial of the defendant, were possessed of an actual fraudulent intent, or whether they acted without a realization of the turpitude of their conduct, is immaterial. Certain it is that what they did operated to deceive the defendant as to their purpose in bringing him from Missouri to this state, and was such conduct as they should have known would have the effect of deceiving him. They are therefore, in my judgment, precluded from disavowing a fraudulent intent. Representations were made to the defendant that he was accused by one Hart of the crime of forging a note upon one Harmon, with intent to defraud one Budd, and he was asked whether he would waive the formality of a requisition upon the governor of Missouri, would submit to arrest upon an ordinary warrant, and accompany the officer back to the scene of the alleged offense in Kansas. He consented to do so, presumably conscious of his ability to prove his innocence of that charge. No sooner was he fully within the jurisdiction of the court, than the state, as though it contemplated the ensnarement of the defendant in a trap, abandoned the charge to which he had been induced to respond, and preferred an entirely different one, made by one Wendlandt, for the forgery of a note upon said Wendlandt with intent to defraud him (the said Wendlandt). That was a fraud upon the defendant, and the court should not have permitted its process to be used to give it effect. It will not do to say that the officers violated no faith with the defendant because, as an inducement to return, they made no promise of immunity from arrest upon other charges. The making of the first charge was by reasonable implication a representation that it, and it alone, was the one upon which he was to be tried. There is not, I confidently believe, a single case, decided upon the principles of the extradition laws, or otherwise, in which a denial of the defendant's rights in this respect has been rested upon such narrow grounds. Nor will it do to say that the state is not bound by an implied agreement upon the part of the officers to prosecute upon the charge first made, and upon no others, resulting from their conduct in inducing him to agree to return to answer such charge alone. The state set in motion its legal machinery for the defendant's apprehension and trial, and it is bound by the action of its officers in securing jurisdiction of his person. It is inconsistent with the high faith and dignity of the sovereign to countenance the practice of subterfuge and artifice in its behalf, or to accept an advantage over one of its citizens secured by the trickery and chicanery of its official servants. Its grace and honor in this respect are legal obligations,

enforceable by the courts. As remarked by Mr. Justice Valentine in *State v. Hall*, 40 Kan. 842: "The state should not be allowed to obtain jurisdiction of a fugitive from justice for one purpose, and then take advantage of that jurisdiction thus obtained and use it for another and a different purpose. A state has no more right to act fraudulently or unfairly than an individual person has, and what the state does by its officers or agents it does itself." In such cases the limitations of good faith and fair dealings which rest upon private individuals likewise rest upon the state. The state permits no fraudulent use of its process in controversies between its citizens, and it would be strange indeed if the sovereign should stoop to the performance of an act which it esteems dishonorable in them. Where a person by fraud and deceit inveigles another into the jurisdiction of the court for the purpose of suing him and of obtaining service of summons upon him in that jurisdiction, the summons and service thereof should be set aside. Such an abuse of judicial process cannot be tolerated in any court of justice. *Van Horn v. Great Western Mfg. Co.* 37 Kan. 523. I do not believe there is a single case dissenting from the above statement of law. The principle thus declared is the true basis for all the decisions affirming the right of extradited persons to be tried alone upon the charge first preferred. 'Good faith is the *raison d'être* of them all,—good faith not merely towards the sovereign surrendering the fugitive, but towards the fugitive as well. This was the controlling reason for the decision in *State v. Hall*, 40 Kan. 842, and *State v. Simmons*, 39 Kan. 262. In the former case it was remarked: "It is a general maxim of law that judicial process shall not be abused. But to try a person for an offense other than the one for which he was extradited would be an abuse of judicial process. Within this broad and general maxim above referred to is included the following more definite rule of law, to wit: Where the presence of a person has been changed from a place outside of the territorial jurisdiction of a court of justice to a place within such jurisdiction, and this change has been procured through the instrumentality of another person and upon a pretext of thereby accomplishing some particular purpose, such first-mentioned person cannot, after his presence has been thus

obtained within the territorial jurisdiction of the court, and before he has had an opportunity to return, be prosecuted in such court by the person who has thus been instrumental in procuring his presence, for the purpose of accomplishing some wholly different purpose." In the latter case it was also remarked: "It would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things, to hold society together." Counsel for the state in the case under consideration assumes that the authority of the *Case of Hall*, 40 Kan. 842, is now at an end, because overruled by the later decision of the Supreme Court of the United States in *Lascelles v. Georgia*, 148 U. S. 587, 37 L. ed. 549. There is, however, no conflict between them. *Lascelles* claimed immunity from prosecution upon charges other than the one for which extradited because of the protective provisions (as he viewed them) of the Federal Constitution and statutes. The court simply held against his theory of constitutional and statutory interpretation, and denied his claim of constitutional right. The subject of limitations upon the right of prosecution growing out of the principles of interstate comity, and of good faith and honest dealing with the defendant, was not adverted to, because not involved in the case. Whether, since the decision of *Lascelles v. Georgia*, a claim of immunity from additional prosecution can still be rested upon constitutional grounds, certain it is that the general grounds of justice are still open. Upon these grounds the decisions of *State v. Hall*, 40 Kan. 842, and *State v. Simmons*, 39 Kan. 262, were based, and, as I think, the one in this case should be based.

**Johnston and Allen, JJ., concur. Do-
ster, Ch. J., dissents from first paragraph of syl-
labus, and corresponding portion of opinion.**

TENNESSEE SUPREME COURT.

CLEVELAND NATIONAL BANK, *Appt.*,
v.

William MORROW *et al.*

(.....Tenn.....)

**A perpetual scholarship in a college,
granted in consideration of a donation thereto.**

NOTE.—On the question of the rights of creditors to reach a debtor's membership in a stock exchange, see *Habenicht v. Lissak* (Cal.) 5 L. R. A. 713, 88 L. R. A.

entitling the donor to keep one pupil in the college free of charge, is not such property as can be taken and sold for debt.

(October 16, 1897.)

A PPEAL by plaintiff from a decree of the Court of Chancery Appeals reversing a

and *Lowenberg v. Greenebaum* (Cal.) 21 L. R. A. 388. For similar question as to rights in sporting club, see *Lyon v. Denison* (Mich.) 8 L. R. A. 353.

decree of the Chancery Court for Bradley County in plaintiff's favor in a suit brought to subject a scholarship owned by defendants to the payment of their debts. *Affirmed.*

The facts are stated in the opinion.

Messrs. Mayfield & Son & Aiken for appellant.

Messrs. Vertrees & Vertrees and Webb & McClung for appellee William Morrow.

Wilkes, J., delivered the opinion of the court:

Centenary Female College is a chartered institution for the education of girls, located at Cleveland, Tennessee. Defendant Morrow, who was at the time a man of wealth and public spirit, donated and paid to it \$5,000. About the same time, Mr. Hale agreed to give \$5,000, but he became afterwards unable to do so. Thereupon defendant Morrow assumed and paid this amount, also. The authorities of the college, in grateful acknowledgment of the gift, bestowed upon each of the parties the right to appoint a pupil to attend the college and receive its benefits and advantages free of charge. This was done by resolution, with suitable laudatory preamble, and is in the following words: "Resolved, that the board hereby gives and grants to James W. Hale and Wm. Morrow each a scholarship perpetual in Centenary College, which shall give the right to place and keep in the college one pupil, who shall have all the advantages of the college (board, furnished room, fuel, lights, tuition in literary department, tuition in musical department, tuition in art department) free of charge." An addition to the college was erected, and named the "Hale and Morrow Wing," and a hearty indorsement of the use of the Bible as a text-book in the college was also expressed. A certified copy of the resolutions was sent to Hale and Morrow. Some years thereafter Dr. Morrow became involved in financial embarrassments, resulting in his insolvency. The complainant bank was one of his creditors, and in October, 1893, recovered a judgment against him for \$8,000, upon which execution issued, and was returned *nulla bona*. It then filed its bill against Morrow, and sought to subject to sale for its debt the right or power to appoint to a scholarship vested in him by said proceedings and resolution. The bill proceeds upon the theory that Morrow had paid the entire \$10,000, and was entitled to the two scholarships; that they were property rights, and subject to sale for his debts. An attachment issued, and the officer returned that he had levied it upon the scholarship in the hands of the college, and had notified the president of its board of trustees, and of the college faculty. Morrow answered the bill, admitted the judgment and his insolvency, but denied that he had shifted or concealed any of his property to evade his creditors. He set out fully the circumstances of the gift of \$5,000, and the subsequent assumption and payment of the amount promised by Hale, of \$5,000 and stated that the gifts were unconditional, and the subsequent act of the college in conferring upon him the power of appointment was voluntary, and that, in view of his payments of his own and Hale's gifts, he had

been permitted to send two pupils to the college, and that he had exercised this privilege by appointing worthy daughters of poor ministers. After his answer was made, Hale was made a party by amended bill and publication, and it was alleged that all Hale's rights and privileges in the premises had become vested in Morrow, and hence both scholarships were subject to his debts. A *pro confesso* was taken against the college and against Hale, and a decree was rendered holding that the scholarships were vested rights in defendant Morrow, and that they had been rightfully attached, and they were ordered to be sold by the master. They were sold October 5, 1895; the bank buying one of the scholarships for \$525, and one James M. Loudon the other for \$500. The sale was reported, but has not been confirmed. A writ of error was granted to defendant Morrow to bring the case to the supreme court. The cause has been heard by the court of chancery appeals, and the decree of the court below reversed; and it is now before us on appeal of complainant, and errors assigned by it.

The question presented is whether this right of appointment vested in defendant Morrow is such property as can be taken for debt. It is argued that it is a valuable property right; that it is perpetual; that it is unlimited as to time, and unconditional; that it can be disposed of by will or deed, or other proper transfer; and that the courts can divest it out of him and vest it in another. The only question before us is whether it can be seized for debt and sold at public sale. As to whether it can be revoked by the college authorities, we are not called upon to decide. Neither are we called upon to say whether Morrow may devise or give it to another. None of these questions are involved in this case, except very remotely and incidentally. We have not been furnished with any authority upon this novel question. It will be noted that it was not a case of an ordinary scholarship sold by an institution to a purchaser, with right to use or sell and transfer it as he might choose, as is often done by schools. Nor is it a power over or attached to real estate or tangible property. It is not, in any correct sense of the term, an "estate." It is merely a privilege or power to be exercised by and with consent of the college, and under its rules and regulations. Certainly the power cannot be exercised, and appointment made, except under such reasonable rules and requirements as the college might dictate. It must be subject to the charter and regulations which control the institution. Dr. Morrow, subject to these limitations, can appoint whom he pleases. He can decline to appoint altogether. It is a privilege personal to him as long, at least, as he sees proper to exercise or refuse to exercise it. It does not appear that he has attempted to use it for any pecuniary or personal benefit. The appointment had been treated as an act of charity. If it can be sold publicly, any person might buy, and the power of appointment might thus be vested in disreputable hands. We do not think it is such a right as can be seized and sold for debt.

Let the decree of the Court of Chancery Appeals be *affirmed*.

NORTH DAKOTA SUPREME COURT.

Lynn C. STANFORD, *Respt.*,

v.

S. G. MAGILL *et al.*, *Appls.*

(.....N. D.)

- *1. The repudiation of a contract before the time for performance arrives does not constitute a breach thereof. The only effect of such repudiation is to dispense with an offer to perform by the other party if such refusal to stand by the agreement is not withdrawn before the performance is due under the terms thereof.
2. The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, after he has made, before the day of delivery, an *ex parte* selection of the property he intends to deliver under such contract, sell such property to another, without being guilty of a breach of agreement. All that the law requires of him is that he make delivery of property of the description mentioned in the contract at the time delivery is due.
3. Whether the sale, by the vendor in an executory contract for the sale of specific property, of the very property to which such contract relates, before the day for delivery thereunder has arrived, is a breach of the agreement, on the ground that the vendor has thereby put it out of his power to perform the agreement, not decided. But the mere making of a second executory contract to sell the same property is not of itself a breach of the prior executory contract. The vendor does not thereby incapacitate himself from carrying out his contract.
4. Where a party has an option to deliver property under a contract at any time between certain dates, he must, if he intends to treat the time of performance as having arrived, and therefore to hold a repudiation of the agreement by the vendee before the last day for performance has arrived as a breach thereof, notify the vendee that he has exercised his option to call for an earlier delivery. But no offer to perform is necessary, as that is waived by the vendee's refusal to perform.
5. The measure of damages in an action by a vendor to recover damages for breach by a vendee of an executory contract of purchase and sale is fixed by §§ 4988, 5009, Rev. Codes, where the vendor does not elect to proceed under § 4983, *Id.*
6. Where a suitor moves the court to direct a verdict in his favor, and his motion is overruled, he must thereafter specifically request that the questions he desires to have submitted to the jury be so submitted, or he is deemed to have agreed that all controverted questions of fact be decided by the court. If he makes no such request, he cannot complain of a direct verdict if the evidence is conflicting. But the rule will not apply if the verdict would be held to be unsupported by evidence, although voluntarily tendered by the jury.
7. It is only when property has been resold by the vendor in the manner prescribed by § 4983 that he can recover the damages

*Headnotes by CORLISS, Ch. J.

NOTE.—As to the right to rescind or abandon a contract because of the other party's default, see *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 80 L. R. A. 33, and *note*.
88 L. R. A.

mentioned in subdiv. 1 of § 4988; and, if it is not so sold, the measure of damages is governed by subdiv. 2 of § 4988 and § 5009. An abortive attempt to proceed under § 4983 will not preclude a recovery of damages under subdiv. 2 of § 4988 and § 5009.

(November 1, 1897.)

APPEAL by defendants from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to recover damages for breach of a contract to purchase flax. *Reversed.*

The facts are stated in the opinion.

Messrs. Ball, Watson, & MacLay, for appellants:

One who sells or agrees to sell personal property as his own thereby warrants that he has a good and unencumbered title thereto. Rev. Codes, § 3972.

Plaintiff had no such title, but such fact was not communicated to defendants and they dealt in ignorance of it. This amounted to a failure of title, a failure of consideration, and went to the substance of the contract.

Plaintiff was unable at any time in September to deliver the flax on board the cars.

Plaintiff by his conduct on September 9 elected to rescind the sale.

Plaintiff elected to rescind the contract by selling the flax at private sale and without notice to defendants.

None of the provisions of the statutes were complied with for establishing the measure of damages.

There should be notice to the vendee, in case the vendor elects to hold a lien for the purchase price.

Sands v. Taylor, 5 Johns. 395, 4 Am. Dec. 874; *Mallory v. Lord*, 29 Barb. 454.

The common-law remedy of storing and retaining the property for the vendee and suing him for the entire purchase price does not seem to be included in any of the provisions of our Code.

See *Dustan v. McAndrew*, 44 N. Y. 78.

At common law it was always necessary for the vendor to give notice of his intention to resell.

2 Sutherland, *Damages*, p. 859, and cases cited; 21 Am. & Eng. Enc. Law, 595, 800; *Pollen v. LeRoy*, 80 N. Y. 549; *Rea v. Holland* (Mich.) 12 N. W. 169.

The plaintiff, when he resold at private sale, rescinded the contract as he had a right to do under § 3963. He elected to rescind in preference to either keeping the property and holding defendants for the difference in value, or treating the property as a pledge, and reselling according to the statute.

The remedies are not concurrent. The choice once made, the others are gone forever.

Westfall v. Peacock, 63 Barb. 209; *Dreyfus v. Foster*, 19 N. Y. S. R. 683.

If one elects between two inconsistent remedies, the right to pursue the other is forever lost.

Farwell v. Myers, 59 Mich. 179; *Terry v. Munger*, 121 N. Y. 161, 8 L. R. A. 216; 3

Herman Estoppel, §§ 1045-1051; *Pence v. Langdon*, 99 U. S. 578, 25 L. ed. 420.

The election to rescind necessarily waives the right to sue on the contract.

Tiffany, Sales, 120, 121; *Kearney Milling & E. Co. v. Union P. R. Co.* 97 Iowa, 719.

The omission of notice of intention to resell, even though there was no statute requiring such notice, indicates an election to rescind the contract.

Redmond v. Smock, 28 Ind. 870.

Messrs. William C. Besser and Arthur B. Wright, for respondent:

The title to chattels does not pass from a mortgagor upon the execution and delivery of the mortgage, or upon a breach of its conditions; nor does the title pass until a foreclosure has been completed.

Sanford v. Duluth & D. Elevator Co. 2 N. D. 6.

A sale of a chattel by the mortgagor with the consent of the mortgagee will convey a good title to the purchaser, even though such consent be not in writing, or if it be in writing, be not recorded or indorsed upon the mortgage.

2 *Cobbey, Chat. Mortg.* § 687, and cases cited.

Respondent elected to hold the appellants to their contract, and proceeded to fix the damages under the rule laid down by § 4988, subd. 2, as explained by § 5009.

Corliss, Ch. J., delivered the opinion of the court:

On the 8d of August, 1895, plaintiff and defendants entered into an executory contract for the sale by plaintiff to defendants of 5,000 bushels of No. 1 flax, at \$1 a bushel, to be delivered at Kelson, in Traill county, in this state, during the month of September of that year. On the 7th of September following the defendants notified the plaintiff by letter that they did not recognize the binding force of the agreement, and therefore refused to carry it out on their part. This letter was received by him September 8. At that time the plaintiff had not exercised his option to make delivery at any time during that month, as was his right under the contract. The action was to recover damages for breach of this agreement, and on the trial of the case the court directed a verdict for the plaintiff. The defendants on this appeal urge certain reasons why they should not be held liable. They insist that the crop of flax raised by plaintiff on his farm was mortgaged, and that, therefore, he could not give them an unencumbered title. But whether he could deliver the flax, according to his contract, free from all liens, could not be determined in advance of the actual delivery thereof. In the meantime the mortgage might be paid, or the mortgagee might release the 5,000 bushels from the lien of his mortgage. Had the plaintiff tendered the defendants 5,000 bushels with a lien thereon, they would have been justified in refusing to receive the same; and had he not, in proper time, delivered to them the flax free from all encumbrances, they could have held him responsible for breach of contract. But they had no right to settle for the plaintiff, in advance of the time when he was required by the terms of

the contract to make delivery, the question whether he could and would deliver unencumbered flax. Moreover, the specific property to be delivered was not designated in the contract. It was not necessary that the plaintiff should deliver any of the flax raised upon his own farm. Delivery of any 5,000 bushels of flax, of the quality and grade specified in the agreement, would have constituted compliance with the contract on the part of the plaintiff. It is further urged that plaintiff was not able to deliver the flax for the reason that up to the end of the month of September he had threshed only 642 bushels. If it should be conceded that plaintiff had not, and could not have, threshed a bushel during the month of September, this would not establish any inability on his part to comply with the terms of his agreement. A person may agree to sell property which he does not even own, and the purchaser cannot on that account insist, as an excuse for violating his agreement, that it is not in the power of the vendor to make good his promise. This fact cannot be ascertained until the day for delivery has come and passed without any delivery being made. It is claimed that plaintiff rescinded the contract by selling the 5,000 bushels in Duluth on the 9th of September, two days after the defendants had written plaintiff that they would not fulfil their agreement. The question whether the contract was rescinded is so related to the question whether it was violated by the defendants, and the further question when it was broken by them, if at all, that it will conduce to clearness of discussion to treat these questions together.

On receiving from defendants their letter of the 7th of September, repudiating the contract, the plaintiff wrote them that he expected them to carry out the agreement, and that he would give them further time for consideration. In this letter, which was written September 9, he says, among other things: "Altogether, I am inclined to defer my conclusions until you have taken time to review the transaction, and see the unfavorable light your letter of the 7th puts you in. I certainly shall expect you to take flax as per agreement. Please let me hear from you again by return mail." On the same day he sold on the Board of Trade in Duluth 5,000 bushels of flax, through brokers in that city. In his testimony he speaks of this flax as being the same flax which he had agreed to sell to defendants. He says: "When I received this letter [referring to the one dated September 7], I sold the 5,000 bushels of flax in Duluth. I sold it to Wheeler, Carter, & Co. On September 9 I telegraphed Wheeler, Carter, & Co., of Duluth, relative to the sale of this 5,000 bushels of flax, as follows: 'Sell five October flax. Answer.' Wheeler, Carter, & Co. answered by wire that they had sold the flax; and the same day they confirmed their telegram by a letter, in which they explained in detail the circumstances and terms of the sale. But it is undisputed that the title to the flax sold in Duluth did not pass to the vendees in such sale, nor was possession thereof delivered at any time during the month of September. The contract was merely an executory contract for the sale of 5,000 bushels of flax, to be delivered in

October. On the 11th of September the plaintiff, not having received from the defendants any answer to his letter of the 9th, again wrote them; and on the 13th they sent him a reply, in which they reiterated their purpose to treat the alleged contract as possessing no binding force. In this letter they said, "We expressly deny that any contract exists which obligates you to deliver to us, or we to receive from you, flax, at any time, or at any price." This closed the correspondence between the parties. The plaintiff did not thereafter inform the defendants that he elected to treat their second refusal to recognize the contract as a breach thereof; nor did he advise them, after their last refusal, that he had decided to exercise his option to insist upon the fulfilment of the agreement before September 30th. The contract gave him the option to call for performance at any time during the month of September. This action was not commenced until after the 30th of that month.

We will first consider the case as though there was a fixed time for performance of the agreement, and that that time was September 30. Under the English doctrine, which has apparently met with much favor in this country, the plaintiff, even assuming that the day for delivery of the flax was September 30, and that he had no right to call for an earlier performance of the agreement, might have elected to treat the defendants' premature refusal to carry out the contract as an immediate breach thereof. *Hochster v. De La Tour*, 2 El. & Bl. 678. But he did not so elect. On the contrary, he wrote the defendants that he would give them time to reflect and then determine what they would do, but that in any event, no matter what their decision might be, he would hold them to the contract. His words were, "I shall expect you to take flax as per agreement." Although the English courts have, in our judgment, departed from sound principles, in holding that mere talk is a breach of a contract, despite the fact that the time for performance thereof has not arrived, yet they have not violated justice as well as legal principles by putting it in the power of the party to an agreement, who does not wish to fulfil it, to force a breach upon the other party before the day for performance has arrived, and thus escape the perhaps more serious consequences which might flow from a breach at the time of performance, by selecting such a season for a premature breach thereof as would make the damages comparatively light. In England the innocent party may treat a premature refusal to perform as a present breach, but he is not bound to do so. If he elects to ignore such refusal, the agreement, so far as the question of the violation of it is concerned, stands precisely the same as though no word had been uttered by the other party. If anything occurs which would have released that party from the obligation of the agreement had he remained silent, he is released notwithstanding his premature repudiation thereof. It follows, too, that if then the innocent party thereafter violates the contract the other party may take advantage of such violation of the agreement, just as he could have taken advantage of it had he not himself prematurely refused to respect the binding force of such agreement. 88 L. R. A.

All the adjudications which follow what may, for convenience, be denominated the "English doctrine," indorse this qualification of that doctrine, and it is repeatedly recognized by the English tribunals themselves. *Frost v. Knight*, L. R. 7 Exch. 111; *John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co.* 180 Ill. 660; *Kadiash v. Young*, 108 Ill. 170; *Lawson, Contr.* § 440; *Zuck v. McClure*, 98 Pa. 541; *Avery v. Bowden*, 5 El. & Bl. 714; *Reid v. Hoskins*, 5 El. & Bl. 729.

In *Frost v. Knight*, Lord Chief Justice Cockburn said: "The law with reference to a contract to be performed at a future time, where the party bound to perform announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De La Tour* and *Danube & B. S. R. & K. Harbour Co. v. Xenos*, 13 C. B. N. S. 825, on the one hand, and *Avery v. Bowden*, *Reid v. Hoskins*, and *Barwick v. Buba* [2 C. B. N. S. 568, 26 L. J. C. P. N. S. 280], on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any circumstance which would justify him in declining to complete it." We are therefore clear that, if plaintiff's letter of September 9 is to control, the contract was not broken September 7. The plaintiff in and by that letter elected to treat the contract as unaffected by the letter of September 7 written him by the defendants. But it may be urged that other circumstances show that the plaintiff had elected on September 9 to treat the contract as broken by the defendants by their first letter, dated September 7. In his complaint the plaintiff alleges that he made the sale of the 5,000 bushels of flax in Duluth for the purpose of fixing at that time the amount of defendants' liability for damages, the price of the flax being at that time daily on the decline. The averment of the pleading on this point is as follows: "That immediately after the defendants had so repudiated the said agreement, and refused to accept the delivery of the said flax, and refused to pay for the same, as provided by and in the said agreement, and on or about the 7th day of September, A. D. 1895, the plaintiff, in order to protect the defendants against loss, as much as possible, in view of the facts and circumstances incident to the said agreement and the said breach thereof, the market price of flax being then daily on the decline, sold the said 5,000 bushels of flax at the best market price obtainable, and which he could obtain for the same." Taking plaintiff's allegation in connection with this testimony, there is much to show that he had elected to proceed on the theory of a breach of the contract on September 7, the day when the defendants wrote their first repudiation of the agreement. But the sale of the 5,000 bushels of flax in Duluth on September

9 does not purport to be a sale of the particular flax which plaintiff had contracted to sell the defendants, nor is there anything to indicate that plaintiff's purpose in selling it was to fix the defendants' damages, on the theory of a then breach of the contract, aside from his allegation in the complaint. He never at any time disclosed to the defendants any such purpose, nor did he ever advise them at all that he had sold their flax. On the contrary, he distinctly informed them in his letter of September 9 that he did not consider their letter of September 7 as a breach of the agreement, but that he certainly would expect them to take the flax according to the contract. His election to ignore their premature refusal, and to treat the agreement as unaffected by anything they had said, is conclusively shown by his letter of September 9; and thereafter the defendants might have recalled their refusal, and have proceeded with the performance of the agreement, despite anything the plaintiff might in the meantime have done. His undisclosed sale of the flax in Duluth could in no manner affect their right to hold him to his avowed purpose to regard the agreement as continuing in unimpaired force. Moreover, we should reach no different conclusions even if we should find that plaintiff had not in express terms asserted that he would not treat the contract as broken. We are confident in the soundness of our view that the English doctrine, that a refusal to perform a contract before the period of performance by either party has arrived constitutes a breach thereof, is violative of legal principles, and leads to most incongruous results. This point, however, we will discuss in a later portion of the opinion.

But it is strenuously urged that plaintiff cannot recover, because he has rescinded the contract, and also because he had himself broken it, while it remained unbroken by the defendants. The sale in Duluth is relied upon as establishing the rescission by him of the agreement. We are concerned in this case with only the question of rescission based on mutual consent. It is not a case where one party has the right to rescind an agreement for the fraud of the other, or for other legal reasons of like character. When one party to an agreement has violated its obligations in a particular that goes to the root of the agreement, then it is true that the other party may treat his conduct as an offer to rescind, and may acquiesce in the desire so manifested to abandon the contract. In such a case the parties unite in a mutual release of the obligations which reciprocally bind them. So, too, when one party to an agreement expresses, even before the time for performance has arrived, his desire to escape the burdens of the agreement, he thereby offers to discharge the other party from the obligations thereunder resting upon him; and such party may treat such conduct as an overture for rescission, and assent thereto. Doubtless, the plaintiff, after receiving from the defendants their letter of September 7, might have written them that he considered the contract as canceled, and thereafter it would have been forever extinguished for all purposes. Possibly he might have rescinded without performing any overt act, or making any state-

ment to manifest his purpose. But that he never intended to rescind the agreement is too clear to admit of doubt. His letter of September 9 shows that he had no thought of rescinding, and thereby releasing defendants from liability. So do the allegations of his complaint. Although his letter is inconsistent with the averments of his pleading that he sold the flax on a theory of a present breach of the contract, yet it is to be noticed that nowhere does he assent to a rescission thereof. His attitude is at all times that he will rigidly hold the defendants to the obligations of their agreement. In his letter he tells them that he will hold them to it, by his statement that he will insist upon performance on their part. In his pleading he alleges that he intended to hold them to it when he sold the flax in Duluth, for he sold it with the express purpose of fixing their damages for a breach thereof. However much he may have been mistaken as to his legal right to sell at that time, and in the manner in which the sale was made, for the purpose of fixing the measure of damages, he clearly never meant to acquiesce in the repudiation of the contract by the defendants, and thus assent to a rescission thereof. But if, while the agreement remained in full force, the plaintiff himself violated its terms, then it is obvious that the defendants may take advantage of this breach as a perfect defense. They may elect to treat his breach of contract as warranting a rescission thereof by them, or they may consider it as a breach, rendering him liable for damages. In either event they would have a perfect defense to this action. It is therefore necessary to determine whether, by the sale of the flax in Duluth on the 9th of September, the plaintiff himself violated his agreement to deliver the flax to the defendants. It is not pretended that he violated it in any other manner. The plaintiff did not agree to deliver any particular 5,000 bushels of flax to the defendants. All that he was called upon to do, to fulfil his obligation, was to deliver the specified number of bushels of flax, of the quality and grade designated in the contract, without reference to the place where it was raised, or the question whether it was owned by the plaintiff at the time the agreement was entered into.

But it is said that it appears from the plaintiff's testimony that he segregated 5,000 bushels of flax from the common mass of the flax raised by him on his farm, and then sold that particular flax in Duluth, as being the identical property he had agreed to sell the defendants. It is true that he speaks of selling the same flax that he had agreed to deliver to the defendants, and the allegations of his complaint are to the same effect. But it is evident that the segregation of this flax was purely mental. He did not in fact set apart any particular 5,000 bushels as the property he had obligated himself to deliver to the defendants, and then agree to sell the same property in Duluth. At that time none of his flax had even been threshed. But even if we should assume that plaintiff had actually set apart a particular 5,000 bushels as the flax he was subsequently to deliver, and that thereafter he had sold and delivered it to a third person, this would not of itself constitute a breach of his contract. The selection

by the vendor of the property he intends ultimately to deliver under a contract is not irrevocable, where he has the choice, and the vendee does not unite with him in such selection. Despite the fact that the vendor has set apart the property as the particular property he will finally deliver, he may change his mind before the time for delivery arrives, and substitute other property in place of that which he had tentatively selected. The vendee acquires by such an *ex parte* selection no vested right to insist that that is the particular property which must be delivered to him by the vendor to fulfil the conditions of the contract. All he can demand is that, when the time for performance arrives, property of the description and quality specified in the agreement shall be delivered to him. The implied understanding of the parties is that the vendor shall have until the day for performance to determine what specific property he will deliver. Any selection made by him before that time is revocable by him. The rights of the vendee are in no manner affected by such selection, or by the vendor's change of mind. He has no cause for complaint, provided, at the time prescribed in the agreement, property of the kind and quality of the property therein specified is delivered to him in strict accordance with the provisions thereof, whatever vacillations of purpose may have characterized the conduct of the vendor in the meantime. Should a grocer, receiving from a customer an order for a barrel of flour of a particular brand, to be delivered the following day, select, in the absence of such customer, a barrel from a number of barrels in stock, and direct that that barrel be taken to the customer's house the next day, it certainly would not be a breach of the contract for him subsequently to sell it and substitute another barrel in its place; the sale and substitution both taking place before the time for delivery according to the agreement had arrived. Indeed, it is questionable whether a sale and delivery of property by the vendor before the day for delivery under an executory contract has been reached is a breach of such contract, even in cases where the specific thing to which the contract relates is agreed upon by the parties. If A agrees to sell and deliver to B, at the end of thirty days, a particular horse, for a price named in the contract, can it be said that A has put it out of his power to perform the agreement by selling and delivering to C the same animal twenty days before B can call for the performance of the contract by A? How can B say, without possibility of error, that A will not be able to perform his agreement when the time for performance arrives? May not A repurchase the horse in time to fulfil his compact with B? See opinion of Denman, Ch. J., in *Lovelock v. Franklin*, 8 Q. B. 371; 2 Parsons, Contr. 668, 667. But see *Heard v. Bowers*, 23 Pick. 460.

Besides, on what principle can be based the doctrine that the certainty that a party will not be able to perform his agreement when performance by him is due is equivalent to a present breach of the contract, although, as a matter of fact, he has not violated, and cannot violate, the contract until the future day for fulfilment has been reached? It is by no means certain that the fact that a party has put it out of his power

to perform a contract when the day of performance has arrived is a breach thereof, or whether the utmost effect of such an act is merely to make inevitable a future breach of the agreement. Neither can it be said in every case that the bare fact that the vendor in an executory contract of sale has, before performance is due, sold the very property to which the executory contract relates, demonstrates the certain inability of the vendor thereafter to make delivery in the future in accordance with the terms of his promise.

But in the case at bar it does not even appear that the plaintiff had sold the flax he had agreed to sell to the defendants. The second contract, like the first, was executory. It was an agreement which by its very terms was not to be performed until after the time for performance of the contract with the defendants had passed. The Duluth contract provided for delivery in October. It is therefore clear that plaintiff had not divested himself of the title to the flax, or agreed to deliver possession thereof to the Duluth parties at any time prior to the time for delivery to defendants under his contract with them. And it is an undisputed fact that he did not deliver any of such flax to the Duluth parties until long after the day for delivery to the defendants had passed. Indeed, all the flax called for by the Duluth contract had not been delivered at the time this case was tried. It is therefore apparent that, during the entire period between the making of the contract with the defendants and the time for performance thereof according to its terms, the plaintiff had not parted with the title to or possession of the 5,000 bushels of flax, even assuming that the contract with defendants related to a particular 5,000 bushels. Conceding that the two contracts both related to the same property, yet it is obvious that it cannot be said that the mere fact that plaintiff could not fulfil his agreement with defendants without being guilty of a breach of contract with the Duluth parties establishes the proposition that he had placed it beyond his power to carry out his agreement with the defendants. He was absolutely master of the situation. He could break either contract he saw fit to break, and perform either contract he saw fit to perform,—subject, of course, to legal liability for such breach. But it was not even necessary for him to violate his agreement with the defendants in order to fulfil his contract with the Duluth parties, even assuming that he had agreed to sell a particular 5,000 bushels to the defendants, and had in mind the same flax when he made the Duluth contract. In that contract he did not bind himself to deliver any particular 5,000 bushels of flax, but, on the contrary, to deliver any 5,000 bushels, of a certain grade, which he might tender in fulfilment of the contract. He may have considered that he was selling the 5,000 bushels he had agreed to sell the defendants, and yet he did not bind himself to sell only this flax to the parties in Duluth. At no time, therefore, did he divest himself of the title to the particular flax he had agreed to sell to defendants, assuming the specific flax to have been pointed out, or the possession thereof, or bind himself to sell it at all to the parties in Duluth.

When plaintiff wrote to defendants, on September 9, stating that he would give them further time to consider their refusal to recognize the contract, his attitude was that he did not elect to treat their first letter, to which his letter was in answer, as constituting a breach of the contract. But he did not thereby bind himself not to consider any subsequent repudiation by them of the agreement as a violation thereof. Accordingly we would be compelled to hold that, on receipt of their second letter, plaintiff was in a position to insist that defendants had broken the contract, if we should adopt the English rule. As before indicated, we deem it indefensible on principle, nor are we able to discover how it subverts business convenience, or in what respect it is more just than the contrary doctrine. In the country in which it had its origin, it was not at first recognized as the correct rule of law. In *Phillipotts v. Eeans*, 5 Mees. & W. 475, Parke, B., said: "The notice [that he will not receive the wheat] amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime, and rescinds the contract. . . . I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery of the wheat, to see whether the defendants would then receive it." In *Leigh v. Paterson*, 8 Taunt. 540, the defendant had until December 31 in which to deliver the goods contracted for. On October 1 he notified plaintiff that he would not carry out his contract. The question was whether the market value of the goods on October 1 or December 31 should be taken into consideration in fixing the plaintiff's damages. The court ruled that the value on December 31 was the value to be ascertained in determining the damages, and the decision was placed on the ground that, despite the premature repudiation of the contract by the defendant, he might thereafter have delivered the property, at any time up to December 31. Dallas, Ch. J., said: "The defendant had a right to deliver the tallow at any time before twelve at night on the 31st of December." Parke, J., said: "The defendant might have delivered the tallow any moment up to the 31st of December, and the price on that day should have regulated the verdict of the jury." In *Ripley v. M'Clure*, 4 Exch. 359, the court said, in reference to the contention of counsel for defendants, that the refusal on the part of the defendants to accept the goods, the refusal being made before the time for performance had arrived, was no more than an expression of intention, which could be retracted: "And we think, that, if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We consider that point rightly decided in *Phillipotts v. Eeans*, 5 Mees. & W. 475." Mr. Benjamin, in his work on Sales, declares that "the date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract and so refuse accepting the goods." Vol. 2 § 1118. In the very case in which the modern English doctrine was first promulgated (*Hochster v.*

De La Tour, 2 El. & Bl. 678), Lord Campbell clearly recognizes the general rule that until the time for performance has arrived there can be no breach, by the assertion that it is not the universal rule, and by proceeding to carry out the exceptions to it. He seems to have treated the case before him as an exception to the general rule. And in *Frost v. Knight*, L. R. 7 Exch. 111, 114, Lord Chief Justice Cockburn declares, in so many words, "that there can be no actual breach of a contract by reason of nonperformance so long as the time for performance has not yet arrived." In *Roper v. Johnson*, L. R. 8 C. P. 167, the doctrine laid down in *Hochster v. De La Tour* is spoken of as a novel doctrine. While the court in *Frost v. Knight*, L. R. 7 Exch. 111, treats the rule enunciated in *Hochster v. De La Tour* as settled law, yet when *Frost v. Knight* was before the court of exchequer the majority of that court (Kelly, C. B., and Channell, B.) vigorously assailed the anomalous doctrine which was applied in the *Hochster Case*. See L. R. 5 Exch. 322. It is so obvious that, unless some obligation is violated by a party, he cannot be said to have broken his contract, that Lord Chief Justice Cockburn, in *Frost v. Knight*, was obliged to assume, in order to support his reasoning in that case, that there was an implied understanding that neither party should sever the contractual relation, and that the premature refusal to perform was a violation of this implied understanding. The lord chief justice says: "The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly." But that is a strange mode of reasoning which assumes a breach for the purpose of establishing a breach. Lord Cockburn asserted that the contractual tie was severed, for the purpose of proving that the contract had been violated. Unless the contract calls for a continuance of the willingness of a party to perform it during all the time between the execution thereof and the day of performance, his mere expression of a purpose not to fulfil his obligation is not a breach of such contract. But what interest has a vendor in a contract for the sale of 5,000 bushels of flax in the unchanged purpose of the vendee to carry out the agreement? The only matter which concerns him is the willingness of the vendee at the time specified in the contract to accept and pay for the property. There is always the possibility that either party to an agreement may violate it when performance by him is due. This possibility is not converted into a certainty by his premature refusal to fulfil his

obligations. He may repent of his hasty decision. After such anticipatory disavowal of the contract, there still remains, as before, the possibility both of ultimate performance and of ultimate violation of the agreement by the one who has threatened, but only threatened, to ignore it. By a premature repudiation the rights of the other party are not in any degree affected. He still has a right to insist upon the performance of the agreement at the appointed time, or that the other party shall pay damages for the breach of the contract. This was the extent of his right before the other party had spoken a word inimical to the agreement, and he continues to enjoy this right despite such premature repudiation.

How it can be asserted, as Lord Chief Justice Cockburn asserted in *Frost v. Knight*, that the premature repudiation of a contract deprives the other party of all advantage under it, is inexplicable. He, in the very same opinion, declared that the innocent party, so far from being deprived of any advantage, could elect to treat the agreement as unimpaired. The warning, which leaves the agreement unaffected, is a positive benefit, and not a detriment, to the other party. Should the would-be violator of the agreement keep his purpose to himself, the other party would be in a situation not so favorable. Suppose, for instance, that the vendor had agreed to sell property, fluctuating in value, at a specified time. He may discover, subsequently to the making of such contract, that the vendee has become insolvent and does not intend to perform the agreement; yet so long as such vendee keeps silent the vendor is obliged to stand to the agreement, taking all the risk that, if the market should turn against him at the time for delivery, he must lose, and yet knowing that, if the market should prove favorable to him, the vendee will break the contract, and leave him (the vendor) only a worthless cause of action for damages against a bankrupt. Under such circumstances a statement by the vendee that he will not carry out the contract would place the vendor in a more favorable position, for it would enable him, at his option, to rescind the contract, thus escaping the risk of loss in a case where he could not hope to reap any benefit from the agreement should the market be favorable to him at the time for performance. The fundamental inquiry is, of course, in every case, whether any essential provision of the contract, either express or implied, has been violated. If the agreement is for the sale of property at a fixed time in the future, the intermediate expression by either party of a purpose not to stand by the contract is not a breach thereof, because he has not thereby done anything in violation of his promise, to the detriment of the other party. But, if the contract is to marry at a future date, a different case is presented. The agreement to marry connotes the further agreement to remain affianced until the performance of the contract has established the still closer relation of husband and wife. Such an agreement establishes a distinctive relation, known as "betrothment." He who destroys this relation—though it be done before the period of marriage has, under the terms of the contract, arrived—violates the contract in a vital ele-

ment; and the violation is none the less actionable because the promise to remain engaged in the meantime is implied, and not expressed. The contract is an entirety, and, when broken, is broken in its entirety. It is on this ground that the decision in *Frost v. Knight*, L. R. 7 Exch. 111, 114, is placed by the lord chief justice. He says: "It is next to be observed, that the law, as settled by *Hochster v. De La Tour* and *Danube & B. S. R. & K. Harbour Co. v. Xenos*, is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to the one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage." And Byles, J., concurs in the judgment of the court on the ground that the implied agreement to remain betrothed until marriage had been violated. He says: "An express pre-contract of marriage, as already suggested by the lord chief justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So I conceive the man cannot during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the meantime. So, for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract, for it puts an end to the condition of betrothment, which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract."

A review of the English decisions will disclose the fact that only in a single case has this modern English doctrine been applied where the enforcement of a contrary rule would have led to a different decision. This is *Hochster v. De La Tour* (decided in 1853) 2 El. & Bl. 678. In that case it appeared that the plaintiff and defendant, in April, 1852, had entered into a contract of service. The plaintiff was to serve the defendant, as a courier in his travels on the continent for a period of three months,

commencing June 1, 1852. On the 11th day of May, 1852, defendant notified plaintiff that he would not perform the agreement, and on the 22d of the same year the action to recover damages for breach of the contract was commenced. The question was squarely raised, by the contention of counsel for the defense, whether what had been said by the defendant constituted a present breach of the agreement. The court of Queen's bench held that it did. Lord Campbell says: "The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract, and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement, before that day, to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable for an action for breach of promise of marriage. *Short v. Stone*, 8 Q. B. 358. If a man contracts to execute a lease on and from a future day for a certain term, and before that day, executes a lease to another for the same term, he may be immediately sued for breaking the contract; *Ford v. Tiley*, 6 Barn. & C. 325. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. *Bowdell v. Parsons*, 10 East, 859. One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow, for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that, in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveler and courier, from the day of the hiring till the day when the employment was to begin they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounced the engagement. . . . The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done,

still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." So far as the lord chief justice could perceive an analogy between the engagement between the plaintiff and defendant in that case and an engagement between a man and a woman who are betrothed, his faculty for discovering similitudes is certainly phenomenal. The balance of his reasoning is that the rule that is there laid down is more convenient than the other rule, which squares with legal principle. There is a tacit confession through this entire discussion of the question that the decision is at war with settled principle. And in *Frost v. Knight*, also, the argument of convenience appears to have had great weight with Lord Chief Justice Cockburn. In *Dugan v. Anderson*, 86 Md. 567, 11 Am. Rep. 509, the court, while not deciding the question, seems to have been governed in the utterance of its dictum on the subject by considerations of convenience. We agree with the Massachusetts supreme court that the argument of convenience should have no weight as against the demands of legal principle. In *Daniels v. Newton*, 114 Mass. 580, 19 Am. Rep. 884, the court said: "Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of nonperformance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or have it performed." And in *Frost v. Knight*, L. R. 7 Exch. 111, Lord Cockburn declared that the argument founded on convenience should not control, but should be considered only in connection with arguments founded on settled doctrines of the law. He, however, was able to discover, as we have already pointed out, a basis for the English rule in elementary principles; but we are unable to agree with him in this respect, and, such being the case, we have his authority for rejecting the argument of convenience when it stands alone as the supporter of this novel rule. Moreover, we are unable to see wherein business convenience is subserved by the English doctrine. It is subserved thereby only on the theory that to establish a rule for the special advantage of the party who does not proclaim his purpose to violate the contract is to advance the convenience of the business world. The option, under such doc-

rine, is with such party to treat the premature declaration as a breach of the agreement, or to refuse to so treat it. He may decline to consider it a breach, and hold the other party to the contract, the same as though no word inimical thereto had been spoken. Under the guise of furthering business interests, the English rule unfairly discriminates against the party who speaks, and in favor of the one who is silent. The latter may secretly intend not to carry out the agreement. The former may be actuated—indeed, he often is prompted—by the laudable motive of giving the other party timely warning of what he deems at the time his inevitable inability to perform the agreement. On what principle of justice, then, should the law thus discriminate between the parties? If this rule be adopted, then it will not infrequently happen that a party has been held liable for a breach for merely admonishing the other party that a breach is inevitable, when, had he remained silent, no liability could have been enforced against him, because the contract would have been extinguished before the day for performance could arrive, by reason of the death of one of the parties thereto,—the contract being for personal services,—or because of the destruction before that day, without the fault of anyone, of the subject-matter of the agreement. By being allowed to treat the agreement as broken, the party can enforce a liability for substantial, and perhaps very heavy, damages, whereas, if he had been forced to wait until it should be ascertained whether the other party would in fact perform his agreement, the damages then would have been merely nominal, or the latter might have escaped all liability, by reason of the extinguishment of the contract before the day of performance arrived, for the reasons already mentioned. Indeed, the party who sues might himself been unable to perform when the time for performance was reached, and might have been put in default by demand of the other party that the agreement be carried out. If the doctrine of the *Hochster Case* be sound, then one who has agreed to enter the service of another two years in the future may elect to treat as a breach of the contract an immediate refusal by the employer to fulfil the same, and he may then sue, and the case may be tried before the period for entering upon the discharge of his duties under the contract has arrived. In such a case he would recover full wages, it being impossible to show what he had earned or could have earned during the time he was to have worked for the defendant. And yet subsequent developments may reveal the fact that, so far from being damaged, he was positively benefited, by the fact that he did not enter the defendant's employ. He may during that period earn double the wages he was to have received under the contract, and this, too, in addition to that which he has already collected without doing a stroke of work therefor. Nay, the death of the employer before the day for commencing the performance of the agreement arrives, working an extinguishment thereof, may show that but for his statement the plaintiff could never have collected \$1. Undoubtedly the party to whom the refusal is communicated may treat it as an overture for a consent by him to a rescission and rescind the

contract. But he has no right to construe as a present breach words which only disclose the probability of a future breach.

Many of the cases which appear to support the doctrine of the *Hochster Case* are distinguishable on this ground of rescission. It will be found on an analysis of them that all that the party to the contract was seeking to do by his action was to recover on a *quantum meruit*, on the theory that he rescinded the contract on being informed by the other party that he did not intend to carry it out. The court did not in these cases hold that the contract was broken but merely that, it having been rescinded by mutual consent, the party who had parted with anything of value in the performance of the agreement could recover the value thereof, on an implied promise to pay the same. In *Planché v. Colburn*, 8 Bing. 14, the plaintiff had a contract with the publishers of a periodical to write a series of articles therefor. The publishers having discontinued the publication, he treated their conduct as justifying a rescission, and rescinded the contract. The action was to recover the value of work already performed by him, at defendants' request, in writing a portion of the articles. It was on this theory that a recovery was sustained. In some of the cases, the party to whom the notice of refusal was given had the option to call for a performance at any time; and, of course, he could elect to regard the time of performance as having arrived, and then treat the refusal as a waiver of tender of performance, and in this way hold the party as for a present breach of the agreement. This element exists in the following cases: *Lovelock v. Franklyn*, 8 Q. B. 371; *Bowdell v. Parsons*, 10 East, 359; *Newcomb v. Brackett*, 16 Mass. 161; *Windmuller v. Pope*, 107 N. Y. 674; *Short v. Stone*, 8 Q. B. 358. Of the English cases, we have seen that *Phillipotts v. Evans*, 5 Mees. & W. 475; *Ripley v. McClure*, 4 Exch. 345; and *Leigh v. Paterson*, 8 Taunt. 540, are opposed to the *Hochster Case*. Mr. Benjamin, also, in his work on Sales (an English work), states the rule the other way, as we have already seen. 2 Benjamin, Sales, § 1118. In *Lovelock v. Franklyn*, 8 Q. B. 371, Lord Denman intimated that, where the time of performance is fixed, the fact that a party has in the meantime incapacitated himself from performing the contract will not constitute a breach thereof. *Frost v. Knight*, L. R. 7 Exch. 111, was an action for breach of promise to marry, and stands, as we have seen, on peculiar grounds, not applicable to actions for breach of contracts generally. And in the court of exchequer the doctrine in the *Hochster Case* was powerfully assailed by the majority of the court. L. R. 5 Exch. 323. *Short v. Stone*, 8 Q. B. 358, was also such an action. In this case the defendant had not only broken the engagement, but had actually married another person. *Planché v. Colburn*, 8 Bing. 14, was not an action for breach of contract, but to recover on the theory of a rescission. In *Danube & B. S. R. & K. Harbour Co. v. Xenos*, 18 C. B. N. S. 825, the action was not brought until after the time for performance had arrived. The defendant never retracted his premature refusal. Therefore, all the court was called upon to decide in that case was that when the day for fulfilment

of the agreement was reached the unwritten refusal was a waiver of tender of performance by the plaintiff, and enabled it to sue for breach of contract, the same as though such tender had then been made and refused. There was no occasion for alluding in this case to the doctrine laid down in the *Hochster Case*. In *Aery v. Bouden*, 5 El. & Bl. 714, and *Reid v. Hoskins*, 5 El. & Bl. 729, the court held that the plaintiff could not recover, because he had declined to treat the premature refusal of the other party as a breach. The same result was reached in these cases that would have been reached if the doctrine we believe to be sound had been applied. In *Roper v. Johnson*, L. R. 8 C. P. 167, and *Brown v. Muller*, L. R. 7 Exch. 319, we observe the practical working of the rule promulgated by the *Hochster Case*. Having violated legal principles once, in deciding that case, the courts were forced to violate them a second time, in laying down the rule relating to the measure of damages in such cases. Instead of fixing the value at the time of the premature breach as the element to be considered, the court held that the value at the time for performance, as fixed by the agreement, must be considered. In *Roper v. Johnson* the court, after speaking of the doctrine of the *Hochster Case* as a novel doctrine, says: "The difficulty which presents itself here is introduced by the comparatively recent case of *Hochster v. De La Tour*, the first case which decided that in the case of an executory contract the refusal of one party to perform the contract would justify the other in at once treating such refusal as a breach and suing for damages. That case has been distinctly recognized on many subsequent occasions, and we must now assume it to be law. It has undoubtedly introduced a difficulty in the assessment of damages in similar cases." Judge Keating, after referring to the rule the court would adopt in that case as to the proper measure of damages, said: "I think it is the better and the safer rule, though I am free to confess that the matter is by no means destitute of difficulty,—a difficulty occasioned by the novel doctrine introduced by the case of *Hochster v. De La Tour*." It must be admitted that the case of *Ford v. Tiley*, 6 Barn. & C. 325, strongly supports the decision in the *Hochster Case*.

In this country there appears, from a superficial view of the decisions, to be a great mass of authority in favor of the English doctrine. But a review of adjudications on this side of the water will reveal the fact that there is very little in the way of express authority in America upholding the English rule. The case of *Burtis v. Thompson*, 43 N. Y. 246, 1 Am. Rep. 516, may be dismissed with the observation that it was an action for breach of promise to marry. In *Howard v. Daly*, 61 N. Y. 363, 19 Am. Rep. 335, there is a *dictum* by Commissioner Dwight that the doctrine in the *Hochster Case* is sound. But the facts did not call for any decision on this point, as the defendant had refused to allow the plaintiff to enter upon the performance of her contract of service after the time for performance had arrived. The other members of the court expressly refused to state their views whether the English rule could be sustained on principle. See page 378, 19 Am. Rep. 293. In *Bunge v. Koop*, 48 N. Y. 225, 8 Am. Rep.

546, all the court decided was that a premature refusal, unretracted, constitutes a waiver of tender of performance, when the time to fulfill the contract arrives, and that thereafter the plaintiff may sue for breach without showing an offer to perform. In *Preer v. Denton*, 61 N. Y. 496, and *Shaw v. Republic L. Ins. Co.* 69 N. Y. 293, the court expressly refuses to determine whether the English rule should be followed. In *Ferris v. Spooner*, 102 N. Y. 10, the defendant had broken his contract after he had entered upon the performance thereof. The court said: "When therefore, he repudiated the further performance of the contract, the plaintiff was discharged from all obligation to either and set at liberty to enforce his securities for the money already advanced. . . . A previous demand of payment was not essential to a cause of action." In *Windmuller v. Pope*, 107 N. Y. 674, the court appears to have recognized the English rule, but the case does not show whether the suit was brought before or after the day for performance had arrived. Moreover, the time for the vendors to commence delivery by shipment of the property agreed to be sold had arrived at the time the vendees had declared their purpose not to accept the property under the contract. The vendors appeared to have had an option to deliver at any time between certain dates. When the vendors repudiated the agreement, the time when the vendors might have insisted upon delivery had arrived, although they could, at their option, have made delivery at a later date. The vendors having a right to begin performance at the time the vendees refused to receive the property, the former might, of course, treat the repudiation as a breach. It was not a premature repudiation of the contract, but one which occurred after the time had arrived when the vendees had a right to insist on performance thereof. All that the court held in *Crist v. Armour*, 34 Barb. 378, was that a premature refusal, unretracted at the time for performance, was a waiver of an offer of performance at that time. In *Donoran v. Sheridan*, 4 Misc. 433, it appeared that the point that a premature repudiation was not a breach was not made at the trial, and the court declared that therefore it would not be considered. But the court did utter a *dictum* in favor of the English rule. However, it was based on New York decisions which had not at that time, at least, settled the law in that state in favor of such rule. In *Gray v. Green*, 9 Hun, 334, the court said: "The effect of a mere refusal has been stated to be, that if before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, this of itself does not amount to a breach thereof, but if such expression of intention remain unretracted when the time arrives for the other party to perform his part of the contract, this fact will dispense with such performance." In *Crabtree v. Meersmith*, 19 Iowa, 179, the defendant broke the contract of sale after the time for performance had arrived, by returning the property after possession thereof had been delivered to him. While the English rule is referred to, it is obvious that no question of premature breach was involved. In *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208, the action was for

breach of promise to marry, and the case therefore belongs to the class of cases in which a premature refusal operates as a breach of the implied agreement to continue betrothed until married. In *John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.* 180 Ill. 680, the defendant refused to perform after it had entered upon the performance of the agreement. In *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548, the court held that the premature refusal to perform was not a breach, because the other party to the contract had not elected to treat it as a breach. The same result would have been reached in that case if the English doctrine had not been applied. In *Fox v. Kitton*, 19 Ill. 519, all the court decided was that the innocent party may treat a premature repudiation as an offer to rescind the agreement. In *Chamber of Commerce of Chicago v. Sollitt*, 43 Ill. 523, it appeared that, while the defendant announced his inability to perform before the time for performance arrived, yet he did not withdraw such refusal to carry out the agreement before such time, and the suit was not brought until the period for fulfillment of the agreement had come and passed. In *Follansbee v. Adams*, 86 Ill. 14, the parties to the contract, after one of them (the plaintiff) had notified the other (the defendant) that he could not perform, adjusted the matter, and on his adjustment it was agreed that plaintiff owed defendant a certain sum. Thereafter, plaintiff having sued defendant for failure to perform the contract, this settlement was pleaded as a defense. Of course, it was held that it constituted a perfect defense to the action. The contract was, by the act of the party, extinguished before the time for performance arrived. How could there thereafter be any liability thereunder? The court was not called upon to decide whether the plaintiff, by his premature refusal, had broken the agreement. The principle on which the decision rests is that the parties to a contract may, even before performance is due, extinguish it. The scope of the decision is disclosed in the last sentence of the opinion, "We are satisfied, after a careful consideration of the whole record, that the court decided right in holding the contract rescinded." In *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 80 L. R. A. 33, the breach consisted of acts in contravention of the terms of the contract after the time for performance had arrived. The court, indeed, indorses the English doctrine, but what was said on the subject was pure dictum. In *Zuck v. McClure*, 98 Pa. 541, the court held that a premature repudiation did not constitute a breach, as the innocent party did not elect to so regard it. The result in this case would have been the same if the English rule had not been adopted. In *Heard v. Bowers*, 23 Pick. 455, the court intimated that, if a party voluntarily puts it out of his power to perform a contract before the day of performance arrives, he by that act breaks the agreement. See page 480. In *Dingley v. Oler*, 11 Fed. Rep. 372, the court applied the English doctrine; and when this case was decided on appeal in the Federal Supreme Court (117 U. S. 490, 29 L. ed. 984), that court intimated that it considered the English doctrine as sound, but the decision below was reversed on the 88 L. R. A.

ground that, even assuming that doctrine to be preferable, the facts did not bring the case within it, for the reason that no distinct repudiation of the agreement before the time for performance had been shown. In the case of *United States v. Smoot*, 82 U. S. 15 Wall. 36, 21 L. ed. 107, the court, while leaning very decidedly towards the English rule, held that the case was not brought within its scope, for the same reasons which govern the decision in that court in *Dingley v. Oler*. In *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509, the court, while not called upon to settle the question, indicated that, on the score of convenience, it might, when called upon to settle the point, adopt the English rule. But, as we have already seen, it is indefensible to rest the English doctrine upon the mere ground of convenience, and in this case it appeared that the contract was broken while it was being performed. In *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716, the action was brought to recover the value of labor expended on materials out of which an engine was to be constructed by plaintiff in error for defendant in error. The defendant in error had repudiated the contract while plaintiff in error was performing it. Of course, this was a breach of the agreement. No question of premature repudiation was involved. In *Platt v. Brand*, 26 Mich. 175, it would seem that the plaintiff, against whom the defendants sought to set up, by way of recoupment, a claim for damages for a breach of contract to furnish glass, had broken the contract after performance thereof had been entered upon, although at a time anterior to the time when delivery of the installment which he refused to deliver was due. In *Wolf v. Marsh*, 54 Cal. 223, it appeared that the written instrument sued upon was given on condition that it was not to be enforced until a certain mine should yield a profit to the defendant, and that, if it should not yield a profit to him, the instrument was to be void. The defendant sold the mine, and the court held that the instrument at once became enforceable. By the act of sale the defendant had put it out of his power to make the mine yield a profit to him, and the court therefore very properly held that the instrument could be enforced without waiting future developments. In *Sullivan v. McMillan*, 26 Fla. 543, the refusal to go on with the contract was made after performance thereof had been entered upon. Therefore no question of premature refusal was involved. The court did not adopt the English doctrine. On the contrary, it stated that the case did not call for a decision on that point. The court said: "The case at bar does not, however, call for an expression of opinion as between the doctrine of *Hochster v. De La Tour* and that of *Daniels v. Newton*. It rests upon another and unquestionable doctrine. The time for performance was on when the breach complained of was committed. The contract was entire and not severable in its character, and had been performed in part at least, and upon a breach of the entire contract, it being committed by defendant while the plaintiff was ready and willing to perform, the latter became entitled to recover in one action the same damages as if he had fully performed his contract." In *Mattby v. Eisen-*

hauer, 17 Kan. 309, Justice Brewer said: "To what extent a contract may be held to be broken before the time of performance arrives may not be entirely settled. There are authorities which say that, if, before the time of performing the contract arrives, the promisor expressly renounces the contract, the promisee may treat this as a breach and may at once maintain an action in respect thereof. . . . Several of these cases were for breaches of contracts to marry, and the courts in many express themselves qualifiedly, and as doubtful whether the proposition was correct as applicable generally to all classes of contracts. But be the proposition ever so sound we think it is not applicable here." In *Grau v. McVicker*, 8 Biss. 13, it was squarely decided that the premature repudiation of an agreement is a present breach thereof. The decision in this case is founded entirely upon *Hochster v. De La Tour*. In *McPherson v. Walker*, 40 Ill. 371, all the court decided was that a refusal to perform, not withdrawn before the time of performance, operates as a waiver of an offer to fulfil the agreement at the time stipulated therein. The court, so far from adopting the English doctrine, laid down the very rule we hold to be proper in cases of this kind: "The rule is, if one bound to perform a future act, before the time for doing it declares his intention not to do it, this of itself is no breach of the contract; but, if his declaration be not withdrawn when the time arrives for the act to be done, it constitutes a sufficient excuse for the default of the other party." In *Davis v. Grand Rapids School Furniture Co.* 41 W. Va. 717, the court follows the English doctrine, but the question was not discussed. The leading decision opposed to the *Hochster Case* is *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 334. Nor does it stand alone. It has been followed in *Curstens v. McDonald*, 38 Neb. 858, and *Clark v. National Benefit & C. Co.* 67 Fed. Rep. 222. See *Kelly v. Oliver*, 113 N. C. 442.

That the English courts are not disposed to give the rule in the *Hochster Case* very wide scope appears to be shown by the fact that nothing short of the most positive repudiation of an agreement will suffice to give the innocent party, at his option, a cause of action when the repudiation is premature. See *Mersey Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648; *Avery v. Bowden*, 5 El. & Bl. 714; *Reid v. Hoskins*, 6 El. & Bl. 953; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460.

Nothing decided by this court in *Davis v. Bronson*, 2 N. D. 300, 16 L. R. A. 655, conflicts with our ruling in this case. There the plaintiffs and defendants had made a contract for the construction of a creamery. All that was held in that case was that plaintiffs could not, in the face of a refusal to accept, construct the creamery, and then sue the defendant for the contract price. Their remedy was to sue for damages for breach of the contract. When one has contracted to erect for another a building, and the latter, when the time for commencing construction thereof arrives, refuses to permit the builder to enter upon his premises for the purpose of carrying out his contract, it is obvious that the owner of the land has prevented the performance of the contract

by the builder, and has therefore been guilty of a breach thereof. Indeed there is eminent authority that notice that one will not stand by an agreement, though given before performance by him is due, is a present breach of the agreement, if at the time it is given the time for the other party to enter upon performance has arrived. *Danforth v. Walker*, 37 Vt. 214; *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967; *Hoamer v. Wilson*, 7 Mich. 304, 74 Am. Dec. 716; *Sullivan v. McMillan*, 26 Fla. 543; *Dillon v. Anderson*, 43 N. Y. 282; *Lamoignon v. Rolfe*, 36 N. H. 38; *Parker v. Russell*, 133 Mass. 74.

Whether this doctrine is sound or whether the better rule is that such notice is merely a waiver of performance, irrevocable in character, inevitably involving an ultimate breach, it is unnecessary for us to decide. If one has agreed to manufacture and deliver certain goods at a specified time, and the other party has agreed to take them, it is evident that a notice to manufacture them is not only a waiver of the manufacture of the articles, but also of the tender of them, in fulfilment of the agreement, and the waiver is irrevocable. To advise a manufacturer that he need not manufacture, because the purchaser will not accept is irrevocably to waive tender on the day for delivery, for he cannot deliver goods of his own manufacture without producing them. But, while a future breach is certain, can it logically be said that it has already taken place? Is it sound to declare, as some of the decisions do, that in such a case the performance by the manufacturer has been prevented? See *Cort v. Ambergate, N. & B. & E. Junction R. Co.* 17 Q. B. 127. But we express no opinion on this point, as it is not involved. What we do decide is that the letter of September 13, although embodying a positive refusal to perform, did not place it in the power of the plaintiff to treat the contract as broken, assuming that September 30th was the day fixed for performance. But it is undisputed that under the contract the plaintiff might, at his option, have delivered the flax at any time during the month of September. When he received the second letter from the defendants (i. e. the one dated September 18), it was in his power at that time to exercise his option to call for the performance of the agreement. The refusal of the defendants to perform was a standing waiver of tender of performance by the plaintiff, so long as such refusal was not withdrawn, and there is no pretense that it was ever retracted. For the purpose of establishing a party's liability for breach of contract, his refusal to perform, made at the time for performance or made before and not withdrawn at that time, is equivalent to a then offer to perform by the other party, followed by a refusal by the party who so refuses before an offer is made. This is elementary law, and the principle is embodied in our Code. Rev. Codes, §§ 3774, 3820, subd. 3, and § 3823. Had plaintiff been absolutely entitled to performance on the day he received defendant's second refusal to perform, he could, without tender of notice, have treated the contract as then broken. Does the fact that he had only an option to call for fulfilment of the agreement affect his right? We think not, so far as tender is con-

cerned. All that was necessary to entitle him to insist on performance on any day prior to September 30 was notice to the defendants to that effect, and an offer to perform. But the unwidrawn refusal to recognize the contract constituted a waiver of tender of performance. Whether it constituted a waiver of notice that the plaintiff then elected to exercise his option to make an earlier delivery of the flax is another question. It is not claimed that the plaintiff in any manner brought to defendant's notice his purpose to exercise his option to call for performance before September 30. To allow him to wait and watch the fluctuations of the market, and then, after the last day for delivery had passed, claim that he had secretly decided to insist upon performance at a particular time prior thereto, or on the last day itself, according as his interests would be best subserved, would be a dangerous doctrine, and one that there is no necessity for adopting, seeing that it was easy for him to manifest his election in a way that would make it irrevocable, and bring it to the knowledge of the defendants. He should not be afforded the opportunity of playing fast and loose with the rights of the other party, but should be required to declare his purpose, or be held, in the absence of notice to the contrary, to have elected to wait until the last day for performance. Unless this rule is adopted, the vendor, who has an option to deliver at any time within six months, and who is notified by the other party immediately after the contract is made that such other party will not stand by the agreement, could remain quiet during this entire period, and then select such a day as the day when he had elected to call for performance, and therefore as the day of breach, as would give him the largest amount of damages. We hold, therefore, that the plaintiff could not claim that he decided to exercise his opportunity to tender the property before the last day of performance,—i. e. September 30. Indeed, he does not pretend that he is entitled to recover damages on a theory of a breach of the contract at any time between September 13 and September 30. Proceeding on a hypothesis which to us is inexplicable under the circumstances, he seeks to hold defendants responsible for the difference between the contract price and the price he realized on the sale of the 5,000 bushels of flax in Duluth on the 9th of September. That he cannot bind defendants for the purpose of fixing the damages they must pay by the sale in Duluth is obvious for two reasons: First. It was not made in the mode pointed out in the statute. The statute, recognizing a settled rule of the common law, permits the vendor in an executory contract of sale, the title not having passed to the vendee, to treat the property as the property of the vendee, for the sole purpose of fixing the measure of damages, and then proceed to sell it on the theory of the foreclosure of a vendor's lien for the purchase price. The property is to be sold in the manner pointed out by the statute for the sale of pledged property. The vendee is made liable for the deficiency, if any. Rev. Codes, §§ 4833, 4938. But the sale in Duluth was not made in conformity with the provisions of the statute relating to the sale of pledged property. No

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notice of the time and place of sale was given to the defendants as required by § 4760, Rev. Codes, nor was the sale at public auction, upon the notice to the public usual at the place of sale in respect to auction sales of similar property, as required by § 4763, Rev. Codes. Another conclusive answer to the position taken by plaintiff that he could bind the defendants by the price realized on the sale in Duluth, is that the contract had not then been broken. It is only after breach that the statute permits the vendor to proceed to sell as in case of a pledge, for the purpose of fixing the vendee's liability for the deficiency. Rev. Codes, § 4938.

It is urged that by selling the 5,000 bushels of flax in Duluth, with a view of fixing the defendants' damages, the plaintiff chose his remedy, and hence cannot pursue any other remedy for damages. We are unable to discover that any question of remedy is here involved. If the vendee breaks his contract, the vendor may recover damages according to the rule laid down in subdiv. 2 of § 4988 and § 5009, Rev. Codes, unless he has in fact proceeded under § 4833, and actually fixed the damages thereunder. It is only when the property has been resold in the manner prescribed by § 4833 that the deficiency fixes the measure of damages. If the property has not in fact been resold under that section, then subdiv. 2 of § 4988 and § 5009 point out the true measure of damages. The right to hold the vendor responsible for damages on this theory is not cut off unless the property has in fact been "resold in the manner prescribed by § 4833." A mere attempt to proceed thereunder will not bar the right to damages according to subdiv. 2 of § 4988 and § 5009. Nothing short of an actual sale in the manner prescribed by § 4833 will have such effect. Counsel first contends that damages cannot be recovered on the theory of a sale to foreclose a vendor's lien, because the vendor failed to sell in the manner prescribed by § 4833; and yet, *una et eadem flatu*, they insist that plaintiff should not be allowed damages under the other subdivision of § 4988,—a claim utterly untenable if this fact be true. They would make an abortive attempt to proceed under § 4833 fatal to the recovery of any damages whatever, although the vendee has not thereby suffered any injury whatsoever. We cannot assent to a position so repugnant to the explicit language of the statute, and so contrary to natural justice.

Having reached the conclusion that the contract was not broken by defendants before September 30, this was the day for performance, as the plaintiff has not elected to make delivery before that time. All that was necessary to put the defendants in default was a tender of performance, followed by their refusal. But an offer by plaintiff on the 30th of September was waived by their unretracted repudiation of the contract. He is deemed to have made it, and to have been met by a refusal. This constitutes a breach as of that day. If, then, there was any evidence tending to support the verdict as to the amount of damages, the verdict must be sustained, although directed by the court. The fact of liability is conclusively established. The defendants having requested the

court to direct a verdict in their favor, and the court having instructed the jury to find for the plaintiff, on his motion, the defendants must be regarded as having submitted all controverted facts to the court for decision; no request having been made by them, after their motion for a directed verdict had been overruled, that any question of fact be submitted to the jury. It follows that if there is any evidence at all to support the verdict, in point of damages, the judgment must be affirmed. The defendants by their motion took the position that there was no question of fact which they desired to have submitted to a jury, and cannot complain of the decision of any question of fact on which the evidence is conflicting which the court must be regarded as having made by instructing the jury to find for the plaintiff. After a party has moved the court that the jury be instructed to render a verdict in his favor, he must, if the court denies his motion, specifically request that there be submitted to the jury the questions of fact which he desires to have so submitted. Otherwise he is deemed to have acquiesced in the decision of such questions by the court, and, if the court directs a verdict in favor of the other party, on his motion, the defeated litigant is not in position, in case of his failure to make such requests, to claim that any issue upon which the evidence is conflicting should have been left to the decision of the jury. 2 *Thomp. Trials*, § 2272; *Mayer v. Dean*, 115 N. Y. 556, 5 L. R. A. 540; *Protost v. McEncroe*, 102 N. Y. 650; *Winchell v. Hicks*, 18 N. Y. 558; *Collihan v. Scott*, 58 N. Y. 670; *Mervin v. Magone*, 35 U. S. App. 741, 17 C. C. A. 961, 70 Fed. Rep. 776; *Bueteli v. Magone*, 157 U. S. 154, 39 L. ed. 654; *Chrystie v. Foster*, 26 U. S. App. 67, 9 C. C. A. 606, 61 Fed. Rep. 551; *Sutler v. Vanderveer*, 122 N. Y. 652. It follows, as we have already said, that, if there is any evidence in the case tending to prove the amount of damages for which the verdict was directed, the defendants, not being in position to complain that that question was not settled by the jury, are bound by the finding of the trial court, just as they would have been bound had the verdict been voluntarily rendered by the jury. On the 9th of September, plaintiff sold 5,000 bushels of flax, through brokers in Duluth, and realized 84 cents a bushel from the sale. While this evidence was perhaps competent to prove the value of the flax on the 9th of September, it has no tendency to prove its value at such a time after September 30 as would have sufficed for the seller, acting with

reasonable diligence, to effect a sale. *Rev. Codes*, §§ 4988, 5009, fix the measure of damages in such cases. They provide as follows:

"Sec. 4988. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: (1) If the property has been resold pursuant to § 4833 the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or (2) if the property has not been resold in the manner prescribed by § 4833 the excess, if any, of the amount due from the buyer under the contract over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market over those which would have been incurred for the carriage thereof if the buyer had accepted it."

"Sec. 5009. In estimating damages the value of property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed with reasonable diligence for the seller to effect a resale."

In this case, there being no evidence tending to prove the value of the property at Kelso at such time after September 30 as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, the court had no basis, even on the theory that all issues of fact were submitted to it for decision, for finding the value of the flax at that time. The state of the evidence was such that the plaintiff, while establishing a breach of the contract, had failed to show any actual damages. On the evidence as it stood, the most the plaintiff could have recovered was nominal damages.

For the error of the court in directing a verdict for the plaintiff on the theory that the price realized by him on the sale of the flax in Duluth fixed the measure of his damages, *the judgment and the order denying a motion for a new trial are reversed*, and a new trial is ordered.

Under the facts of this case, the proper measure of damages is the difference between the price agreed to be paid for the flax and its market value at Kelso, at such time after September 30 as would have sufficed, with reasonable diligence, for the plaintiff to effect a sale thereof, and the excess of expense, if any, mentioned in § 4988, *Rev. Codes*. See *Rev. Codes*, § 5009

WYOMING SUPREME COURT.

Henry RASMUSSEN

v.

Fred M. BAKER.

(.....Wyo.....)

1. A person is not "able to read the Constitution of this state" within the mean-

NOTE.—As to the publication of official notices or documents in foreign languages, see *State*, 88 L. R. A.

ing of Const. art. 6, § 9, unless he can read it in the English language instead of a translation.

2. A copy of an instrument is a reproduction or imitation of it, and a translation is not a copy.

3. Debates of the Constitutional convention, although they may for some purposes but in a limited degree, be consulted in in-

North Orange Baptist Church, v. Orange (N. J.) 14 L. R. A. 62, and note on page 64.

interpreting a doubtful phrase or provision of the Constitution, are as a rule deemed an unsafe guide.

4. **Judicial knowledge is taken of the fact** that at the elections in several years persons who could read the Constitution of the state only in a translation were allowed to vote.

5. **The question, "What judgment should be rendered in this action?"** is not a proper one for reservation under the Wyoming statute which authorizes questions, not cases, to be certified to the supreme court.

(November 15, 1897.)

QUESTIONS reserved by the District Court for Carbon County for the opinion of the Supreme Court in a proceeding to contest the election to the office of treasurer of Carbon County on the ground that certain votes had been counted for defendant which were cast by unqualified voters. *Answers in plaintiff's favor.*

The facts are stated in the opinion.

Messrs. C. E. Blydenburgh and N. E. Corthell, for plaintiff:

It is a solemn act to declare a law unconstitutional, and one to be performed only with reluctance and hesitation.

Cooley, Const. Lim. 192, 193; *Slaymaker v. Phillips* (Wyo.) 40 Pac. 972, 42 Pac. 1052.

The legislative interpretation of the Constitution is entitled to great weight.

Sutherland, Stat. Constr. 311; *Slaymaker v. Phillips* (Wyo.) 40 Pac. 972, 42 Pac. 1052; Cooley, Const. Lim. 81-85.

The whole instrument is to be examined. Each clause and section is only a part of a complete and symmetrical structure intended to establish the state upon a sound and enduring basis in which our civil rights are supported by carefully guarded political privileges.

Cooley, Const. Lim. 71; 1 Kent, Com. 461; Sutherland, Stat. Constr. 241.

The Constitution is intended to be a practical and working instrument.

Almost every tongue known to the civilized world is spoken here by persons who know no other. Is it to be supposed that the members of the convention intended that the Constitution should be turned into these multifarious languages and authentic copies of all furnished to the registration and election officers in each precinct?

The great inconvenience, if not the impossibility, of thus carrying out the construction contended for by the defendant, is a well recognized and useful test to apply in determining its reasonableness and fitness.

Sutherland, Stat. Constr. 324; 1 Bl. Com. 60; *Taylor v. Taylor*, 10 Minn. 107.

Not mere general ability to read is required, but the ability to read a particular composition.

All uncertainty is removed by this language and the visible test is set before the very eyes of the voters.

Mabry v. State, 71 Miss. 716; Sutherland, Stat. Constr. 325.

In Texas, the ability to "read and write" was established as one of the qualifications for jury service.

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This was held to mean ability to read in the English language.

Nolen v. State, 9 Tex. App. 423; *Garcia v. State*, 12 Tex. App. 389.

The publication of a translation does not infringe the copyright either of the original work or of another translation of it into the same language.

Stowe v. Thomas, 2 Wall. Jr. 547; Cooley, Const. Lim. 72.

With the policy of the educational qualification we have nothing to do.

1 Burgess, Political Science & Const. Law, 42, 45.

Messrs. F. Chatterton and Van Orsdel & Burdick, for defendant:

Provisos and exceptions to general clauses are to be strictly construed.

Sutherland, Stat. Constr. p. 297, § 223; *United States v. Dickson*, 40 U. S. 15 Pet. 141, 10 L. ed. 689; *Eppe v. Eppe*, 17 Ill. App. 196.

Restrictions upon the elective franchise are strictly construed.

Cooley, Const. Lim. p. 486.

When an inquiry is directed to ascertain the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument; and where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory.

Cooley, Const. Lim. 80.

If the statute of the state, as contended for by counsel for plaintiff, in express terms provided that there should be no proof except an actual reading of the Constitution in the English language in the presence of the registry agents, this would be to add to the Constitution qualifications of the right of suffrage not contained in that instrument.

Cooley, Const. Lim. pp. 78, 79, and note, p. 758.

Potter, J., delivered the opinion of the court:

The plaintiff brought this action in the district court to contest the election of defendant to the office of county treasurer of Carbon county. The plaintiff and defendant were opposing candidates for that office at the election held on the 3d day of November, 1896. According to the abstract of votes made by the county board of canvassers, the defendant was credited with 1,189 votes, and the plaintiff with 1,162 votes, and a certificate of election was issued to the defendant. The case was submitted to the district court upon an agreed statement of facts, whereupon that court ordered that certain important and difficult questions arising in said case be reserved to this court for its decision thereon. The questions thus reserved involve all of the votes mentioned and specifically described in the statement of facts upon which the legality of defendant's election is questioned. Such questions are 14 in number. The first 9, respectively and separately, inquire whether or not the votes mentioned in paragraphs 5 to 12, inclusive, and in paragraph 17, of the statement of facts, are legal votes. The 10th and 11th questions seek the decision of that court respecting the number of votes, if any, which should be deducted from the votes re-

turned and abstracted for the plaintiff and defendant, respectively; and the 12th and 13th, the number of legal votes received by the plaintiff and defendant, respectively. The 14th question, which is general, and embraces all the others, is: "What judgment should be rendered in this action?" The principal point of controversy in the case arises in relation to the 1st and 6th reserved questions. Question No. 1 is: "Are the votes mentioned in paragraph 5 of the statement legal votes?" Paragraph 5 of the statement reads as follows: "At said election in precinct No. 1 of election district No. 6 of said county, known as 'Hanna Precinct,' 54 votes were cast for the said defendant by natives of Finland, naturalized citizens of the United States, who were not able to read the Constitution of the state of Wyoming in English, and who were not prevented by physical disability from complying with the requirements of § 9, art. 6, of the Constitution of the state of Wyoming, and who did not have the right to vote in the territory of Wyoming at the time of the adoption of the Constitution of said state, but who could read a proper translation or interpretation of such Constitution in the Finnish language, which said votes were by the judges of election in said precinct counted and returned for the said defendant." Question No. 6 refers to the votes mentioned in paragraph No. 10 of the statement, and that paragraph presents similar facts as in paragraph 5 with respect to fifty votes cast for defendant at Carbon precinct.

A determination respecting the legality of the votes mentioned in the said two paragraphs depends upon the import of that provision of our Constitution which requires what is known as an "educational qualification" for the right of suffrage. The particular constitutional provisions affecting this matter are as follows: "The rights of citizens of the state of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political, and religious rights and privileges." Article 6, § 1. "Every citizen of the United States of the age of twenty-one years and upwards who has resided in the state or territory one year and in the county wherein such residence is located sixty days next preceding any election shall be entitled to vote at such election, except as herein otherwise provided." Id. § 2. "No person shall have the right to vote who shall not be able to read the Constitution of this state. The provisions of this section shall not apply to any person prevented by physical disability from complying with its requirements." Id. § 9. "Nothing herein contained shall be construed to deprive any person of the right to vote who has such right at the time of the adoption of this Constitution, unless disqualified by the restrictions of § 6 of this article. After the expiration of five years from the time of the adoption of this Constitution none but citizens of the United States shall have the right to vote." Id. § 10. Section 6 excludes from the elective franchise all idiots, insane persons, and persons convicted of infamous crimes, unless restored to civil rights. It is further required that all elections shall be by ballot; that the legislature shall provide by law for the printing of the

names of all candidates for the same office to be voted for at any election upon the same ballot at public expense, to be delivered on election day to the voters, within the polling place, by sworn public officials; and that only such ballots shall be received and counted, the privilege being saved to the voters, however, of writing upon the ballot the name of any other candidate. Absolute privacy in the preparation of ballots is required to be guaranteed, and the legislature is required to pass laws to secure the purity of elections and guard against the abuse of the elective franchise.

The following clause of § 9 is the cause of this controversy: "No person shall have the right to vote who shall not be able to read the Constitution of this state." It is contended on behalf of plaintiff that this requires an ability to read the Constitution in the English language. On the other hand, it is insisted that the clause is not restricted to that language. The question has not been free from embarrassment. We are profoundly impressed with the gravity and deep significance of this question, appreciating the fact that the decision of the case at bar is but a single instance of the interests which are involved. Not only are the votes to be affected which were cast at Hanna and Carbon in 1896 by native Finlanders, unable to read the Constitution in English, but their right, as well, to vote at subsequent elections, and also the qualification of others in a similar situation; so that the question is one of vital interest to many of our citizens from an individual standpoint, and in its possible result upon elections the entire people are concerned. No person in this state is now permitted to exercise the elective franchise who is not a native-born or naturalized citizen of the United States. If one is foreign born, he must have resided in this country for such a length of time, and have become sufficiently attached to our institutions, to authorize his naturalization. The question therefore is whether such a person, otherwise qualified, is denied the right to vote because his acquaintance with the English language is too limited to enable him to read the Constitution in that language, notwithstanding that he has learned to read in his own language, and in such language can read the Constitution. The primary principle underlying an interpretation of Constitutions or statutes is that the intent is the vital part and the essence of the law. Sutherland, Stat. Constr. § 234; *People, Jackson, v. Potter*, 47 N. Y. 375. "The object of construction, as applied to a written Constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced." Cooley, Const. Lim. 55. Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration. "This intent is to be found in the instrument itself." *Ibid.*; Sutherland, Stat. Constr. § 234. If the language employed is plain and unambiguous, there is no room left for construction. It must be presumed that in case of a Constitution the people have intended whatever has been plainly expressed. Courts are not at liberty to depart from that meaning which is plainly declared. The remarks of Mr. Justice Brounson in *People v. Purdy*, 2 Hill,

86, have been frequently quoted with approval. Commenting upon different opinions which were held respecting the purpose and effect of a certain clause of the state Constitution, and the effect of departing from the language used, he said: "In this way a solemn instrument, for so I think the Constitution should be considered, is made to mean one thing by one man, and something else by another, until in the end it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we first lose sight of the instrument itself and allow ourselves to roam at large in the boundless field of speculation. For one, I dare not venture upon such a course. Written Constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. We are not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language." In that case the question was whether the words "any body politic or corporate" embraced all corporations, whether public or private. In the case of *People, Hughes v. May*, 8 Mich. 603, the court stated the principle as follows: "Among the well-settled rules of construction of statutes are these: (1) The natural import of the words of any legislative act, according to the common use of them when applied to the subject-matter of the act, is to be taken as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound acknowledged principles of public policy; . . . and (2) if the subject of the statute relates to courts or legal proofs, the words of the legislature are to be construed technically, unless from the statute it appears that the terms were used in a more popular sense. . . . These rules are equally applicable in the construction of a Constitution—as the Constitution is law, the people having been the legislators, as much as a statute is law, the senators and representatives being the legislators." And again: "The natural import of words is that which their utterance promptly and uniformly suggests to the mind,—that which common use has affixed to them." In *Hawkins v. Carroll County Supers*, 50 Miss. 785, we find a statement of the same principle as follows: "To get at the thought or meaning expressed in a statute, a contract, or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the 'words' convey a definite meaning, which involves no absurdity or contradiction with other parts of the instrument, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed; and neither the courts nor the legislature have a right to add to or take from that meaning." And, again: "The object of construction applied to the Constitution is to give effect to the intent of its framers, and the people in adopting it. This intent is to be found in the instrument itself." *Newell v. People, Phelps*, 7 88 L. R. A.

N. Y. 97. "It is not allowable to interpret what has no need of interpretation, and, when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation." *Beardstown v. Virginia*, 76 Ill. 84; *McCluskey v. Cromwell*, 11 N. Y. 601.

The presumption is that language has been employed with sufficient precision to convey the intent. *Cooley, Const. Lim.* 55; *Hills v. Chicago*, 60 Ill. 86. Chief Justice Marshall, in the case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 183, 6 L. ed. 68, said: The framers of the Constitution "and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." See also *Springfield v. Edwards*, 84 Ill. 626, 632. In an early interesting case in Massachusetts, the court was called upon to expound the true meaning of that clause of the Constitution which required that representatives should be chosen by written votes: and the precise question as presented was whether printed votes are written votes. It was held that "printed votes were legal." In the course of the opinion, Chief Justice Parker used the following language: "In construing so important an instrument as a Constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations which may lead us wide from the true sense and spirit of the instrument; nor, on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge of the force and extent of the words they employ, that they had a beneficial end and purpose in view, and that more especially in any apparent restriction upon the mode of exercising the right of suffrage, there was some existing or anticipated evil which it was their purpose to avoid." *Henshaw v. Foster*, 9 Pick. 312. The Constitution derives its force from the people who adopted it, and it is the intention of the people which is to be sought for. *Cooley, Const. Lim.* 6. And that learned author says: "It is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." Further, the meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. *Id.* 155; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 408. In this connection, Judge Cooley, in his work on Constitutional Limitations, made some observations which are so pertinent that I quote them: "A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so

changed as perhaps to make a different rule seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed. . . . What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require." Cooley, Const. Lim. 54, 55. So, the language of the Constitution is to be understood in the sense in which it was used at the time when it was adopted. *Hale v. Everett*, 58 N. H. 9, 125, 16 Am. Rep. 82; *Opinion of the Justices*, 126 Mass. 557, 589.

Is there ambiguity in the language of the first clause of § 9 of article 6, or does it possess a definite and precise meaning? If it is plain, clear, and free from ambiguity, what meaning is expressed thereby? This clause is not connected with any other part of the Constitution which tends to explain or modify it. It is an independent provision, and its meaning must be found disclosed within its own terms. The subject-matter of the article in which it appears is "Suffrage." It prescribes the qualifications of electors. In gathering the intent from the language employed in a law covering that subject, there are certain additional rules of construction which should be observed. Statutes which confer or extend the elective franchise should be liberally construed. *Sutherland*, Stat. Constr. § 441. The voter must, without any undue straining of the language in any direction, come within the terms of the law, and all reasonable doubts should be resolved in his favor. "Such is the fair tendency of our institutions." *People v. Dean*, 14 Mich. 406, 417. As a reasonable corollary of those principles, we think it should follow that any provision which excludes any class of citizens from the exercise of the elective franchise ought to receive a strict construction, without, however, doing violence to or distorting the language, to the end that none shall be held excluded who are not clearly designated. Such a rule would seem to be the natural and reasonable outgrowth of the fundamental principles of our form of government. The sovereignty resides in the people, although by written constitutions they have delegated the exercise of sovereign powers to several departments. The people "retain in their own hands a power to control the governments they create so far as they thought it needful to do so, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon." Cooley, Const. Lim. 598. "Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety." *Id.* 599. The sovereign power residing primarily in all the people, but in fact and practically with those only

who possess the right of suffrage, it would seem that none who are not clearly embraced in any restriction upon such right should be excluded.

From an orderly and logical standpoint, the initial step in arriving at a correct interpretation of the provision that "no person shall have the right to vote who shall not be able to read the Constitution of this state" is an inquiry respecting the ordinary and obvious meaning of the words employed, according to their arrangement and connection. Independently of the specification of a particular instrument which a voter must be able to read, an ability to read necessarily implies some language; but the requirement that a person, as a condition precedent to the right to vote, shall be able to read, is inseparably connected with a definite instrument. The sense in which the framers of the Constitution, and the people in adopting it, employed the phrase "the Constitution of this state," must be determined from a consideration of its relation to the remainder of the clause. The Constitution is mentioned as something which one must possess an ability to read. With this idea in view, the true significance of the word "Constitution," as used in this section, becomes a matter for serious investigation. In its most general sense, a Constitution is defined as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised." Cooley, Const. Lim. 2. In a lecture forming one of a series delivered by the late Mr. Justice Miller upon the Federal Constitution, he said: "The term 'Constitution' may be applied, not improperly, to the guiding principles underlying all these varying forms of government, whether they are or are not, established by any written instrument." Miller, Const. 68. Comprehensively considered, therefore, a Constitution consists in the fundamental principles of government; and, as thus understood, the use of the term would not be inapplicable in referring to almost any kind of established human government. Under such an enlarged definition, however, it might be either written or unwritten. The principles thereof might rest solely upon the will of an absolute monarch. It is manifest that we are not at liberty to entertain so broad a view of word as it is found employed in the clause under consideration. It is this country it is invariably understood and received as indicating something less than that which is embraced within its comprehensive definition. In the language of Judge Cooley: "In American constitutional law, the word 'Constitution' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it." Cooley, Const. Lim. 8. And Mr. Justice Miller, in further defining it, did so as follows: "In America when we speak of a Constitution, we refer to a written instrument, one in which the powers granted and duties imposed by it are reduced to writing." And again: "A Constitution, in the American sense of the word, is a written instrument by

which the fundamental powers of the government are established, limited, and defined, and by which these powers are distributed among several departments, for their more safe and useful exercise, for the benefit of the body politic." And he added: "A search for a more satisfactory definition has been in vain, but this language perhaps, fairly expresses the meaning of the term in this country." Miller, Const. [86] 71. In the case of *State v. Parkhurst*, 9 N. J. L. *427 [528] at page *448 [548], the court defined it in the following language: "What is a Constitution? According to the common acceptance of the word in these United States, it may be said to be an agreement of the people, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves." It would be difficult to ascribe any different meaning than the American one, as above defined and explained, to the term, as it is found in the article on suffrage in our Constitution. When the word was used, the convention was engaged in formulating, and the people afterwards in ratifying and adopting, a written instrument containing organic rules for their government. They were proceeding to organize and establish a state, and to lay down in written form certain fixed and inflexible principles and mandates, which should, until legally changed, be adhered to by all departments and officials, and by the people themselves. It is self-evident that the common acceptance of the word "Constitution" elsewhere in this country was the sense in which they understood and employed it in providing that one qualification for an elector should consist in an ability to read the Constitution of this state, which was in writing and existed in no other condition. Thus, in giving to the world as large a meaning as it is capable of imparting in its relation to the other words of the section, it signifies a written instrument only. In that sense we have the natural, ordinary, and obvious meaning of the term, and in that sense we are to determine the essential qualities of an ability to read it.

Whether a person, in reality, is capable of reading it by reading a translation in some language other than English depends upon a correct solution of the question whether such a translation is in fact the Constitution, or is in truth and common acceptance a copy of it. In pursuing such an inquiry, the path has been enveloped in some obscurity by the fact that no reference to any particular language is found in the section, and the further fact, which seems reasonably certain, that such omission occurred by design. The circumstance which indicates that purpose is the strong probability that the source of our provision is to be found in the Constitution of Massachusetts, the phraseology of which closely corresponds to that of our own, but follows the word "Constitution" with the words "in the English language;" thus explicitly and expressly confining the ability to read to that language. In the place of those added words in the Massachusetts Constitution we have used the words "of this state." Reference to the debates of the constitutional convention discloses that the confessed author of the proposition cited the case of Massachusetts,

and alluded to the fact that in that commonwealth a voter was required to be able to read the Constitution in English. Such omission, under all the circumstances, is supposed to positively indicate, not only a purpose to omit the words above mentioned, but an intention that there need not exist an ability to read in English. A majority of, if not all, the members of the court, have been strongly impressed with that argument; and the position has seemed not only plausible, but to some extent reasonable. Its very plausibility has courted careful investigation and analysis. It cannot fail, upon reflection, to be observed that the omission of the words deemed to assume so great an importance may have designedly and understandingly occurred, but that, nevertheless, the fact alone of the omission may not demonstrate with reasonable conclusiveness an intention to depart from the Massachusetts requirement. We must, I apprehend, assume that the convention understood the ordinary import of the language they did employ; and if, without the use of the omitted words, the import would be identically the same, it becomes evident that the mere act of omission would not unerringly point to a contrary intention. Placing reliance alone upon the omission, if there is a palpable and definite meaning to be discerned in the language actually used, which would constitute the sense in which such language is commonly accepted, the court would not be at liberty to depart from that meaning. For the very reason that it is possible that the omitted words may have been considered unnecessary, it would be clearly unsafe to impute to even a purposed omission a conclusive indication of but one intent and purpose behind it. The fact that in the convention the provision of the other state was mentioned, we have also thought, disclosed a purpose to otherwise regulate the matter in this state. We are still somewhat of that opinion, but the difficulty in the way of allowing that fact to have more than persuasive influence rests in the proposition that, to do so, we must attribute such intention to the convention itself, and to the people adopting the instrument, when it may be true, for all that we can know, that but few may have heard or learned of the remarks referred to. The committee of the convention on suffrage, which reported the article on that subject, and as regards the first clause of § 9, in the condition it is now found, except a provision for its taking effect at a date a few years later, was composed of the author of the proposition, three members of the legal profession, the president of the state university, and the secretary of the convention, all of them being men of education and ability. With the exception of the gentlemen hereinbefore referred to and one other, none of the committee appear to have given voice to any expression indicative of a purpose to avoid whatever may be the full force and effect of the provision as it stands. The other member above alluded to addressed the convention, but not at length, several times during the consideration of the article on suffrage. He expressed the opinion that many foreign-born citizens who were not conversant with English could read the Constitution in their own language, if it was put into that language, and

that they would vote the same as others. He subsequently, in voting in favor of the article, stated that the educational qualification was very objectionable to him; but it does not appear whether that was because it went too far or not far enough. Another prominent member of the committee addressed the convention at some length, and stated that what was desired was that a man should be able to read the ballot that he casts. This same opinion was similarly expressed by at least one other member of the convention during the debates.

The debates of the convention are not a very reliable source of information upon the subject of the construction of any particular word or provision of the Constitution. As we understand the current of authority and the tendency of the courts, they may for some purpose, but in a limited degree, be consulted in determining the interpretation to be given some doubtful phrase or provision; but, as a rule, they are deemed an unsafe guide. In this case the debates are rather unsatisfactory. It is difficult to reconcile them upon the understanding which may have prevailed respecting the real scope of the educational qualification. There appears to have existed quite a divergence of views concerning the number of persons who would be affected by the provision, and we are at a loss to satisfactorily determine whether that difference of opinion, or rather of statement, grew out of a difference of conception of the purport of the language or not. So that, even were it entirely proper to extract the intention of the convention from the discussions favoring and opposing the measure, it would in this instance be utterly useless to attempt it, with the expectation of arriving at any positive or certain result. In fact, counsel on both sides have cited confidently the remarks of various members as supporting their respective views and arguments. Nevertheless, did a determination depend solely upon the intention to be discovered in the proceedings and discussions of the convention, and did it become our duty to locate the preponderance of intent therefrom, we would be inclined to regard them, together with the omission of the words above alluded to, as indicating a purpose on the part of some of the members at least to refrain from requiring an ability to read in English. The effect, if any, which such individual purpose may have upon the real question at bar, is to be controlled by the result of a further consideration of the language which was chosen as the ultimate expression of the intention of the framers of the Constitution and the people adopting it. English was and is the language in common and general use in this state. The legislative enactments, from the organization of the territory, had uniformly been expressed and published only in that language. The proceedings of the courts were and are conducted exclusively in English. In the constitutional convention no other language was employed, the Constitution itself being framed and expressed in that language. It has never been promulgated in any other. These facts, in addition to their influence upon the true meaning of the term "Constitution," should also be kept in view if it becomes proper or necessary to go outside of the phraseology

to discover the prevailing intent of those who prepared the organic law. Such facts have therefore a double bearing. They serve to illustrate and explain the words themselves, and are factors in the search for any purpose behind them. They are important in either respect.

After much reflection, we are constrained to announce ourselves as unable to observe any ambiguity in the words "the Constitution of this state." Under the well-considered definitions above quoted, they possess and convey a meaning which is precise, clear, and certain. We revert, therefore, to the question whether a translation would constitute a "copy" of the Constitution, in the commonly accepted sense of that word. A "copy" is defined as a reproduction or imitation as of a writing, printing, drawing, painting, or other work of art, so as to have another or others similar to the original. *Standard Dict.* It is a document which is taken or written from another, as opposed to an original. *1 Rapalje & L. Law Dict.* 293. To translate is to give the sense or equivalent of, as a word, an expression, or an entire work, in another language or dialect (*Standard Dict.* 1917); hence to explain by clearer terms, or to express in a different form or style of language (*Ibid.*). The question whether a translation constitutes a copy of a book was squarely decided in the case of *Stowe v. Thomas*, 2 Wall. Jr. 547. That case involved an alleged infringement of the copyright of Mrs. Stowe's *Uncle Tom's Cabin*, the defendant Thomas having made a translation in German. Mr. Justice Grier, in the opinion, said: "Now, although the legal definition of a 'book' may be much more extensive than that given by lexicographers, and may include a sheet of music as well as a bound volume; yet, it necessarily conveys the idea of thought or conceptions clothed in language or in musical characters, written, printed, or published. Its identity does not consist merely in the ideas, knowledge, or information communicated, but in the same conceptions clothed in the same words, which make it the same composition. A 'copy' of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or 'copy' of the same 'book.'" And the learned justice refers to a remark of Mr. Justice Willes, *viz.*: "Wherein consists the identity of a book? Certainly, bona fide limitations, translations, and abridgments are different, and, in respect of property, may be considered new works." Generally speaking, a translation need not consist of transferring from one language into another; it may apply to the expression of the same thoughts in other words of the same language.

We apprehend that if someone should undertake to embody the principles and rules set out in our Constitution in other words of our language, and rewrite the whole instrument by the use of different words, but expressing the same sense, such a work could not in any correct sense, legal or otherwise, be denominated the Constitution of this state, or even a copy of it; and it is probable that no one would

long contend that it could be. A translation into another language might just as completely preserve, and the work composed of such translation might truly communicate, the sense of the Constitution. All its rules, maxims, and definitions might be found therein stated, but it would not be considered a copy. The substance of its mandates would have been copied, but not the words and language. We have shown in an earlier part of this opinion that, according to the American understanding of the word, the term "Constitution" is not merely the fundamental principles of government, but the written instrument containing them, or such principles reduced to writing. Hence it is clear that a work reproducing such principles only cannot constitute, in any correct sense, a copy of the Constitution, as it is usually understood and accepted. We are convinced that a copy of that instrument can consist only in a reproduction of the words of which it is composed, in the same relation as they are there found, and thus, as a necessary consequence, in the language in which it is written. No doctrine of statutory construction will permit the adoption of loose and reckless expressions, such as calling a "translation" of the Constitution a "copy" would amount to.

Again, we search in vain for any provision in the Constitution respecting its publication or the manner in which it shall be promulgated. Under the provisions for the publishing of the laws enacted at the various legislative sessions, there appearing no express statutory regulation to the contrary, it would doubtless be presumed that they were to be published in the language in which they were written and passed. That presumption has been uniformly acted on by the officials of the executive department. Analogous doctrines are found in the decisions. In the case of *Road in Upper Hanover*, 44 Pa. 277, the court said, in considering a notice about roads which had been published in a German newspaper in the German language: "The law must have a definite meaning, and, therefore it cannot mean that public notice may be given in any language that one of the parties may choose to employ, but in the ordinary language of the country which is used in judicial proceedings." In another case we find the following: "When a statute directs notice to be published in a newspaper, the courts will presume, in the absence of anything to the contrary, that the legislature designed the notice to be published in the same language as the newspaper itself. . . . They will also presume that the notice is to be given in the ordinary language of the state. . . . The present statute contains no express intimation as to the language in which the notice is to be given or the newspaper is to be printed. Consequently, the presumptions mentioned arise, and require the notice to be given in English in a newspaper printed in the same tongue." *State, City Publishing Co., v. Jersey City*, 54 N. J. L. 487. In the state of Louisiana, under the Constitution of 1812, all laws were required to be promulgated and preserved in the language in which the Constitution of the United States is written; and, in construing a statute passed while that Constitution was in force, the court refused to consider or attach any force to a French translation,

although it is apparent that it was customary for the statutes to be translated into French, but whether with or without legislative authority we are not informed. *State v. Mir*, 8 Rob. (La.) 549. In the case of *People, Hughes, v. May*, 8 Mich. 604, the Michigan court said that "a Constitution is law, the people having been the legislators." In that law—the organic law of the state, which could only have been adopted originally by the people, and is not susceptible of any ultimate change, except with their consent or, more correctly speaking, their positive act—no provision was made with reference to the language in which it was to be promulgated. It seems to us that the same presumptions which have been adverted to must be held to apply; and, consequently, that it was and is to be published in the English language, the same in which it was written, and which is the language of the country. It is impossible, therefore, that there can exist any authorized publication of the Constitution in any other language, for any purpose of construction or enforcement. We are not prepared to deny the power of the legislature to provide for translations of that instrument for some limited purposes,—for instance, to inculcate a more general knowledge of its rules and principles, and of the character of our local government; but under no circumstances could a court resort to such a translation as possessing any force or authority.

It follows that the word "Constitution," mentioned as the instrument which a voter must be able to read, is to be understood and construed with reference to the presumption arising from an absence of authority given by the people to publish it in any language or form other than that in which it was written, and which is the language in common and general use. The Constitution is a law. It is the fundamental, inflexible law in written form, which controls, limits, and orders the powers of all departments of government. We are thus led to inquire regarding the essential feature of that law, as something which may be read. In what character and form is it endowed with living force? At the outset, this appeared to lead into an original field for judicial investigation. It is comparatively a new question, but at least on two occasions the courts have considered the character and effect of a translation of a statute or law. Those cases are directly in point. In *State, North Orange Baptist Church, v. Orange*, 54 N. J. L. 111, 14 L. R. A. 62, the legality of a municipal ordinance was involved. The charter required that all ordinances, after their passage, should be published in all three of the newspapers published in the city of Orange. One of the papers was printed in the German language. Another requirement respecting ordinances concerning a public improvement was that a notice of the contemplated improvement should be given by publishing a copy of the proposed ordinance, and a statement of the time and place of the meeting of the common council appointed to consider said ordinance, in the same three papers. The notice of the time and place of meeting was printed in the German paper, as in the other two, in the English language; and the ordi-

nance was published in the German newspaper, in a German translation only. It was held that the notice of the time and place should have been published in the German paper in the German language, as the statute required its publication in that paper, and a notice requires no collocation of words so long as it conveys a clear notion of its subject, and in a German newspaper the medium through which intelligence is communicated is the German language. In reference to the ordinance it was held a mistake to publish it in the German language, and that, even as a part of the notice, it should have been published in the German paper in English. And the court said: "But a statute or ordinance has no legal existence except in the language in which it is passed. No translation, however accurate, can be adopted in the place of its original text for the purposes of construction in a legal proceeding. Until the legislature makes a provision for the printing of ordinances in German newspapers in translation, it is not perceived how they can be printed otherwise than *litera et verbis*. The publication of the translation may be regarded as a proper explanatory adjunct of the English copy, but cannot be accepted as a legal substitute for it." In the Louisiana case (*State v. Mir*, 8 Rob. (La.) 549) the court was employed in construing a statute, and a French translation thereof was called to its attention. This translation seemed to convey a different meaning from that of the English text. As in that state both languages were in quite general use, a liberal quotation from the opinion of the court cannot fail to be useful: "Anterior to the adoption of the Constitution, the laws of the territory were passed and promulgated in the two languages; and our civil tribunals have repeatedly and invariably decided that the one was as much entitled to respect as the other. These decisions contain a proper exposition of the law as it then existed. The Constitution, however, which is the supreme law, appears to have formally abrogated and abolished what was no doubt, up to that time, the settled law upon the subject. In the 15th section of the 6th article of the Constitution, it is enacted, that 'all laws that may be passed by the legislature, and the public records of this state, and the judicial and legislative written proceedings shall be promulgated, preserved, and conducted in the language in which the Constitution of the United States is written.' The language here used is as clear and unambiguous as that found in the section of the act of 1829, on which we have just been commenting. If all the laws passed by the legislature are to be promulgated, preserved, and conducted . . . in the language in which the Constitution of the United States is written, and that language is English, it is difficult to imagine how an act which has not been thus promulgated, preserved, or conducted, can be considered as possessing the stringent force, power, and effect which is necessary to constitute a law. It would be a *petitio principii* to say that it has been promulgated, conducted, and preserved in the English language, because, in that case there would be no necessity of resorting to the French translation." The opinion from which the above is quoted, it will be observed, distinctly holds that, except as

preserved and promulgated in the English language, the statute did not have the force and power of a law. That is equivalent to saying that the translation is not the statute; and by analogy, applied to the matter here under discussion, it would follow that a translation of the Constitution would not be the Constitution. In the state of Connecticut the Constitution, by an amendment in 1855, provides that "every person shall read any article of the Constitution, or any section of the statutes of this state, before being admitted as an elector." We have not been able to find any report of a judicial construction of that amendment, and have every reason to be satisfied that it has not been before the courts for that purpose; but so far as we know the custom in that state has invariably been to require a reading in English, and that it has not been suggested that a reading of a translation would answer the constitutional requirement.

The two cases above referred to are the only ones coming to our notice wherein the precise nature of a translation of a law into another language was involved and determined. They refused to brand such a translation as either the law itself or a copy of it. It is essentially something else. It is so entirely distinct from the law that a mention of the latter as an entity, considered as a written instrument, will not include it. No decision to the contrary has been cited, and we have found none.

From what has been said, the proposition, to us, seems irresistible that to authorize such an interpretation of the constitutional provision as would confer upon a person the right to vote if he is able to read a translation of the Constitution in another language renders it necessary to entirely depart from the clear, commonly accepted meaning of the language employed, and, in doing so, to enter upon a field of almost boundless speculation, with the reasonably certain assurance that in such an investigation a like conviction from the ascertainable facts would not be imparted to all minds, however honestly and conscientiously the investigation may be conducted.

The debates of the constitutional convention have been referred to. In all probability there would occur no disagreement, after a careful scrutiny of those debates, regarding the general purpose the convention had in view by the adoption of the educational qualification. Throughout all the discussion a particular class of voters was prominently mentioned. That was what was called the uneducated foreign element in the coal-mining camps along the line of the Union Pacific Railroad. They were by some spoken of as ignorant of our institutions, and it was claimed that they were not intelligent voters. It would seem that had it been the positive intention not to deprive a foreign-born citizen of the right to vote in case he was sufficiently educated in his own language to enable him to read a translation of the Constitution, that intention would have been expressed, or some provision would have been made for translations. Had some such provision been made, there might have been room for modifying the ordinary import of the words of the clause. Hanna and Carbou precincts are located in coal-mining towns along the railroad mentioned. We are not unmind-

ful of the fact that, as reported by one of the newspapers published at the time at the capital of the territory, public meetings were held in that city, previous to the vote of the people upon the question of the adoption of the Constitution, which were addressed by prominent men, and that it was publicly stated by two gentlemen, one of whom had been a member of the convention, that, as to the educational qualification, a reading in English was not required. I have no doubt whatever of the honesty of those statements; and, if it were possible to attribute any ambiguity to the words providing such qualification, such statements publicly made would be strongly persuasive; nor has it escaped our attention that, so far as public knowledge is concerned, at the elections in 1892 and 1894, and likewise in 1896, except at Hanna and Carbon precincts, the question of the disqualification of the citizens who could only read a translation of the Constitution was not raised. I am inclined to consider it as a matter of common knowledge that such persons were, without objection, allowed to vote at the elections mentioned. Nevertheless, that practice has not been indulged in for such a length of time as to give it a controlling effect in the interpretation of what must be regarded as an unambiguous constitutional mandate. *Chicago v. McCoy*, 136 Ill. 844, 11 L. R. A. 413. For the reason that, at least, a majority of the court had felt strongly persuaded by the extraneous circumstances which seemed to point to a contrary understanding, our conclusion has been reached with some reluctance; but we perceive no possible escape from it. We cannot avoid the clear import and significance of the language of the Constitution. Upon greater deliberation, moreover, it has become apparent that, from the circumstances referred to, there is not a clear indication of such contrary understanding having been general. Whatever the actual purpose was, even if there existed at that time a misconception of the provision, it must bow to the supremacy of the words themselves. They constitute the only safe and reliable index of the intent and purposes of the convention and the people. In view of the probability that any express mention of the English language was purposely avoided by some person or persons in framing the provision for an educational qualification, we are not surprised that there has existed an honest difference of opinion relative to its scope and effect, and that it has been the subject of inaccurate and loose interpretation. That any broader construction than that which the court has placed upon it is loose and inaccurate, we are convinced, and are therefore constrained to hold that, in the sense of the constitutional requirement, no person is able to read the Constitution of this state who cannot read it in the English language, and consequently is not entitled to vote, unless such incapacity is the result of physical disability, or such person had the right to vote at the time of the adoption of the Constitution.

The decision of the court upon questions 1 and 6 is that the 54 and 50 votes, respectively, making a total of 104 votes mentioned in paragraphs 5 and 10 of the statement of facts, were not legal votes. In view of this conclusion, it is not apparent from an inspection of 38 L. R. A.

the papers in the case that a decision upon the questions regarding the votes mentioned in the other paragraphs of the statement is at all essential to a determination of the cause. We should therefore refrain from responding to such questions. Respecting the number of votes to be deducted from the number counted, returned, and abstracted for the defendant, that becomes a mere matter of calculation, and, not being involved in any difficulty, hardly requires direction or advice from this court. The fourteenth question is: "What judgment should be rendered in this action?" The statute authorizes questions, not cases, to be certified to this court for its decision. It may be said, not improperly perhaps, that the case is certified for the decision of the supreme court upon certain important and difficult questions; but, in the strict sense, the case itself is not brought before us for determination. It is here temporarily awaiting a decision upon the reserved questions. The papers must be here to disclose the fact that the reserved questions are actually involved. In our opinion, the 14th question is not a proper one for reservation.

Conaway, Ch. J., concurs.

Corn, J.:

I concur in the conclusion reached, and very largely in the views expressed in the opinion of the court. The Constitution (art. 6, § 9) provides that "no person shall have the right to vote who shall not be able to read the Constitution of this state. The provisions of this section shall not apply to any person prevented by physical disability from complying with its requirements." The first and most important question presented is whether certain foreign-born citizens residing at Carbon and Hanna (coal-mining towns in Carbon county), who were not voters in Wyoming at the time of the adoption of the Constitution, and who at the time of the election of 1896 were not able to read the Constitution of the state of Wyoming in English, but who could read a proper translation or interpretation of such Constitution in the Finnish language, are precluded by the provisions of this section from the right of suffrage. The rule uniformly laid down by the courts and text-writers in interpreting statutes and Constitutions is that resort must first be had to the language itself. Sutherland says: "It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way. But . . . first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail, without resorting to other means of aiding in the construction." Sutherland, Stat. Constr. § 237. He says, further: And "one who contends that a

section of an act must not be read literally must be able to show one of two things; either that there is some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general purview." Id. § 238. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning. Cooley, Const. Lim. 70.

The plaintiff contends that, to qualify a citizen for the suffrage in this state, he must be able to read the Constitution of the state in the English language; while, upon the other hand, it is contended by the defendant that the citizens in question, though unable to read the Constitution in English, are yet qualified voters, being able to read a translation or interpretation of it in the Finnish language. Considering the question in the light of the principle and according to the rule above stated, if the language were simply that the voter must be able to "read," without specifying the particular language or the particular instrument to be read, the meaning might be deemed less clear. Yet even in cases where an act is required to be done, and the language to be employed is not specified, it has been uniformly held, so far as I have been able to find, that, where the judicial language of the state is English, that language is intended, and must be employed. In Texas, where one of the qualifications of jurors was the ability to read and write without specifying any language, it was held that the English was intended, and that a citizen was disqualified as a jurymen unless he was able to read and write English. *Nolen v. State*, 9 Tex. App. 423; *Garcia v. State*, 12 Tex. App. 339. In Pennsylvania, where publication of a notice "in a newspaper" was required, not specifying the language to be used, it was held that English was intended, and that publication in a German newspaper was not a compliance with the law, although German was largely used in the particular locality; and the court, in the same opinion, referred to the propriety and necessity of a proper statute authorizing a publication in German. *Road in Upper Hanover*, 44 Pa. 277. In New Jersey, where a statute directed publication in a newspaper, without specifying in what language, the court held that it must be in English, the ordinary language of the state. *State, City Publishing Co., v. Jersey City*, 54 N. J. L. 437. And the same point was again decided in the same way in *State, Wilson, v. Trenton*, 56 N. J. L. 469. In Wisconsin, where the language in which the required publication should be made was not specified, it was held that, if the publication was made in English, a city council might also authorize a publication in a German newspaper. *Kellogg, v. Oakkosh*, 14 Wis. 624. Indeed, I have found no case where the question has arisen that it has not been decided, either expressly or by implication, that where no language is named, the English, the language of the country, is intended.

But the requirement of the Constitution is much more than that the voter shall simply be able to read. It is that he shall be able to read a particular instrument,—"the Constitution of this state." These additional words cannot be treated as mere surplusage, and re-

jected from our consideration. They have some meaning, and, interpreting them, the question immediately and necessarily arises: What is the Constitution of Wyoming, which this clause requires the citizen to be able to read to qualify him for suffrage? The answer is drawn from the common knowledge of the people, and which courts and juries are supposed to possess, and must apply in reaching their decisions. It is an instrument written and adopted in the English language, the judicial language of the state. The requirement is not that the voter shall have studied or shall understand and comprehend the contents or substance of it, but that he shall be able to read the specific instrument. He must have that much and that character of education. To construe a reading in any other language than the English to be sufficient, something must be added to the section, so that it would read, in substance: "No person shall have the right to vote who shall not be able to read the Constitution of this state, or a translation thereof." It needs no argument to establish that a translation is not identical with the original. No matter how similar it may be in meaning, it is plain it cannot be identical. It is not the instrument, but a translation or interpretation of the instrument. A copy of a Finnish, Russian, or German translation would not be a copy of the Constitution, and the officer would be rash who would certify it as such. Cooley says, "In interpreting clauses, we must presume the words have been employed in their natural and ordinary meaning;" and he quotes the language of Chief Justice Marshall that the framers of the Constitution and the people who adopted it "must be understood to have employed words in their natural sense, and to have intended what they have said." Applying this rule, and neither adding to nor taking away from that meaning, it cannot be said that one who is able only to read a translation of the instrument fills the requirement of this provision, that he must be able to read the instrument.

The argument might, if necessary, be much extended. Not only is a translation not identical in the sense of being the same in words, but it is uniformly recognized that it is not precisely similar in meaning, and, in the nature of things, in any extended composition, cannot be. Many English words have no precise equivalent in other languages, for the reason that the ideas expressed by them are not familiar to the people who speak those languages. It is plain that a people having no knowledge of the steam engine would have no word to express or describe it. And it is equally clear, I think, that, civil liberty as it exists in the states of America being unknown to the subjects of a despotic government, they could, in the nature of things, have no word or phrase in their language to describe or define it; and the very word "Constitution," when translated into their language, would, of necessity, convey the idea of a grant or concession from the ruler, rather than the idea of an instrument declaring the organic law, made by the people themselves, and binding upon the people and their rulers alike. So that to hold that the ability to read a translation in such cases would meet the requirements of the section would ne-

cessitate a still greater alteration in its words, so that the section would then in substance read: "No person shall have a right to vote who shall not be able to read the Constitution of this state, or a translation of so much thereof as is capable of being translated into such person's own language." This is not only the reasonable view, but the one supported by authority. In the case of *State, North Orange Baptist Church, v. Orange*, 54 N. J. L. 112, 14 L. R. A. 62, the charter of the city required that public notice of a contemplated improvement should be given by publishing a copy of the proposed ordinance, and that the said notice should state the time and place of the meeting of the council to consider the said ordinance. The charter also provided that these notices should be published in all three of the newspapers of the city, one of which was published in the German language. The court held that the notice published in the German newspaper must be in the German language, as otherwise it would not be "published," but only "printed," but that the copy of the ordinance required to be inserted in the notice in such German paper must be in the English language. The court further says: "Again, the charter requires all ordinances, after their passage, to be published in the same three papers. This ordinance was published in a German translation only. I think this was also a mistake. There is a manifest distinction to be observed between the publication of a notice and the publication of an instrument or statute or ordinance. A notice requires no particular collocation of words so long as it conveys a clear notion of its subject. But a statute or ordinance has no legal existence except in the language in which it is passed. No translation, however accurate, can be adopted in the place of its original text for the purposes of construction in a legal proceeding. Until the legislature makes a provision for the printing of ordinances in German newspapers in translation, it is not perceived how they can be printed otherwise than *litera et verba*. The publication of the translation may be regarded as a proper explanatory adjunct of the English copy, but cannot be accepted as a legal substitute for it. This view of the manner in which an ordinance should be printed under these conditions applies in some degree to the notice also. As already set forth, the charter requires that as part of such notice a copy of the proposed ordinance shall be published. For the reasons already stated, this copy should appear in English. The ordinance must be set aside." This language cannot be misunderstood. The court distinctly hold that such an instrument "has no legal existence except in the language in which it is passed;" that a translation "cannot be accepted as a legal substitute for it." In *Stowe v. Thomas*, 2 Wall. Jr. 547, Uncle Tom's Cabin had been translated into German by the author, and the translation secured by copyright. The defendant made a second translation into German, published it in a Philadelphia newspaper, and was proceeding to secure such second translation by copyright. It was held that such second translation was not an infringement of the copyright of the original, nor, being an independent translation, of the copyright of the first translation. And the court says: "Its identity does not consist

merely in the ideas, knowledge, or information communicated, but in the same conceptions clothed in the same words, which make it the same composition. A 'copy' of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or 'copy' of the same 'book.'" Id. 565.

The reasoning of these cases applies with full force to what is called the "Constitution," under our system of government. It is true that, in a general sense, a Constitution may be defined as a "fundamental law or basis of government," and, as in the case of the English Constitution, may be unwritten. But that is not the American sense. Judge Cooley says: "In American constitutional law, the word 'Constitution' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the states, etc." Const. Lim. 3. Neither is this a mere technical sense of the word. It is the technical and it is the popular sense. It is the only correct, legal sense, in its context. The requirement being the ability to read, the necessary inference is that it is a written instrument.

But it is urged with great earnestness that the section must be strictly construed; that no language being mentioned, and the term to "read" being applicable to a reading in any language, it cannot be restricted to a reading in the English. It is said, "He must be unable to read the Constitution at all, to come within the strict meaning of § 9;" that is to say, if, by any possible interpretation of the words, he can be said to be able to read the Constitution, he is not excluded from the suffrage by its terms. This is not a proper application of the rule of strict construction. The court in *United States v. Wiltberger*, 18 U. S. 5 Wheat. 95, 5 L. ed. 42, says: "It is said, that notwithstanding this rule, the intention of the lawmaker must govern. . . . This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend." And in the English case of *Nicholson v. Fields*, 31 L. J. Exch. N. S. 235, it is said: "I . . . admit that though the common distinction taken between penal acts and remedial acts, that the former are to be construed strictly, the others are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a judge, yet I think that we ought always to look, whatever be the act, be it penal or be it remedial, for the true construction of the act by its language, and in that respect that there ought to be no distinction between a penal statute and a remedial statute." The intention of the convention and the people is

to be collected from the words they employ. They have used words of definite meaning, legally and commonly well understood. They must be accepted in that sense by the court. No distinction of a strict or liberal construction is involved. If, however, having ascertained the correct meaning of the words in their context, it were reasonably doubtful whether the persons referred to are included, the rule of strict construction would be applied, and they would be excluded from the operation of the section. No such doubt arises in this case, but they are obviously included within the words as interpreted, and have not the right of suffrage under the Constitution.

In my opinion, the circumstances do not arise which would authorize the court to interpret the section otherwise than by the natural and ordinary meaning of the words themselves; for it cannot be shown, as required by the rule as stated by Sutherland, before it can be read other than literally, "either that there is some other section which cuts down or expands the meaning, or that the section itself is repugnant to the general purview." But, if it were deemed necessary or permissible to resort to other sources of information to aid in the construction, this view is rather strengthened than otherwise. At the same time, there is one suggestion which seems to be, in some measure, at least, persuasive of a different view; and that is that this section is modeled upon a similar one in the Massachusetts Constitution, where the requirement is the ability "to read the Constitution in the English language." And it is forcibly urged that the omission of the words "in the English language" proves the intention of the convention to dispense with that requirement. But it is evident, in the first place, that the rule that statutes originally enacted in another state, when adopted, are deemed to be taken with the settled construction given them in the state from which they are copied, has no application; for the converse of the proposition is simply a negative, that, not having copied the original statute, we do not adopt its construction. But the argument is that the changed phraseology indicates a change of substance and intent. It is clear that a change of the phraseology of an older statute of the same state by a revision presents a much stronger case than this, and, in discussing that subject, Sutherland says: "The presumption of a change of intention from a change of language is of no great weight, and must mainly depend on the intrinsic difference as resulting from the modification. A mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain; there must be such substantial change as to import such intention, or it must otherwise be manifest from other guides of interpretation, or the difference of phraseology will not be deemed expressive of a different intention." Stat. Constr. § 256. And in this case the omission does not of itself furnish an interpretation of the words as they now stand;

and, to give it the greatest weight that could reasonably be claimed for it, the only effect would be to send the court upon a search through the journals of the convention to ascertain what the motives of the convention were in making the change of language. This we are not permitted to do when the words themselves are unambiguous, as they are in this case. But, if we should do so, other facts appear which must outweigh the one named. The section was introduced in its present form and no mention is anywhere made that it was taken from the Constitution of Massachusetts; and the fact that that Constitution contains the words "in the English language" is only once mentioned in the debates. The provision was debated at great length, and by a large number of the members, and the section as it now stands was under fire during the entire discussion. And while, by the well-settled rules of construction, we would not in any contingency be permitted to recur to the views of individual members, yet it is easily ascertainable from the debates what the general purpose of the convention was. Without any question, it was to deny suffrage to a class of foreign birth, who congregated in large numbers in the mining towns, and who, it was claimed, were unfamiliar with our institutions, were unable to vote intelligently, and were and would be voting at the dictation of others. This class was designated again and again. At the same time there was expressed in unmistakable terms the greatest disinclination to disfranchise citizens of the United States, whether of native or foreign birth, who were attached to our institutions, acquainted with public affairs, and able to vote intelligently, but who, by defect of early education, were unable to read; and the determination not to disfranchise any of the latter, except so far as it might be unavoidable in carrying out the purposes of the convention, was repeatedly expressed, and was clearly shown in the adoption of § 10 of the same article. There can be no question of the identity of the class intended to be reached with those whose right of suffrage is involved in this case. Of the wisdom or justice of the measure this court is not empowered to judge; but it would be a strange and surprising result if the very class whom the convention purposed to exclude should be adjudged entitled to suffrage, while others native to the country, or thoroughly Americanized by long residence and familiarity with our institutions, and whom the convention desired to exempt as far as possible from the operation of the provision, should be disfranchised. I am therefore of the opinion that the meaning of the words themselves is clear, and there is no occasion to resort to external aids in their construction; and that, if the debates should be resorted to, it would further appear that the words, as interpreted, express the true intent of the convention and the people. I also concur in the opinion that, an answer to the remaining questions submitted not being necessary to a decision of these cases, they ought not at this time to be considered.

PENNSYLVANIA SUPREME COURT.

Wilson W. JAGGER, *Appt.*,

v.

PEOPLE'S STREET RAILWAY COMPANY *et al.*

(180 Pa. 436.)

Jumping from an electric car moving at the rate of from 4 to 5 miles an hour is contributory negligence as matter of law.

(March 22, 1897.)

APPeal by plaintiff from a judgment of the Court of Common Pleas for Lackawanna County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The case sufficiently appears in the opinion.

NOTE.—*Negligence in getting on or off a moving street car.*

The question of how far it is negligence to get onto or off from a moving street car will generally arise in actions against the street-car companies to recover damages for injuries received while making the attempt. A number of decisions have been rendered against the plaintiffs in such cases, not because they were guilty of contributory negligence, but because no negligence on the part of the carrier was shown, which was necessary to support a recovery.

Carrier must have been negligent.

There may be circumstances under which a person alights from a moving car and is injured when the question of contributory negligence cannot arise because there has been no negligence on the part of the street-car company which would render it liable. For instance, if the passenger signals for a stop and while the car is slowing down for that purpose, without waiting for it to come to a stop, he steps off, falls, and is injured, there has been no negligence on the part of the carrier which would render it liable, and the question of his contributory negligence cannot be considered. *Harmon v. Washington G. R. Co.* 6 Mackey, 64.

If there was no negligence on the part of the carrier there can be no recovery, although the act of the plaintiff may not have been negligent. *Hestonville Pass. R. Co. v. Connell*, 88 Pa. 520, 32 Am. Rep. 472; *Sandford v. Hestonville, M. & F. Pass. R. Co.* 186 Pa. 84; *Clutzbeher v. Union Pass. R. Co.* (Pa.) 1 Cent. Rep. 629; *Coller v. Frankford & S. R. Co.* 9 W. N. C. 477; *West Chicago Street R. Co. v. Binder*, 51 Ill. App. 420; *Dallas Consol. Traction R. Co. v. Randolph*, 8 Tex. Civ. App. 213.

In *Nichols v. Middlesex R. Co.* 106 Mass. 463, the injury occurred by the sudden starting of the car, and the case turned, not on the question of whether or not the attempt to get on the car while it was in motion was negligence, but upon the question whether or not those in charge of the car knew of the attempt so as to be chargeable with negligence in starting the car forward when they did.

Passenger takes the risk.

If a person undertakes to board or to alight from a moving car he takes the risk of injury which ordinarily attends such action.

In the absence of negligence on the part of the carrier the person who steps off the moving car will take the risk of injury. *White v. West End Street R. Co.* 166 Mass. 622.

So, a person attempts to get onto a moving street car at his own risk. *Picard v. Ridge Ave. Pass. R. Co.* 147 Pa. 196.

A passenger who voluntarily jumps onto or off from a moving car does so at his own peril and cannot recover for an injury thereby received on the ground that the construction of the car was defective, if the car would have been safe for ordinary use. *Werbowsky v. Fort Wayne & E. R. Co.* 86 Mich. 286.

88 L. R. A

A person who attempts to get upon a horse car while it is in motion, and who persists after he is told to wait until the car stops, cannot recover for an injury caused by running against a person on the step of the car. *Gallagher v. West End Street R. Co.* 156 Mass. 187.

If the attempt to get onto the moving car is the sole cause of the injury there can be no recovery. *Thrings v. Central Park R. Co.* 7 Robt. 616.

If an injury is caused by a person's attempting to get off a car in motion, and being thrown against an obstruction in the highway by the momentum of the car, he cannot recover. *Saffer v. Dry Dock, E. B. & B. R. Co.* 2 Blv. Sup. Ct. 343.

The mere refusal of the carrier to stop the car will not authorize the passenger to attempt to get off from it while it is in motion so as to charge the carrier with liability for the result of the attempt. *Ginnon v. New York & H. R. Co.* 3 Robt. 25.

A person forty-two years old and weighing 210 pounds who attempts to board a street car moving 6 miles an hour with a basket in one hand and a bottle in the other must bear the consequences of an injury which results from the failure of his attempt. *Baltimore Traction Co. v. State, King-sold*, 78 Md. 409.

But it has been held that a person attempting to get on an electric street-railway car while it is in motion assumes the risk of injury only from the ordinary movement of the car. *Schepers v. Union Depot R. Co.* 126 Mo. 665.

How far negligence a question of law.

Where the carrier has been negligent so that the passenger will have a right to recover in case he was himself free from negligence, the question how far his act was negligent immediately arises. And the further question then arises whether the judge or the jury shall give the answer. As a general rule it may be stated that the question is for the jury. But in some cases it may be determined as matter of law.

Thus, it is negligence to attempt to board a street car while it is in rapid motion. *Chicago City R. Co. v. Delcourt*, 38 Ill. App. 430.

So, it is gross negligence in a passenger to jump from a car which is going at the rate of 20 miles an hour, whether or not he knows that the speed is so high. *Masteron v. Macon City & S. Street R. Co.* 88 Ga. 436.

So, it is negligence for a person to board a cable car running at the rate of 10 miles an hour without signaling the car to stop on the side next the other track upon which another car is approaching at the same speed but a short distance away. *Brooks v. Mt. Auburn Cable Co.* 29 Ohio L. J. 50.

So, stepping from a cable car going at the rate of 11 miles an hour is gross negligence. *Denver Tramway Co. v. Owens*, 20 Colo. 107.

It is presumptively negligent to attempt to board a street car which is running at its ordinary rate of speed or at accelerated speed, or to attempt to get on the platform or between cars. *Sahlgard v. St. Paul City R. Co.* 48 Minn. 223.

If the rate of speed is so high and the place of

Mr. Charles L. Hawley, for appellant:

The defendants, having on many previous occasions slowed the speed of the car so uniformly that the plaintiff had many times alighted therefrom without injury, where un-

der an obligation to the plaintiff to do so on the occasion of the accident. The sudden putting on of the power was negligence in this case.

Linch v. Pittsburgh Traction Co. 153 Pa. 102.

dercent so obviously perilous that a person of ordinary prudence would not attempt to get off, the act is contributory negligence and will bar a recovery. So if the passenger steps from a rapidly moving train on to the other track without looking to see if a train is coming on it he will be guilty of such negligence as to bar his recovery for injury by a train on the other track. *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819.

Getting off a car in rapid motion is negligence. *Saffer v. Dry Dock, R. B. & B. R. Co.* 2 Silv. Sup. Ct. 343.

A person injured by attempting to board an electric car when it is running at full speed cannot recover from the carrier for the injury. *Woo Dan v. Seattle Electric R. & Power Co.* 5 Wash. 465.

In *Ricketts v. Birmingham Street R. Co.* 85 Ala. 606, the court says there can be no question that the plaintiff was guilty of negligence which proximately contributed to his injury, if while the car was in motion he attempted to step off with a keg of lead in his hands, and would not have been injured had he remained on the car. It is further said that stepping from a moving car without necessity when injury is caused thereby which would have been avoided by remaining on the car is negligence which will defeat a recovery. And that ruling was followed in *McDonald v. Montgomery Street R. Co.* 110 Ala. 161.

But in cases where the speed was not great, and no other circumstances making negligence plainly apparent were present, the court refuses to decide the question as one of law.

It would be impossible for a court to lay down the rule as to what particular speed would be sufficient notice to a passenger that if he attempted to get on or off he would be guilty of contributory negligence. *Cicero & P. Street R. Co. v. Meixner*, 160 Ill. 320, 81 L. R. A. 381.

It cannot be announced as a legal principle that a passenger upon a street railway car may not get off the car when it is in motion. *Brown v. Seattle City R. Co.* 16 Wash. 465.

The mere fact that a car is moving slowly when a man attempts to get onto it does not make him guilty of negligence as matter of law, but the question is for the jury. *Morrison v. Broadway & S. Ave. R. Co.* 130 N. Y. 166, Affirming 23 N. Y. S. R. 493.

It is not under all circumstances negligence, as matter of law, for a person to get upon a street car while it is in motion. In exceptional cases it may be so, but ordinarily it is a question for the jury. *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 23 Am. Rep. 171.

It is not negligence, as matter of law, to step on or off from a moving street car. *Omaha Street R. Co. v. Craig*, 39 Neb. 601.

In *McSwyny v. Broadway & S. Ave. R. Co.* 27 N. Y. S. R. 363, the court charged that if the plaintiff had attempted to enter the car while it was in motion she could not recover, and the appellate court held that this was as favorable to defendant as it could demand, because it was settled that it was not, as matter of law, always negligent to pass upon a street car while it is in motion.

In *Schacherl v. St. Paul City R. Co.* 42 Minn. 42, the court while recognizing the general rule says that the conditions attending the act might, from the undisputed testimony, appear so unfavorable as to warrant the court in holding, as matter of law, that recklessness and negligence were apparent in the attempt.

38 L. R. A.

In *Hagan v. Philadelphia & G. Ferry R. Co.* 15 Phila. 273, it was held that it was contributory negligence, as a matter of law, for a person to leap from a moving horse car. But there was nothing to show negligence on the part of the carrier in the case except the fact that the car was not stopped when the signal was given so that the ruling could have been placed on the ground that there was nothing to charge the carrier with negligence, and the ruling as to contributory negligence was unnecessary.

And in *Nichols v. Sixth Ave. R. Co.* 38 N. Y. 131, 97 Am. Dec. 780, it is said that a passenger has no right to jump from a street car while it is in motion.

It is not negligence in law to get on to a slowly moving street car. *Valentine v. Broadway & S. Ave. R. Co.* 14 Daly, 540; *Seitz v. Dry Dock, R. B. & B. R. Co.* 16 Daly, 234; *Eppendorf v. Brooklyn City & N. R. Co.* 51 How. Pr. 473.

How far act is due care as matter of law.

There are a few expressions in some of the cases which would tend to imply that a person getting off from or onto a moving car might be exercising due care as matter of law.

If when the passenger attempts to step off from the car it is barely moving, his attempt will not constitute such negligence as will prevent his recovery for an injury caused by a sudden jerk of the car which throws him to the ground. *Chicago City R. Co. v. Mumford*, 97 Ill. 560.

If a person has free use of his faculties and limbs, and has given proper notice of his desire to be taken up, and the car has slackened speed in the usual manner, it is not negligence for him to attempt to get on when it is slowly moving. *Conner v. Citizens Street R. Co.* 105 Ind. 63, 55 Am. Rep. 177.

It would be a hard rule to hold a passenger guilty of contributory negligence in attempting to board a street car moving so slowly that there would be no apparent danger whatever in the attempt—so slowly that a person of reasonable prudence in the exercise of ordinary care would not hesitate to make the effort. *Stager v. Ridge Ave. Pass. R. Co.* 119 Pa. 70.

If the intending passenger has a right to think from the condition of the car that it is about to stop he has a right to get on. *Walters v. Philadelphia Traction Co.* 161 Pa. 86.

How far the courts in the above cases intended to decide that the person was exercising due care as matter of law is somewhat uncertain. The question would probably involve the further question of proximate cause so that if the court decided it, the decision would simply be that the act of the passenger did not cause or contribute to the injury. So far as the act was one of negligence simply it would seem to be properly within the province of the jury.

As matter of law the act of getting on a moving street car is colorless. It is for the jury to say whether the passenger is guilty of negligence or was in the exercise of due care. *Gilbert v. Third Ave. R. Co.* 22 Jones & S. 270.

Although it may not be negligence as matter of law to leave a street car in motion, yet it is not evidence of due care. So, where a person receives injury by stepping from a moving car immediately in front of another car coming from an opposite direction no recovery can be had for the injury. *Creamer v. West End Street R. Co.* 156 Mass. 330, 18 L. R. A. 490.

A passenger's leaving a slowly moving street car is not *per se* negligence.

Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470; *Cincinnati, W. & M. R. Co. v. Pe-*

ters, 80 Ind. 168; *St. Louis, I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 58, 48 Am. Rep. 88; *Edgar v. Northern R. Co.*

If the passenger has proceeded so far toward getting off before the car stops that he cannot retrace his steps, he will not be negligent in getting off after the car has started. *Piper v. Minneapolis Street R. Co.* 52 Minn. 269.

To get on or off a moving street car is not necessarily negligence. *West Chicago Street R. Co. v. Dudzik*, 87 Ill. App. 681.

It is not negligence for a man twenty-six years old, in good health and unencumbered, to attempt to board a slowly moving car, but in case he does so and is injured by coming in contact with a truck standing in the street before he gets safely inside, he cannot recover for the injury for the reason that the injury is due to his own act as much as to the act of the carrier, and there is no ground for recovery. *Moylan v. Second Ave. R. Co.* 128 N. Y. 583, Reversing 85 N. Y. S. R. 644.

Question for jury.

In the majority of cases it will be a question for the jury to determine whether or not the injured person was negligent. *North Chicago Street R. Co. v. Wrixon*, 51 Ill. App. 307; *Sahlgard v. St. Paul City R. Co.* 48 Minn. 222; *Omaha Street R. Co. v. Martin*, 48 Neb. 66; *Munroe v. Third Ave. R. Co.* 18 Jones & S. 114; *Lynch v. Pittsburgh Traction Co.* 163 Pa. 102.

If the person is in physical vigor and free from any hindrance the question of negligence is one of fact for the jury. *Finkeldey v. Omnibus Cable Co.* 114 Cal. 28.

To board or depart from an electric street car in motion is not negligence *per se*, but the question is for the jury. *Cicero & P. Street R. Co. v. Melxner*, 160 Ill. 320, 51 L. R. A. 381.

The question of negligence in getting into a horse car while it is in motion is for the jury. *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, Affirming 40 Ill. App. 590, where it is said that the getting on the cars while they were in motion had nothing to do with the accident.

The court will not be authorized to take the case from the jury unless the act as proved by undisputed testimony is seen to be such that the common judgment of men might pronounce it to be negligence. *McDonough v. Metropolitan R. Co.* 187 Mass. 210.

Where a man sixty-eight years old and weighing nearly 200 pounds attempted to get on to a car going about 4 miles an hour, after signaling the driver to stop, and fell off and was injured, it was held a question for the jury whether or not he was negligent. *Briggs v. Union Street R. Co.* 143 Mass. 72.

If the car had motion when the passenger attempted to get off, the question of negligence will be for the jury unless the testimony uncontroversially shows that it was dangerous motion. *Lax v. Forty-Second & G. Street Ferry R. Co.* 14 Jones & S. 443.

If a person gets upon the wrong side of the car, and is brought into collision with a pole supporting the trolley wires which is located between the tracks, the question is for the jury whether or not he was negligent in making the attempt, under all the circumstances of the case, to get upon the car when it was moving slowly and he had no knowledge of the existence of the poles. *Kowalski v. Newark Pass. R. Co.* 15 N. J. L. J. 50.

In *Van de Venter v. Chicago City R. Co.* 26 Fed. Rep. 82, the court charged the jury that if the plaintiff's injury was caused by her own want of prudence or care in attempting to take the car while it was in motion she could not recover. 88 L. R. A.

Negligence dependent on circumstances.

Whether a person in boarding a moving street car is guilty of negligence must depend upon the circumstances of each particular case. And it cannot be said to be negligence *per se* unless the act be such that under the circumstances but one conclusion can be arrived at, that of negligence. *Citizens' Street R. Co. v. Spahr*, 7 Ind. App. 23.

The question of negligence or not depends upon the circumstances of each particular case, as, the speed of the car, the activity or infirmity of the person and the like, and is for the jury. *Ober v. Crescent City R. Co.* 44 La. Ann. 1059.

The act of attempting to board a street car in motion is not of itself negligence as matter of law, but whether such act is negligent must depend upon the particular circumstances upon which it is done. *Finkeldey v. Omnibus Cable Co.* 114 Cal. 28. The court says it is a matter of common observation that persons do every day get on and off from street cars while they are in motion under circumstances that would not, in the estimation of any reasonable man, be considered negligence.

Particular classes of cases.

If the passenger is at the time of his attempt to leave the car suffering from a wound in his leg which causes lameness or disability, the jury may infer a want of ordinary prudence from an attempt to leave the car under the circumstances. *Wyatt v. Citizens R. Co.* 63 Mo. 408.

Whether or not it is negligence to step off a moving car, encumbered with bundles, is a question of fact for the jury, depending upon the speed of the car and the circumstances under which the attempt is made. *Richmond v. Second Ave. R. Co.* 76 Hun. 238.

It is contributory negligence to attempt to board a car with one hand and arm encumbered. *Reddington v. Philadelphia Traction Co.* 132 Pa. 154.

It is not negligence *per se* for a person with an umbrella in one hand and a handkerchief in the other to attempt to board an electric street car while it is in the act of stopping to receive passengers. *White v. Atlanta Consol. Street R. Co.* 93 Ga. 494.

In *Kirchner v. Detroit City R. Co.* 81 Mich. 400, where the plaintiff recovered, the court charged the jury that if the plaintiff with a large package in his hands attempted to leave the car before it had stopped it would be an act of negligence which would prevent his recovery. But as the suit was brought for starting the car with a jerk and throwing the plaintiff before he had time to alight, the finding of the jury in his favor evidently left the question of contributory negligence out of the case.

Stepping off backwards.

It is negligence to step off backwards from a moving car unless the act is induced by the negligent conduct of the carrier. *Richmond v. Second Ave. R. Co.* 76 Hun. 238.

It is negligence as matter of law to step from a moving car with the face to the rear and retain a hold on the car in such a way that the forward motion of the car will naturally tend to pull the person off his feet. *Beattie v. Citizens' Pass. R. Co. (Pa.)* 1 Cent. Rep. 633.

A person who attempts to alight from a rapidly moving electric car with his back to the poles supporting the wires which he knows are there will be held to have been the cause of his own injury in case he comes in contact with one of the poles.

11 Ont. App. Rep. 453; *Pennsylvania R. Co. v. Kilgore*, 82 Pa. 292, 72 Am. Dec. 787; *Johnson v. Westchester & P. R. Co.* 70 Pa. 357; *Clow v. Pittsburgh Traction Co.* 158 Pa. 410; *Linch v. Pittsburgh Traction Co.* 158 Pa. 103.

while making his attempt. *State, Sharkey, v. Lake Roland Elev. R. Co.* 84 Md. 163.

Women.

In some cases it has been held to be negligence, as matter of law, for a woman to attempt to get on or off a moving train. But there is a difference of opinion upon this question.

A woman is guilty of contributory negligence in attempting to get off from a street car while it is in motion in violation of the rules of the company without anything being done by the employees of the company to cause her to take the step. *Calderwood v. North Birmingham Street R. Co.* 96 Ala. 313.

In *Wheaton v. North Beach & M. R. Co.* 36 Cal. 590, the court says that if the car had started before the plaintiff had commenced to descend she was negligent in not telling the conductor that she wished to get out and in not waiting until he had stopped the car before attempting to do so.

In *Central R. Co. v. Smith*, 74 Md. 212, it was assumed that it would be negligence for a woman to attempt to leave a car in motion. The court giving an instruction that plaintiff could not recover if there was any failure on her part to exercise ordinary care as by attempting to leave the car while in motion.

In *Olfemann v. Union Depot R. Co.* 126 Mo. 408, which was a suit by an elderly woman to recover for injuries received in falling from an electric car, the court says that the trial court might well have told the jury that if the plaintiff after getting on the car platform in a place of safety and after the train had started turned around and jumped off and thereby received the injury of which she complained then she could not recover.

But in other cases it has been held that the mere fact that a car is moving slightly when a lady attempts to get off will not prevent her recovery for an injury which was not caused by her attempt at that time. *Rathbone v. Union R. Co.* 13 R. I. 709.

It is not negligence as matter of law, regardless of the circumstances, for a woman to alight from a moving car. *Duncan v. Wyatt Park R. Co.* 48 Mo. App. 660.

It is not negligence as matter of law for a woman to attempt to alight from a moving car. *Conley v. Forty-Second Street, M. & St. N. Ave. R. Co.* 2 N. Y. Supp. 229.

Whether or not the act of a woman in stepping from a slowly moving street car is negligence is a question for the jury under all the circumstances of the case. *Fortune v. Missouri R. Co.* 10 Mo. App. 253.

Children.

In *Brennan v. Fair Haven & W. R. Co.* 45 Conn. 298, 29 Am. Rep. 679, it was held that a special duty devolved upon those in charge of the car to see that a ten-year-old boy obeyed the rule of the company not to attempt to get off the car while it was in motion.

In *Pittsburgh, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. 421, it was held that a child five years old could not be held to be guilty of negligence in attempting to get off from a street car while in motion, and that it was negligence on the part of the driver to permit it to do so.

But it was held that a boy eleven years old who without signifying his desire to get off goes to the front platform and steps off with his back toward the horses while the car is in motion cannot recover. 88 L. R. A.

Mr. Horace E. Hand, for appellee:
Acts of accommodation or indulgence do not make a usage.
Lawson, Usages & Customs, § 14, p. 87.
A usage of the servants of the corporation,

cover for his injury. *Purtell v. Ridge Ave. Pass. R. Co.* 3 Pa. Co. Ct. 373.

In *North Birmingham R. Co. v. Liddicoat*, 90 Ala. 545, where a boy was injured in attempting to board a dummy train, the court says: "It cannot be affirmed as a universal proposition of law that it is negligence *per se* for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances enter into the question; and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt."

A street-car company cannot be held liable for the death of a boy seventeen years old who jumped on the front platform of the car, seized the driver's whip and whips the mules, jumping off and on and urging the mules to go faster, until by a misstep he falls and is caught by the car wheel and killed. *Taylor v. South Covington & C. Street R. Co.* 14 Ky. L. Rep. 355.

It is a question for the jury whether or not it was negligence for a boy seventeen years old of sound mind to step from a street car in rapid motion. *Wyatt v. Citizens Street R. Co.* 55 Mo. 486.

Whether a boy fourteen years of age is guilty of negligence in attempting as a passenger to get upon a moving street car will depend upon his experience and intelligence, and the rate of speed at which the car is moving. *Sly v. Union Depot R. Co.* 134 Mo. 681.

The refusal of the conductor to stop the car will not justify a boy six years old in attempting to get off while the car is in motion. *Cram v. Metropolitan R. Co.* 112 Mass. 38.

It is negligence *per se* for a boy fifteen years old to attempt to board a moving horse car where the step by which he attempts to ascend is plainly defective. *Dietrich v. Baltimore & H. S. R. Co.* 59 Md. 847.

Whether it is negligence for a boy thirteen years old to get off from a street car before its motion had ceased is a question for the jury. *Crissey v. Hestonville, M. & F. Pass. R. Co.* 75 Pa. 83.

So, in case of a child ten years old. *Philadelphia City Pass. R. Co. v. Hassard*, 75 Pa. 367.

If the negligence of a boy in jumping from a moving car in front of one approaching from the opposite direction is the cause of his injury by the latter car, no recovery can be had for the injury. *Hogan v. Central Park, N. & E. River R. Co.* 124 Y. 847.

Electric or cable cars.

In *Corlin v. West End Street R. Co.* 184 Mass. 197, it was held that there was nothing to show that any different rule should be applied with respect to its being negligence to get upon a moving electric car than would be applied in case of horse cars.

The rule that the question is for the jury applies to both electric and horse cars. *Central Pass. R. Co. v. Rose*, 14 Ky. L. Rep. 304, Affirmed in 15 Ky. L. Rep. 209.

But in *JAGGER v. PEOPLE'S STREET R. Co.* the rule of steam cars seems to have been applied to electric cars, and cases involving railroad trains are cited to sustain the ruling.

not shown to have come to the knowledge of the governing officers of the corporation, does not bind it.

Lawson, Usages & Customs, § 21, p. 50; *Beebe v. Ayres*, 28 Barb. 278; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 439, 10 Am. Rep. 711.

A custom must be continued; there must be no interruption or temporary ceasing of the right.

Lawson, Usages & Customs, § 18, p. 86.

Plaintiff being a passenger in a street car

Front platform.

There is no rule of law that stepping upon the forward platform of a horse car is negligence. *McDonough v. Metropolitan R. Co.* 187 Mass. 210.

Under conductor's direction.

Whether or not it is negligence in a passenger to step off a moving train at the invitation of the conductor depends upon the further inquiry as to whether or not the train was going at such speed as to render the attempt obviously hazardous. *Highland Ave. & B. R. Co. v. Winn*, 98 Ala. 306.

If the act of jumping off is not the voluntary act of the person injured, but he is forced to do so by those in charge of the car, he will not be guilty of contributory negligence. *Baber v. Broadway & S. Ave. R. Co.* 10 Misc. 109.

If a boy is compelled to get off the car by the driver while it is in motion he cannot be held guilty of negligence. *Day v. Brooklyn City R. Co.* 12 Hun. 436.

If a boy ten years old jumps from a moving car because of the threats of the driver the question of his negligence is for the jury. *Hestonville, M. & F. Pass. R. Co. v. Gray*, 8 W. N. C. 421.

To avoid danger.

If the passenger is placed in a position of peril by the negligence of the carrier so that he is compelled to choose between the two evils of jumping from the moving car or being injured by the other peril, it will not be negligence for him to jump. *Twomley v. Central Park, N. & E. R. Co.* 69 N. Y. 153, 25 Am. Rep. 162.

The fact that a woman gets off a moving car upon its turning into the barns on refusal to stop to let her off, will not prevent her recovery for an injury caused thereby, if she had been subjected to insult upon being carried into the barns on a previous occasion, and thought that her only way to escape the same treatment again was to leave the car. *Ashton v. Detroit City R. Co.* 78 Mich. 587.

If the passenger is induced to jump off the car by an impending collision he will not be held guilty of negligence. *Heath v. Glens Falls, S. H. & Ft. R. Street R. Co.* 90 Hun. 560.

If it appears necessary to leave the car to avoid being injured by the running away of the horse it may not be negligence to do so if such action would be ordinary care on the part of careful persons of the class to which the injured person belongs under similar circumstances. *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 55 Am. Rep. 232.

If the passenger jumps from the car to avoid the consequences of an impending collision his act will not be considered negligent. *Washington & G. R. Co. v. Hickey*, 5 App. D. C. 436.

Negligence after knowing peril.

In *Woodard v. West Side R. Co.* 71 Wis. 625, it is said that even if the plaintiff was guilty of negligence in attempting to board a moving car he could yet recover if his injury might have been prevented by the exercise of due care on the part of the driver in stopping the car if he knew that

requested the conductor to stop the car at a particular point. His request not being immediately complied with he leaped from the car and was injured. That this was an act of contributory negligence does not appear to us to admit of doubt.

Hagan v. Philadelphia & G. Ferry Co. 15 Phila. 278; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 150, 62 Am. Dec. 823; *Booth, Street Railways*, § 837, p. 461.

A street-railway company is not liable for a

plaintiff had fallen and was being dragged by the car.

In *Halohan v. Washington & G. R. Co.* 8 Mackey, 814, where a person with one wooden leg was injured in an attempt to get on a moving car, the court assumes his negligence, and the case is made to turn upon the question whether or not the carrier was negligent in failing to take precautions to avoid injuring him after ascertaining that he was in peril.

Summary.

A person in getting onto or off from a street car cannot be reckless but must take proper care of himself.

The mere fact that the driver fails to entirely stop the car will not render the company liable for an injury to a passenger who attempts to get off, but it must also appear that the plaintiff used all reasonable care and diligence to avoid the consequences of the carrier's negligence. *West End & A. S. R. Co. v. Mozely*, 79 Ga. 463.

It is not any particular rate of speed by which the conduct of the passenger in entering or leaving a moving car is governed, but the rule is that of exercising ordinary care and caution under the circumstances surrounding him. *Mettlesadt v. Ninth Ave. R. Co.* 32 How. Pr. 423.

A person who attempts to board a moving trolley car at the front platform must exercise more care than though he attempts to enter from the rear platform, or after the car is stopped, and the mere fact that he is injured will not charge the carrier with liability unless negligence on its part is shown. *Paulson v. Brooklyn City R. Co.* 13 Misc. 387.

The question of proper care will depend on what the ordinarily prudent man would have done under the circumstances. If the speed of the car is great or the person is not in full control of his limbs by reason of injury or encumbrance the court may pronounce him guilty of negligence as matter of law. When the carrier is negligent and the car was moving at such rate when the attempt to board or alight was made that it would not be thought improper to do so by an ordinarily prudent man, the question of negligence is for the jury. And it seems that if the attempt of the injured person did not contribute to the accident the court may hold, as matter of law, that this act will not bar his recovery. A few cases in which the question has arisen have not passed upon it directly.

In *Basch v. North Chicago Street R. Co.* 40 Ill. App. 583, it seems to be assumed that plaintiff was negligent in attempting to board a moving car.

In *Outen v. North & South Street R. Co.* 94 Ga. 662, a nonsuit was held proper where at the moment plaintiff attempted to alight the driver struck the horses, which caused a jerk and the fall of the passenger; but it is not distinctly shown whether the ruling is placed upon the ground of want of negligence upon the part of the carrier because the driver did not know that the passenger was attempting to get off, or of negligence on the part of the passenger, a man seventy years old, in attempting to get off from the moving car. H. F. F.

personal injury sustained by a passenger while attempting to get off a car at a street crossing while it is in motion, and in violation of the company's rules, and without anything having been said or done by the company's employees to induce her to get off.

Ray, *Negligence of Imposed Duties*, 666; Booth, *Street Railways*, § 837, p. 460; *Nichols v. Middlesex R. Co.* 106 Mass. 468; *Reddington v. Philadelphia Traction Co.* 183 Pa. 156.

Per Curiam:

The plaintiff, in going from the business part of the city of Scranton to his home, used the defendant's line of cars. To shorten his walk, he was in the habit of leaping from the cars at a point where they did not ordinarily stop, from which point he walked to his home. It is alleged that the conductor and motorman knew of this habit, and, at a signal from him, would slacken the speed of the car down to about 4 or 5 miles per hour, in order to relieve him from the dangers incident to this mode of alighting as much as they reasonably could. The company was not bound by this practice of the plaintiff, or by the good nature of its

employees. It is the duty of the street-railway company to stop its cars at suitable places for passengers to leave them, and remain stationary long enough to enable them to do so safely (*Crissey v. Heatmville, M. & F. Pass. R. Co.* 75 Pa. 83); and it is contributory negligence to leap from a moving car (*Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 828). To justify such action, the motion must be so inconsiderable that a person of reasonable prudence, exercising ordinary care, would not hesitate about the safety of the attempt to alight. *Stager v. Ridge Ave. Pass. R. Co.* 119 Pa. 70. If the evidence leaves the question whether the car was fairly in motion in doubt, then the question of contributory negligence must go to the jury. If it does not, it is a question of law. This case, upon all the evidence, belongs to the latter class. Whether the attempt to leap from an electric car moving at the rate of from 4 to 5 miles per hour is contributory negligence in the passenger may properly be declared by the court, on a motion for a compulsory nonsuit, and it was properly declared in this case.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

FOSTER D. EDWARDS, *Appt.*,

WARREN LINOLINE & GASOLINE
WORKS, Limited,
and
WALWORTH MANUFACTURING COM-
PANY, Trustees.

(108 Mass. 564.)

1. A partnership association organized under the laws of Pennsylvania is regarded in Massachusetts as an association or partnership, and not as a corporation, for the purpose of bringing an action against it.
2. A statute providing that an association or partnership can be sued in its company name has no extraterritorial force or effect.

(June 15, 1897.)

APPEAL by plaintiff from an order of the Superior Court for Suffolk County dismissing an action which sought to collect a claim against the Warren Linoline & Gasoline Works, Limited, from assets in the possession of the Walworth Manufacturing Company.

Affirmed.

The facts are stated in the opinion.

NOTE.—As to the nature of limited partnership associations, see also *Jennings's Appeal* (Pa.) 2 L. R. A. 43, and note; *Tilge v. Brooks* (Pa.) 2 L. R. A. 798; *Imperial Refining Co. v. Wyman* (C. C. N. D. Ohio) 3 L. R. A. 503, and note; *Vauhorne v. Corcoran* (Pa.) 4 L. R. A. 886; *Abbott v. Hapgood* (Mass.) 5 L. R. A. 586; *Fifth Avenue Bank v. Colgate* (N. Y.) 8 L. R. A. 712, and note. See also *Rouse, H. & Co. v. De-* 88 L. R. A.

Mr. Robert B. Kendall, for appellant:

The appellant is in fact and in law a corporation, or at least a quasi corporation.

Brightly's *Purdon's Dig.* Pa. Stat. tit. *Joint-Stock Companies*; *Morawetz, Priv. Corp.* §§ 6, 18 and cases cited; *Beach, Priv. Corp.* §§ 7, 167, 168; 2 Am. & Eng. Enc. Law, p. 1054; *Oliver v. Liverpool & L. L. & F. Ins. Co.* 77 U. S. 100 Mass. 581; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, *Thomas v. Dakin*, 22 Wend. 9; *Waterbury v. Merchants' Union Exp. Co.* 50 Barb. 157; *Dinsmore v. Philadelphia & R. R. Co.* 11 Phila. 483; *Mala v. American Exp. Co.* 1 Flipp. 611.

The law of comity between the states requires that the rights, powers, privileges, and liabilities of these statutory joint-stock companies should be recognized by our courts, unless they conflict with some settled policy of the commonwealth or directly or unquestionably detrimental to the interests of our citizens.

Story, Confli. L. §§ 36, 87; *Morawetz, Priv. Corp.* § 962; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 588, 10 L. ed. 307.

The law of comity is the law of the land, unless expressly or impliedly repealed.

Morawetz, Priv. Corp. § 966; *Cowell v. Col-*

troit Cycle Co. post, 794; *Staver & A. Mfg. Co. v. Blake, post*, 798; *Carter v. Producers' Oil Co.* 39 L. R. A. 100.

As to so-called joint-stock companies, see also *People, Platt, v. Wemple* (N. Y.) 8 L. R. A. 808; *People, Winchester, v. Coleman* (N. Y.) 16 L. R. A. 186; and *Morris v. Metalline Land Co.* (Pa.) 27 L. R. A. 805.

orado Springs Co. 100 U. S. 59, 60, 25 L. ed. 549, 550; *American & F. Christian Union v. Yount*, 101 U. S. 356, 25 L. ed. 890.

A joint-stock company, if a mere voluntary association, and not organized under a local statute, is everywhere regarded as a mere partnership. If, however, the company has been organized under a local statute, it may be regarded as a quasi corporation.

2 Am. & Eng. Enc. Law, p. 1054.

Messrs. Lauriston L. Scaife and Bancroft G. Davis, for appellees:

The trustee's allegations of fact cannot be contradicted.

Crossman v. Crossman, 21 Pick. 25; *Nutter v. Framingham & L. R. Co.* 181 Mass. 231; *Fay v. Sears*, 111 Mass. 154.

The trustee's disclosures are to be construed liberally and not strictly.

Crossman v. Crossman, 21 Pick. 24.

Only such Pennsylvania statutes and decisions are before this court as are pleaded by the trustee or are disclosed by its answers to interrogatories.

Kline v. Baker, 99 Mass. 253; *Ely v. James*, 123 Mass. 36.

The Pennsylvania law brought before the court by the trustee shows conclusively that the so-called defendant is not a corporation in Pennsylvania, but is a partnership, the liability of the members of which is limited in the state of Pennsylvania.

Eliot v. Himrod, 109 Pa. 569; *Sheble v. Strong*, 128 Pa. 818.

The Massachusetts courts are bound by the construction given to the Pennsylvania statutes by the courts of Pennsylvania.

Elmendorf v. Taylor, 23 U. S. 10 Wheat. 152, 159, 6 L. ed. 289, 292; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 758.

Joint-stock companies, limited, organized under the Pennsylvania laws, are treated in Massachusetts as mere partnerships.

Taft v. Ward, 106 Mass. 518, 111 Mass. 518; *Bodwell v. Eastman*, 106 Mass. 526; *Gott v. Dinamore*, 111 Mass. 51; *Ricker v. American Loan & T. Co.* 140 Mass. 348; *McFadden v. Leeka*, 48 Ohio St. 518; *Imperial Ref. Co. v. Wyman*, 88 Fed. Rep. 574, 3 L. R. A. 503.

The Warren Linoline & Gasoline Works, Limited, being but a partnership in Pennsylvania and being treated in all respects as a partnership in Massachusetts, can sue and be sued in the Massachusetts courts as a partnership only—that is, in the names of the individuals composing it.

Bates, Partn. § 1059; *Seely v. Schenck*, 2 N. J. L. 71; *Lindley*, Partn. Wentworth's ed. *115; *Blackwell v. Reid*, 41 Miss. 102; *Crandall v. Denny*, 2 N. J. L. 128; *Lanford v. Patton*, 44 Ala. 584.

The matters set up in the trustee's answer are matters which a trustee may plead, and are grounds for the trustee's discharge.

Thayer v. Tyler, 10 Gray, 164; *Washburn v. New York & V. Min. Co.* 41 Vt. 50; *Belknap v. Gibbens*, 13 Met. 471. See also *Blake v. Jones*, 7 Mass. 28.

Lathrop, J., delivered the opinion of the court:

It is conceded by the plaintiff that as the jurisdiction of the court depends upon charg-

ing the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee. The question, then, is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the state of Pennsylvania, is a partnership or a corporation. The trustee's answers to interrogatories refer to Brightly's Purdon's Dig. 12th ed. 1086-1088, and to the cases of *Eliot v. Himrod*, 108 Pa. 569, and *Sheble v. Strong*, 128 Pa. 315, as containing the law relative to the statement in the answer that the principal defendant was a partnership, and not a corporation. From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but, if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed twenty years. Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds and mortgages. Land sold to the association or by it is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and, when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association." In *Eliot v. Himrod*, 108 Pa. 569, 580, it is said by Mr. Justice Trunkley, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member and participate in the subsequent business, unless by a vote of the majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." *Sheble v. Strong*, 128 Pa. 318, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one. At common law, a joint-stock company formed for business purposes is considered in this commonwealth merely as a partnership. *Tappan v. Bailey*, 4 Met. 529; *Tyrrell v. Washburn*, 6 Allen, 466. The same rule has been applied to joint-stock associations formed under the laws of the state of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. *Taft v. Ward*, 106 Mass. 518, 111 Mass. 518; *Bodwell v. Eastman*, 106 Mass. 526; *Gott v. Dinmore*, 111 Mass. 45, 51; *Boston & L. R. Co. v. Pearson*, 128 Mass. 445. See also *Frost v. Walker*, 60 Me. 468; *Dinmore v. Philadelphia & R. R. Co.* 11 Phila. 483. In *Taft v. Ward*, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman: "These statutes provide, in substance, that any association, consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer; that in such a suit a judgment may be rendered against the company; and until an execution is issued against the company, and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all copartnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. *Waterbury v. Merchants' Union Exp. Co.* 50 Barb. 157; *Robbins v. Wells*, 1 Robt. 666. So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the state of New York, for each state adopts its own forms of remedy. Story, Conf. L. §§ 556-558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere copartnership." There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. *Phillips v. Blutchford*, 187 Mass. 510. See also *Headley v. Middlesex County Comrs.* 105 Mass. 519; *Gleason v. McKay*, 134 Mass. 419. The case mostly relied on by the plaintiff is *Liverpool & L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029, which was taken to the Supreme Court of the United States on a writ of error from this court. See *Oliver v. Liverpool & L. & F. Ins. Co.* 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth, under Stat. 1862, chap. 224, § 11, to restrain the defendant from prosecuting its business, until the tax assessed upon it by § 2 of the statute had been paid. This section provided that "each fire, marine, and

fire and marine insurance company incorporated or associated under the laws of any government or state, other than one of the United States," should annually pay a certain tax. The defendant was an English company, formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed, and subsequent statutes, declared that it should not be deemed to be incorporated. The company was composed in part of British subjects, and in part of citizens of the state of New York. This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members." In the Supreme Court of the United States the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called "joint-stock companies," and that it could not sue or be sued in this country without legislative aid. This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the Supreme Court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the legislature has clearly recognized the distinction between the foreign corporations and associations; and that, where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus, Stat. 1882, chap. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here, upon whom process may be served, uses the language "every corporation, company, or association." Stat. 1857, chap. 214, in § 1, provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company,' as used herein, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance." The

language is the same in Stat. 1894, chap. 522, § 1. By Stat. 1888, chap. 429, § 11, "fraternal beneficiary corporations, associations, or societies," organized under the laws of another state, and then doing business here, were allowed to continue business without incorporating under the act. But by Stat. 1893, chap. 40, § 1, this was amended by striking out the words "associations or societies." Stat. 1884, chap. 830, requires "every corporation established under the laws of any other state or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served. Stat. 1888, chap. 321, allows "manufacturing corporations established under the laws of other states," which have complied with the provisions of Stat. 1884, chap. 830, to purchase and hold such real estate here as may be necessary for conducting their business. By Stat. 1893, chap. 311, "foreign corporations

engaged in the business of selling or negotiating bonds, mortgages, notes, or other choses in action" are made subject to the provisions of Stat. 1894, chap. 830. Stat. 1896, chap. 391, contains a provision relating to the personal liability, under certain circumstances, of "the officers and members or stockholders in any corporation established under the laws of any other state or other country." See also Stat. 1895, chap. 157. Many other instances of legislation might be given where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect. The trustee, therefore, was properly discharged.

In the opinion of a majority of the court, *the order discharging the trustee and dismissing the action must be affirmed.*

MICHIGAN SUPREME COURT.

ROUSE, HAZARD, & COMPANY

DETROIT CYCLE COMPANY, Limited,
et al., Plffs. in Err.

(.....Mich.....)

1. Subscriptions to the capital stock of a partnership association may be paid by the giving of a promissory note, if the note is immediately converted into money and the proceeds applied for the benefit of the corporation.
2. The jury must determine whether or not the giving of notes in payment of subscriptions to the capital stock of a corporation was in good faith.
3. A decree awarding a mandamus requiring a trial judge to take evidence and award an execution for unpaid subscriptions to capital stock of a corporation as required by statute in a proceeding to which the stockholders are not parties is not *res judicata* upon the question of the right to enforce payment of the subscriptions so as to prevent the stockholders after being made parties to the proceeding from showing that a receiver has been appointed who is entitled to collect all the assets of the corporation.
4. A proceeding under the statute for an execution for unpaid subscriptions to corporate stock cannot be maintained after the appointment of a receiver for the purpose of collecting the assets of the corporation.

(December 24, 1896.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in a proceeding brought to hold the individual defendants liable as partners for a debt of the association. *Reversed.*

NOTE.—As to execution against a shareholder in a limited partnership association, see *Rouse, H. & Co. v. Donovan* (Mich.) 27 L. R. A. 577, 88 L. R. A.

The facts are stated in the opinion.

Messrs. Atkinson & Atkinson and Malcolm McGregor for plaintiffs in error.

Mr. Jonathan Palmer, Jr., for plaintiff in error John T. Holmes:

A limited partnership association is organized as an artificial being distinct from its members, with an existence and individuality of its own. It exists only from recording the articles and is a creature of the legislature. It holds and conveys its property, sues and is sued as a distinct person. The members have no joint proprietary interests in the specific assets of the association, as have members of a limited partnership.

Bates, Limited Partnership, § 70, and cases cited.

Whether land or chattels, the member's interest is always personal estate (Acts 1885, p. 16, § 8 How. Anno. Stat. § 2368) for all purposes, both at law and in equity, and is identical in nature with the interest of a member of any corporation, and it is "stock."

People, Bank of the Commonwealth, v. Tor & A. Comrs. 28 N. Y. 192; *Bailey v. New York C. & H. R. Co.* 89 U. S. 22 Wall. 637, 23 L. ed. 849; *Burrall v. Bushwick R. Co.* 75 N. Y. 211; *Barday v. Culver*, 30 Hun. 1; *Re Klaus*, 67 Wis. 407; 1 Thomp. Corp. §§ 1070-1072; *Cook, Stock & Stockholders*, § 12.

A limited partnership association more closely resembles a corporation than it does a special or limited partnership. It is frequently compared to a corporation and has been held to be a corporation or quasi corporation. It is not a mere common-law partnership plus the attribute of limited liability.

Briar Hill Coal & I. Co. v. Atlas Works, 146

As to such associations in general, see *Edwards v. Warren Linoline & Gasoline Works* (Mass.) ante, 791, and other cases cited in footnotes.

Pa. 294; *Oak Ridge Coal Co. v. Rogers* 108 Pa. 147; *Billington v. Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170.

The Constitution of our own state provides that the term "corporations," shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships.

Mich. Const. art. 15, § 11; *Fargo v. Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Sandford v. New York Supers.* 15 How. Pr. 173; *Malta v. American Exp. Co.* 1 Flipp. 611; *Gregg v. Sanford*, 28 U. S. App. 813, 65 Fed. Rep. 151, 12 C. C. A. 525; *State, Tide-Water Pipe Co., v. Berry*, 52 N. J. L. 808; *Tide-Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

A limited-partnership association is clothed with every essential attribute of a corporation at common law, and scarcely differs therefrom except in name. Its powers comprise the substance of the general powers of corporations under the laws of Pennsylvania and also under the laws of New Jersey (which is the source of our own statute), and it is invested by the laws under which it came into being with the essential characteristics of a corporation, and is included under the constitutional provision.

Gregg v. Sanford, 28 U. S. App. 813, 65 Fed. Rep. 151, 12 C. C. A. 526; *Tide-Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684; *Billington v. Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. 147; *Briar Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 294; *Whitney v. Backus*, 149 Pa. 29; *State, Tide-Water Pipe Line Co., v. Berry*, 52 N. J. L. 808.

Express companies possessing all the rights, attributes, privileges, and immunities which usually belong to corporations may be treated by the courts of Ohio as corporations, although they are not designated as joint stock associations by the statute of the state in which they were organized.

State v. Adams Exp. Co. 2 Ohio N. P. 98; *People, Platt, v. Wemple*, 117 N. Y. 186, 6 L. R. A. 305.

Subscriptions to capital stock may be paid in promissory notes.

Goodrich v. Reynolds, 81 Ill. 490, 83 Am. Dec. 240; *Hardy v. Merriweather*, 14 Ind. 203; *Stoddard v. Shetucket Foundry Co.* 84 Conn. 542; *Ogdensburgh, C. & R. Co. v. Wooley*, 3 Abb. App. Dec. 893; *Mages v. Badger*, 30 Barb. 246; *Vermont C. R. Co. v. Claves*, 21 Vt. 30; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55; *Clark v. Farrington*, 11 Wis. 807; *Blunt v. Walker*, 11 Wis. 349, 78 Am. Dec. 709; *Cornell v. Eichens*, 11 Wis. 854; *Lyon v. Eoings*, 17 Wis. 62; *Andrews v. Hart*, 17 Wis. 298; *Western Bank v. Tallman*, 17 Wis. 581.

Where notes and mortgages have been given in payment for stock, the stock must be regarded as paid in, and the notes and mortgages given as for money loaned and invested by the company.

Union Cent. L. Ins. Co. v. Curtis, 85 Ohio St. 343.

A note given to a corporation in payment for stock is valid in the hands of a bona fide indorsee.

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Mages v. Badger, 30 Barb. 246; *Willmarth v. Crawford*, 10 Wend. 341.

Good faith within the meaning of the statute, is understood to be the opposite of fraud and bad faith.

McConnel v. Street, 17 Ill. 254; *Woodward v. Blanchard*, 16 Ill. 432; *Thornton v. Bledsoe*, 46 Ala. 73.

The receiver having been appointed and having qualified the assets or whatever property the association had, vested in the receiver, and the whole of the association's property, real, personal, claims, and accounts became under the control of the court.

Prescott v. Pfeiffer, 57 Mich. 21; *Tide-Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

Messrs. Bowen, Douglas, & Whiting for defendant in error.

Moore, J., delivered the opinion of the court:

Rouse, Hazard, & Co., the plaintiff in these proceedings, recovered a judgment upon November 8, 1894, for the sum of \$1,761, damages and costs, in the Wayne circuit court, against the Detroit Cycle Company, Limited. Upon this judgment, execution was issued, and returned wholly unsatisfied, after being in the hands of the sheriff of Wayne county for more than twenty days. The Detroit Cycle Company, Limited, is a limited partnership association, organized and existing under chapter 79 of Howell's Annotated Statutes; and the respondents herein, Edwin B. Robinson, John A. Matheson, and John T. Holmes, were the original subscribing members thereof, and remained so during the whole course of the proceedings in this case. After the execution was returned unsatisfied, plaintiff applied to the Wayne circuit court, under the provisions of § 2366, 1 How. Anno. Stat., to have ascertained the amount of the subscriptions, respectively, of the respondents to the capital of the Detroit Cycle Company, Limited, not paid up, and for an order that execution issue against said respondents for the amounts so ascertained. The respondents successfully resisted this application in the circuit court, and thereupon the plaintiff applied to this court for a writ of mandamus to require the circuit judge "to compel the Detroit Cycle Company, Limited, and the respondents, to produce the books of the company, especially its subscription list book, showing the names of the members of the association, and the amount of capital remaining to be paid upon their respective subscriptions, and also to receive such other evidence as might be offered by the plaintiff and the members of the association concerning the amount of capital remaining to be paid upon the subscription of the respective members of the association, and, after ascertaining the truth in regard thereto, to forthwith order execution to issue against the said members for the amount of their unpaid subscriptions, if any there should be." The writ was granted after argument in this court, and the case is reported as *Rouse, H. & Co. v. Donovan*, 104 Mich. 234, 27 L. R. A. 577. On the filing of the respondents' answers to the plaintiff's bill of complaint, an issue was framed, and or-

dered tried before a jury. The issue was: "In what amount, if any, was the said John T. Holmes, John A. Matheson, and Edwin B. Robinson, and any or each of them, indebted to the said Detroit Cycle Company, Limited, on account of any unpaid subscriptions to the capital of the said company?" This issue was tried before the Honorable Robert E. Frazer, circuit judge, with a jury, on April 16, 1895; and, under the charge of the court, the jury found that each of the respondents was indebted to the Detroit Cycle Company, Limited, on account of unpaid subscriptions to the capital stock of the said company, in the sum of \$1,833.33. Certain points of law were reserved by the court for argument after the verdict was rendered; and after an argument of these questions, in accordance with the statute (1 How. Anno. Stat. § 2366) and the mandate of this court, an execution was ordered on January 8, 1896, and issued against each of the respondents, for the amount of \$1,833.33, or so much thereof as might be necessary to satisfy plaintiff's judgment, with costs. This order, and the proceedings upon which the same was based, respondents are now endeavoring to review in this court by writ of error.

The Detroit Cycle Company, Limited, filed its articles in the office of the register of deeds for Wayne county, Michigan, as a limited partnership association, under the provisions of chapter 79 of 1 Howell's Annotated Statutes, on November 1, 1892. The respondents were the original members of said association, and subscribed for equal subscriptions, amounting to the sum of \$3,333.33 for each respondent. There was paid in by each member thereafter the sum of \$1,500, in cash; and there remained still unpaid by each of said members up to about the 6th day of October, 1893, the sum of \$1,833.33. On or about October 6, 1893, the association became financially embarrassed, owing the Gormully & Jeffery Manufacturing Company, of Chicago, between \$14,000 and \$16,000, and owing two local banks in Detroit about \$6,000. The debts to the banks were in the form of notes made by the Detroit Cycle Company, Limited, and indorsed by all three of the respondents individually, and were further collaterally secured by an assignment of bicycle contracts. An arrangement was made between the Gormully & Jeffery Manufacturing Company and the respondents, whereby the Gormully & Jeffery Manufacturing Company were given a chattel mortgage on all the property of the Detroit Cycle Company, Limited; and at the same time there were assigned to the Gormully & Jeffery Manufacturing Company all the bicycle contracts, including those held by the banks as collateral security. At the same time, and as a part of the same arrangement, each of the respondents gave to the Detroit Cycle Company, Limited, his note for \$1,833.33, given for the purpose, as each of the respondents testify, of paying up their subscriptions to the capital stock of the Detroit Cycle Company, Limited. These notes were immediately indorsed in the name of the Detroit Cycle Company, Limited, by the respondents, and turned over to the Gormully & Jeffery Manufacturing Company as a further security for the indebtedness of the Detroit Cycle Company, Limited, \$3 L. R. A.

to it. Thereupon the Gormully & Jeffery Manufacturing Company advanced enough money to take up the notes of the Detroit Cycle Company, Limited, in the two local banks in Detroit; and, these notes having been taken up, the collateral security for the same was turned over by the banks to the Gormully & Jeffery Manufacturing Company. These notes were all payable in one year from the date they bore, namely, October 6, 1893, with 6 per cent interest, and were never paid by the respondents, and were never protested, though they are still outstanding. Immediately after the chattel mortgage was given to Gormully & Jeffery Manufacturing Company, the latter sent a man to Detroit to take charge of the business of the Detroit Cycle Company, Limited; and the Gormully & Jeffery Manufacturing Company sent on new goods, and respondents claim they expect to pay them, and conducted the business. No amendments of the original articles of association, and no schedule, as provided for in 1 How. Anno. Stat. § 2365, or any other paper except the original articles of association, were ever filed in the office of the register of deeds for Wayne county, Michigan. It also appeared that in the secretary's records of the minutes of the stockholders' and directors' meetings of the association running from October 14, 1892, to January 11, 1894, no record anywhere appeared authorizing or making a call for the unpaid subscriptions of the capital stock of the association, or authorizing the receipt of the respective members' notes therefor, although under date of October 6, 1893, there is a record of a meeting of the directors, and the authorization by them of the execution and delivery of a chattel mortgage to the Gormully & Jeffery Manufacturing Company. The absence of any record of the receipt of the members' notes was explained by the secretary, from the fact that he did not enter the minutes of all the meetings in his record, although one of the three members testified that he did not hear of any resolution to this effect, but that it was only agreed to between the members.

The defendants requested the court to charge the jury as follows: "It appearing from the undisputed evidence in this proceeding that the respondents gave their promissory notes to the company for the amount of their unpaid subscriptions, which notes were accepted by the company in payment thereof, and which notes are now in the hands of third parties, and the respondents are liable thereon, the verdict must be for the respondents." "It appearing from the undisputed evidence in this suit that the respondents gave their promissory notes for the amount of their unpaid subscriptions to the company, which notes were taken by the company, and the amount thereof realized in cash, and applied upon existing indebtedness of the company, the making of said notes and realization of the money upon them constituted a payment of said unpaid subscriptions, and the verdict must be for the respondents." If the foregoing are refused: "(6) If the jury believes that the notes in question were given in payment of the unpaid subscriptions, and were accepted by the company as such, and by

them transferred to third parties, who now hold them, and the respondents are liable thereon, then the verdict must be for the respondents. (7) If the jury believe that the notes in question were given for the purpose of paying up the unpaid subscriptions, and the same were taken, and cash realized upon them, which cash was applied in satisfaction of existing indebtedness of the company, so that the company received full benefit thereof, the giving of the notes and the application of the proceeds thereof constituted payment of the subscriptions, and the verdict must be for the respondents." The trial judge declined to give these requests. He entertained the view that the statute authorizing the formation of these limited copartnership associations is a special enactment, permitting such organizations with limited liability as to stockholders, and that all the necessary and essential requirements of the statute must be complied with. He held that this had not been done, and that whether the notes had been given and received for the purpose of paying the balance due on subscriptions was not important, and directed a verdict against the defendants.

It is the claim of the plaintiff that the law as applied to limited partnerships is to be applied to associations like the defendant, and that subscriptions to the capital cannot be paid by giving notes. On the part of the defendants it is claimed that the law as applicable to corporations should be applied to these associations, and that if defendants gave their notes to pay for the capital subscribed by them, and these notes were received by the defendant association as payment, and the proceeds of the notes were received by the association and applied to the payment of its debts, this would constitute a good payment of the capital subscribed, and would release the members from further liability.

Nearly all the questions involved in this proceeding are involved in the case of *Staver & A. Mfg. Co. v. Blake* (decided at the present term of court). (Mich.) *post*, 798. It will not be necessary to refer to the opinion in that case further than to say that, so far as the question of whether the law of limited partnerships applies to the defendant association or the law of corporations, the answer is that the case must be controlled by the law applicable to corporations.

We have no doubt that subscriptions to capital stock to corporations may be paid by the giving of promissory notes, especially if the notes are at once converted into money, and the proceeds applied for the benefit of the corporation. *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Hardy v. Merriceather*, 14 Ind. 208; *Stoddard v. Shetucket Foundry Co.* 84 Conn. 542; *Mages v. Badger*, 30 Barb. 246; *Vermont C. R. Co. v. Clarys*, 21 Vt. 80; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55; *Clark v. Farrington*, 11 Wis. 807; *Blunt v. Walker*, 11 Wis. 849, 78 Am. Dec. 709; *Lyon v. Ewings*, 17 Wis. 63; *Andrews v. Hart*, 17 Wis. 806; *Western Bank v. Tallman*, 17 Wis. 580. It is the claim of the plaintiff that the notes were not given in good faith, and for the purpose of paying up the unpaid portion of the capital. We think the good faith of the transaction was a question for the jury, and

that they should have been instructed as requested by counsel for defendants in the sixth and seventh requests to charge.

The record discloses that upon the application of the plaintiff's attorneys, the circuit court, in chancery, had appointed a receiver for the defendant company, Joseph F. Noera, filing the creditor's bill. A judgment creditor's bill was also filed by William A. Hulbert *et al.* against the defendants. John A. Stanberry was appointed receiver in both cases, and claimed the assets of defendant company. Both chancery suits are still pending. The solicitors for the complainants, in their behalf, and in behalf of the receiver in both cases, in open court, waived all claim to any of the unpaid subscriptions to the capital stock of the defendant that were unpaid by Robinson, Matheson, and Holmes against the claims of the plaintiff. Objection was made to this offer, and the court replied that he had serious doubt of the power of the receiver to waive the claim, or of the court to grant the waiver, but expressed himself as being settled in relation to the other points in the case. Defendants also introduced in evidence an application for execution under the same statute as is invoked in this proceeding, against the same respondents, for the same unpaid subscriptions, upon a judgment recovered by the W. Bingham Company, plaintiffs, against the defendants, in the circuit court of the United States for the eastern district of Michigan. The defendants asked to have the following requests to charge given to the jury: "(1) A receiver of all the property and assets of the defendant company having been appointed prior to the judgment in this suit, and being now in office, the plaintiffs have no standing in this proceeding, and are not entitled to the order asked. (2) It appearing that, since judgment was rendered in this suit, a receiver has been appointed in another suit of all the property and assets of the defendant company, the plaintiffs have no standing in this suit, and are not entitled to the order asked. It appearing from the evidence in this case that an application similar to the one in the present case has been made against the respondents in the circuit court of the United States for the eastern district of Michigan, upon a judgment recovered against the Detroit Cycle Company, Limited, by the W. Bingham Company, the respondents are therefore liable to have execution issued against them in each case for the amount of their subscriptions remaining unpaid and to be subjected to a double liability not contemplated by the statute under which the defendant association is organized. This being so, the plaintiffs' remedy is in equity, where the rights of all parties can be protected, and not by an application for an execution, such as is now pending before the court." The court refused to give either of these requests. This is assigned as error. It is now urged by counsel for plaintiffs that defendants cannot avail themselves of any defense they may have to this action growing out of the appointment of receivers, for the reason that the receivers were appointed before these proceedings were begun, and before the mandamus case of *Rouse, H. & Co. v. Donoran*, 104 Mich. 284, 27 L. R. A. 677, was decided. It is their claim

that as the defense might then have been interposed, and was not, the matter must be treated as *res judicata*. An inspection of the *Case of Rouse, Hazard, & Co.* discloses that neither of the respondents, Holmes, Matheson, or Robinson were parties to that proceeding, or that they took any part in it, except to appear in the case before the circuit judge, and enter their protest against the circuit judge entertaining jurisdiction over them. There was nothing in the record to indicate that any receivers had been appointed, and we are not prepared to hold that the case is *res judicata*. The record as now made does disclose that, before this proceeding was brought, a receiver was appointed by the chancery side of the court; and he still holds his appointment. A receiver is an officer of the court. He is undoubtedly entitled to the assets of the defendant company if it has any. He is spoken of as the "hand of the court." High, Receivers, chap. 1. It would be a very anomalous position, indeed, if this proceeding can be maintained after a receiver has been appointed for the very purpose of collecting the assets of the defendant association to pay its creditors. Defendants' requests 1 and 2 should have been given. Judgment is reversed, and no new trial ordered.

Long, Ch. J., and Montgomery, J., did not sit. The other Justices concur.

STAVAR & ABBOTT MANUFACTURING COMPANY, *Pff. in Err.*,

v.

Katherine A. BLAKE *et al.*

(.....Mich.....)

1. Technical noncompliance with the statute in the formation of a partnership association, and failure to comply with the statutory requirements in its subsequent management, will not render subsequent stockholders who had no knowledge of the defects and had no intent to become partners liable as such, in the absence of a statutory provision making them so, for goods furnished by one who dealt with the concern as a limited association.
2. Omission in a single instance by the manager of a partnership association of the word "limited" in dealing with a correspondent will not render the members of the association liable as partners in the absence of anything to show that any indebtedness, damage, or liability arose in consequence of that act.

(December 24, 1896.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of defendants in an action brought to hold defendants individually liable for goods sold to a limited corporation of which they were members. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to the nature of limited partnership associations, see the preceding cases of *Edwards v. Warren Linoline & Gasoline Works*, ante, 791; and *Rouse, H. & Co. v. Detroit Cycle Co.* (Mich.) ante, 794, with footnote references thereto. 38 L. R. A.

Messrs. Bundy & Travis, with *Messrs. Wyllie & Clapperton*, for plaintiff in error: The joint-stock company is an association of persons for the purpose of business, having a capital stock divided into shares and governed by articles of association.

Cook, Stock & Stockholders, § 504; *Whipple v. Parker*, 29 Mich. 381.

It lies midway between a copartnership and a corporation. Like a copartnership it has no limited liability of its members for the debts of the company, and like a corporation it is not dissolved by a transfer of stock.

Cox v. Bodfish, 35 Me. 302.

The liability for indebtedness incurred for goods sold to a company of this character seeks out and attaches to the persons engaged in the enterprise, and that whether they intended to be individually liable or not.

Davidson v. Holden, 55 Conn. 112.

Exemption from individual liability is derived solely from statutory provisions.

The statutory privilege and immunity offered by the statute can only be secured by the strict fulfillment of the preliminary conditions.

The fund must be paid in money, and in the sole control of the general partner on the day of the special partnership is formed and before the certificate is filed.

Richardson v. Hogg, 88 Pa. 153; *Durent v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 156, 97 N. Y. 132; *Maginn v. Lawrence*, 18 Jones & S. 285; *Haggerty v. Foster*, 103 Mass. 17.

Payment in goods or property does not justify an affidavit of a cash payment.

Bement v. Philadelphia Impact Brick Mach. Co. 12 Phila. 494; *Van Ingen v. Whitman*, 63 N. Y. 518; *Argall v. Smith*, 3 Denio, 435.

The care taken by the statute to prevent parties from being misled by the use of the name, even of the special partner, or by his interference (§ 2343), illustrates the caution with which the common-law, personal liability is relieved.

Farnsworth v. Boardman, 181 Mass. 115; *Madison County Bank v. Gould*, 5 Hill, 309.

Blake subscribed for \$19,800 of the \$26,000 capital, of which it is certified that he has paid in \$12,800 in cash, but nothing is said of how or when the remaining \$7,000 is to be paid in. So, as to more than one third of the total capital, the written statement is defective on its face, and should be so ruled as a matter of law by the court.

Vanhorn v. Corcoran, 127 Pa. 255, 4 L. R. A. 386.

If parties seek to have all the advantage of a partnership, and yet limit their liability as to creditors, they must comply strictly with the act.

Maloney v. Bruce, 94 Pa. 249; *Eliot v. Himrod*, 108 Pa. 569; *Hill v. Stetler*, 127 Pa. 145; *Vanhorn v. Corcoran*, 127 Pa. 255, 4 L. R. A. 386; *Briar Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 290.

The defendants at common law are primarily liable as individuals. The privilege and immunity they claim are a sweeping abrogation of the common law, and the invariable rule applied to all such cases in a strict one.

The question is simply, Have they complied with the statute? If so, they are entitled to its benefit, otherwise not.

Davidson v. Holden, 55 Conn. 103; *Vanhorn v. Corcoran*, 127 Pa. 268, 4 L. R. A. 386; *Merchants & Mfrs. Bank v. Stone*, 38 Mich. 780; *People, Stewart, v. Young Men's Father Matthew & T. A. Benef. Soc. No. 1*, 41 Mich. 67.

A corporation cannot exist in this state, even *de facto*, in the absence of a law authorizing it.

Eaton v. Walker, 76 Mich. 579, 6 L. R. A. 102; *Taggart, Mason, v. Perkins*, 78 Mich. 303.

A partnership association under such a statute is not a corporation.

Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800; *People, Winchester, v. Coleman*, 188 N. Y. 279, 16 L. R. A. 188; *Gregg v. Sandford*, 28 U. S. App. 818, 65 Fed. Rep. 151, 12 C. C. A. 526.

The estoppel has never been based solely on the fact of recognition by the plaintiff, but there must also have been recognition by the state.

Eaton v. Walker, 76 Mich. 590, 6 L. R. A. 102; *Eliot v. Himrod*, 108 Pa. 580; *Hill v. Steller*, 127 Pa. 163.

Under the limited partnership acts it has uniformly been held that they must be strictly complied with in order to acquire their benefits.

Argall v. Smith, 8 Denio, 436; *Henkel v. Heyman*, 91 Ill. 101; *Re Merrill*, 13 Blatchf. 221; *Endlich*, Interpretation of Statutes, 486; *Sutherland*, Stat. Constr. § 458; *Bates, Limited Partn.* 56; *Holliday v. Union Bag & Paper Co.* 3 Colo. 342; *Vandike v. Roskam*, 67 Pa. 830; *Van Ingen v. Whitman*, 62 N. Y. 513.

The payment of his capital by the special partner must be in actual cash; neither property nor bonds, securities, debts, or promises will suffice, except in states permitting property contribution.

Bates, Limited Partn. 60; *Haggerty v. Foster*, 108 Mass. 17; *Benedict v. Van Allen*, 17 U. C. Q. B. 234; *Pierce v. Bryant*, 5 Allen, 91; *Richardson v. Hogg*, 88 Pa. 153; *Haviland v. Chace*, 39 Barb 288; *Re Allen*, 41 Minn. 480; *Andrews v. Schott*, 10 Pa. 55; *Gearing v. Carroll*, 151 Pa. 79; *Haslet v. Kent*, 160 Pa. 85.

These companies cannot be treated as corporations for the purpose of applying the doctrine of estoppel, in order to permit them to evade and ignore the statute with impunity.

Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800; *People, Winchester, v. Coleman*, 188 N. Y. 279, 16 L. R. A. 188; *Gregg v. Sandford*, 28 U. S. App. 818, 65 Fed. Rep. 151, 12 C. C. A. 526.

Our Constitution contains a clause inserted for the express purpose of preventing just what defendants contend happened here.

Thomas v. Collins, 58 Mich. 64; *Bissell v. Durfee*, 58 Mich. 239.

Mr. Vernon H. Smith, amicus curiæ, on behalf of plaintiff in error:

There is no provision in the act to exempt anyone from the liability of a partner, unless the statute has been substantially complied with.

Bates, Limited Partn. 27-29; *Van Ingen v. Whitman*, 62 N. Y. 513; *Henkel v. Heyman*, 91 Ill. 96.

There must be strict compliance with the statute else the partners are personally liable as general partners.

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Bates, Limited Partn. 30; *Parsons, Partn.* 532; *Richardson v. Hogg*, 88 Pa. 155; *Andrews v. Schott*, 10 Pa. 47; *Vandike v. Roskam*, 67 Pa. 830; *Eliot v. Himrod*, 108 Pa. 569; *Gearing v. Carroll*, 151 Pa. 79; *Haslet v. Kent*, 160 Pa. 85; *Maloney v. Bruce*, 94 Pa. 249; *Keystone Boot & Shoe Co. v. Schoellkopf*, 11 W. N. O. 182; *Pears v. Barnes (Pa.)* 1 Cent. Rep. 569; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436.

Substantial compliance is held to be necessary by some courts, and the paying in of the capital is a vital element.

Smith v. Argall, 6 Hill, 479; *Argall v. Smith*, 8 Denio, 435; *Bowen v. Argall*, 24 Wend. 501; *Madison County Bank v. Gould*, 5 Hill, 811; *Van Ingen v. Whitman*, 62 N. Y. 513; *Holliday v. Union Bag & Paper Co.* 8 Colo. 342; *Henkel v. Heyman*, 91 Ill. 96; *Pfirman v. Henkel*, 1 Ill. App. 145; *Bigelow v. Gregory*, 73 Ill. 197; *Haggerty v. Foster*, 108 Mass. 17; *Pierce v. Bryant*, 5 Allen, 91; *Locke v. Lewis*, 124 Mass. 19.

Such an association is a partnership with a limited liability, and not a corporation.

Bates, Limited Partn. 248; *Lennig v. Penn Morocco Co.* 16 W. N. C. 114.

The principles governing as to the personal liability of members are the same whether the organization is called a limited partnership or a partnership association, limited.

Hill v. Steller, 127 Pa. 145; *Guillou v. Peterson*, 89 Pa. 163; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436; *Lennig v. Penn Morocco Co.* 16 W. N. C. 114.

The party invoking the estoppel must have been misled, and so acted that it would be unjust to seek to undo what has been done.

Doyle v. Mianer, 42 Mich. 387; *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 487; 1 Thomp. Corp. §§ 1506, 1507; *Hill v. Beach*, 12 N. J. Eq. 81; *Eaton v. Walker*, 76 Mich. 579, 6 L. R. A. 102.

The doctrine applicable to *de facto* corporations does not apply, because it appears that the attempt to organize was not bona fide.

Beach, Priv. Corp. § 163; *Durant v. Adendorff*, 69 N. Y. 148, 25 Am. Rep. 158.

Messrs. Fitzgerald & Barry, amici curiæ, also on behalf of plaintiff in error:

These partnership associations are not in any sense corporations, and are not intended to be governed by the law relating to corporations.

Eaton v. Walker, 76 Mich. 579, 6 L. R. A. 102.

The original partners obtained no immunity from personal liability by their actions, and could not transmit any to their assignee, Mrs. Blake, and it is not pretended that any action was taken, tending to association, since her purchase.

Wherefore there is no immunity from the common-law liability, as general partners.

Rouse, H. & Co. v. Donoran, 104 Mich. 234, 27 L. R. A. 577; *Hite Natural Gas Co.'s Appeal*, 118 Pa. 436; *Hill v. Steller*, 127 Pa. 145; *Gearing v. Carroll*, 151 Pa. 79; *Maloney v. Bruce*, 94 Pa. 249; *Haslet v. Kent*, 160 Pa. 85.

It is no answer to a suit against partners who have not complied with the statute to say that plaintiff has dealt with the defendants as a partnership association limited, as it is impossible to deal with them in any ordinary

mercantile transaction in any different manner in the one capacity than in the other.

Sheble v. Strong, 128 Pa. 315.

Messrs. Charles B. Blair and Fletcher & Wanty, for defendants in error:

Assuming that irregularities are shown, and that the organization was not legally made; and also assuming that subsequent irregularities are shown in the way the company and its affairs were conducted,—the plaintiff cannot take advantage of them, nor hold the defendants liable personally as partners, whether the company be held to be a corporation or something else.

This result follows, not so much because it is against public policy (*Society Perun v. Cleveland*, 48 Ohio St. 492; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Pape v. Capitol Bank*, 20 Kan. 440, 27 Am. Rep. 189), to allow private persons in a collateral proceeding to question the existence or due organization of a corporation with which they have dealt (*Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 148; *Grand Rapids v. Grand Rapids Hydraulic Co.* 66 Mich. 606); or one of the partnership associations (*Briar Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 290); but rather because the plaintiff cannot "call in question the corporate existence of the company and charge against the individual members the precise obligation which was unequivocally accepted as a corporate one."

Merchants' & Mfrs. Bank v. Stone, 88 Mich. 779; *Gow v. Collin & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007; *American Mirror & Glass-Beveling Co. v. Bulkley*, 107 Mich. 447; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Rouse, H. & Co. v. Donovan*, 104 Mich. 284, 27 L. R. A. 577; *Stokes v. Findlay*, 4 McCrary, 214; *Haves v. Contra Costa Water Co.* ("Haves v. Oakland"), 104 U. S. 453, 26 L. ed. 829; *Kleckner v. Turk*, 45 Neb. 176; *Second Nat. Bank v. Hall*, 85 Ohio St. 166; *Snider's Sons' Co. v. Troy*, 91 Ala. 232, 11 L. R. A. 515; *Baker v. Backus*, 32 Ill. 100.

Neither creditor nor members can go back of the basis upon which they mutually agreed to deal.

Casey v. Galli, 94 U. S. 678, 24 L. ed. 168; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Kleckner v. Turk*, 45 Neb. 176; *Lafin & R. Powder Co. v. Sinnheimer*, 48 Md. 320, 24 Am. Rep. 522; *Humphreys v. Mooney*, 5 Colo. 288; *Planters' & Mfrs. Bank v. Padgett*, 69 Ga. 159; *American Salt Co. v. Heidenheimer*, 80 Tex. 844; *Stout v. Zulick*, 48 N. J. L. 599; *Fay v. Noble*, 7 Cush. 188; *First Nat. Bank v. Almy*, 117 Mass. 476; *Whitney v. Wyman*, 101 U. S. 896, 25 L. ed. 1052; *Briar Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 290; *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Snider's Sons' Co. v. Troy*, 91 Ala. 232, 11 L. R. A. 515; 4 Thomp. Corp. §§ 5254, 5255, 5274, 5275.

Defendants are entirely innocent and occupy the position of bona fide purchasers for value, and "had no better opportunities of knowing the mode and manner of the organization of the corporation, or the worth of the leasehold interest, than any creditor had before he became a creditor."

Young v. Erie Iron Co. 65 Mich. 125.

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There is no authority for holding these innocent defendants liable, and there is no reason to support such a proposition.

American Mirror & Glass-Beveling Co. v. Bulkley, 107 Mich. 447; *Young v. Erie Iron Co.* 65 Mich. 111; *American Salt Co. v. Heidenheimer*, 80 Tex. 845; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Cory v. Lee*, 93 Ala. 468; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *Stokes v. Findlay*, 4 McCrary, 218.

Partnership associations are corporations.

Thomas v. Dakin, 22 Wend. 9; *People, Bank of Watertown, v. Watertown Assessors*, 1 Hill, 620; *Sandford v. New York Supers*, 15 How. Pr. 172; *Fargo v. Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Green v. Graves*, 1 Dougl. (Mich.) 354; *Brooks v. Hill*, 1 Mich. 124; *De Bow v. People*, 1 Denio, 15; *Niagara County Supers. v. People, McMaster*, 7 Hill, 512; *Gifford v. Livingston*, 2 Denio, 395; *People, Winchester, v. Coleman*, 24 N. Y. S. R. 970, 183 N. Y. 284, 16 L. R. A. 183; *Denton v. Jackson*, 3 Johns. Ch. 320; *Waterbury v. Merchants' Union Exp. Co.* 50 Barb. 157; *Liverpool & I. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Edgeworth v. Wood*, 58 N. J. L. 463; 1 Thomp. Corp. §§ 2-6.

Our Constitution is express upon the subject.

Art. 15, § 11; *Sandford v. New York Supers*, 15 How. Pr. 172; *Fargo v. Louisville, N. A. & C. R. Co.* 6 Fed. Rep. 787; *Malts v. American Exp. Co.* 1 Filipp. 611; *Gregg v. Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 525; *State, Tide-Water Pipe Line Co., v. Berry*, 52 N. J. L. 308; *Tide Water Pipe Co. v. State Bd. of Assessors*, 57 N. J. L. 516, 27 L. R. A. 684.

These associations are in form joint-stock companies.

Rouse, H. & Co. v. Donovan, 104 Mich. 284, 27 L. R. A. 577; *Globe Refining Co.'s Estate*, 151 Pa. 558; *Whitney v. Backus*, 149 Pa. 29.

Such an association has "powers" and privileges of corporations not enjoyed by individuals or partnerships.

Tide Water Pipe Co. v. State Bd. of Assessors, 57 N. J. L. 516, 27 L. R. A. 684; *Gregg v. Sandford*, 28 U. S. App. 313, 65 Fed. Rep. 151, 12 C. C. A. 525; *Hillington v. Gautier Steel Co.* (Pa.) 8 Cent. Rep. 170; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. 147; *Briar Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 294; *Whitney v. Backus*, 149 Pa. 29; *State, Tide-Water Pipe Line Co., v. Berry*, 52 N. J. L. 308.

The associates can do business as a distinct person and without any individual liability of the associates. That is the most distinctive attribute of corporations.

Terry v. Little, 101 U. S. 216, 25 L. ed. 864; *United States v. Stanford*, 161 U. S. 412, 40 L. ed. 751; *Thomas v. Dakin*, 22 Wend. 95; *Chase v. Lord*, 77 N. Y. 25; *Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52; *Gray v. Coffin*, 9 Cush. 199; *James v. Atlantic Delaine Co.* 11 Nat. Bankr. Reg. 393.

No status enabling associates to do this is known to the law except that of corporations.

People, Winchester, v. Coleman, 183 N. Y. 279, 16 L. R. A. 183.

The property of the association is not only held in its own name, but the general law of

descent and distribution does not apply, and the rules of succession are different from those applying to individuals and partnerships.

Thompson v. Waters, 25 Mich. 245, 12 Am. Rep. 243

This is alone held to be sufficient to create a corporation by implication, since land cannot be so held by individuals, singly or collectively.

Dunn v. University of Oregon, 9 Or. 857; *Mahony v. Bank of State*, 4 Ark. 620.

These associations are joint-stock companies. *Rouse, H. & Co. v. Donnan*, 104 Mich. 234, 26 L. R. A. 577, and cases *supra*.

So are any of our ordinary business and commercial corporations. Both are incorporated joint-stock companies, and the terms "corporation" and "incorporated joint-stock company" are convertible—they mean the same thing.

Lyon v. Denison, 80 Mich. 860; *Atty. Gen. v. Mercantile Marine Ins. Co.* 121 Mass. 524; *Liverpool & L. L. & F. Ins. Co. v. Olizer*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Blanchard v. Kaul*, 44 Cal. 440; *Habicht v. Pemberton*, 4 Sandf. 857; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *First Nat. Bank v. Goff*, 81 Wis. 77.

Express penalties exclude inference of others.

First Nat. Bank v. Almy, 117 Mass. 476; *Buck v. Alley*, 145 N. Y. 483; *Bates*, Limited Part. §§ 85, 87; *Durant v. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 158; *Pierce v. Bryant*, 5 Allen, 91; *Lancaster v. Choate*, 5 Allen, 530; *Haggerty v. Foster*, 103 Mass. 19.

The radical difference between a limited partnership and a partnership association is manifest.

People, Bank of the Commonwealth, v. Taxes & A. Comrs. 23 N. Y. 192; *Burrall v. Bushwick R. Co.* 75 N. Y. 211; *Barclay v. Culver*, 80 Hun, 1; *Re Klaus*, 67 Wis. 407; 1 Thomp. Corp. §§ 1070-1072; *Cook, Stock & Stockholders*, § 12.

Courts cannot attach limitations or provisions to an act because in other similar acts they have been incorporated.

State v. Sparrow, 89 Mich. 269; *Keeler v. Dawson*, 73 Mich. 601; *Bonnell v. Griswold*, 80 N. Y. 128.

Where an act prescribes penalties for failure to observe certain terms it is conclusively presumed that the intent was to exclude other penalties.

Bohn v. Brown, 88 Mich. 257; *Fritts v. Palmer*, 132 U. S. 289, 33 L. ed. 319; *United States v. Stanford*, 161 U. S. 412, 40 L. ed. 751; *Fay v. Noble*, 7 Cush. 183; *Humphreys v. Mooney*, 5 Colo. 282; *First Nat. Bank v. Almy*, 117 Mass. 476; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1052; *James v. Atlantic Delaine Co.* 11 Nat. Bankr. Reg. 890; *Fourth Nat. Bank v. Franchlyn*, 120 U. S. 747, 30 L. ed. 825; *Morley v. Thayer*, 8 Fed. Rep. 737.

When the statute is express that before organization the capital shall be paid in cash, this condition precedent is satisfied by a payment in good faith and at a fair value in property or services of the kind necessary in the company's business where such payment is accepted in good faith as the equivalent of money.

Liebknecht v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; *State, Atty. Gen., v. Wood*, 13 Mo. App. 139; 88 L. R. A.

Brant v. Ehlen, 59 Md. 1; *Coates's Case*, L. R. 17 Eq. 169; *Sprago's Case*, L. R. 8 Ch. 407; *Beach v. Smith*, 80 N. Y. 116; *Coit v. North Carolina Gold Amalgamating Min. Co.* 119 U. S. 343, 30 L. ed. 420; *Young v. Erie Iron Co.* 65 Mich. 111; *American Tube & I. Co. v. Baden Gas Co.* 165 Pa. 489.

The articles being fair on their face, the existence of the association cannot be questioned collaterally.

Palmer v. Lawrence, 8 Sandf. 161; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Laflin & R. Powder Co. v. Sinsheimer*, 46 Md. 815, 24 Am. Rep. 522; *McFarlan v. Triton Ins. Co.* 4 Denio, 392; *State, Atty. Gen., v. Wood*, 13 Mo. App. 139; *Stout v. Zulick*, 48 N. J. L. 601; *Atty. Gen., Pettee v. Stevens*, 1 N. J. Eq. 878, 22 Am. Dec. 526.

Failure to hold annual meetings to elect officers yearly, the appointment as manager of persons, not members, failure to keep a subscription list,—none of these things can be visited with the highly penal result of holding defendants liable as partners.

Atlas Nat. Bank v. F. B. Gardner Co. 8 Biss. 587; *Cahill v. Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 124; *Johns v. People*, 25 Mich. 499; *Druse v. Wheeler*, 22 Mich. 444; *Wright v. Lee*, 2 S. D. 596.

If a creditor is made aware by direct notice, or by such facts as are the equivalent of notice, that by the actual contract between the parties, some one, or all, of the members of the firm or company have stipulated for an exemption from liability for its debts or some of them, then a creditor dealing with the firm or association is bound by that restriction as to liability, and he cannot hold such member or members to any personal liability.

Edgerly v. Gardner, 9 Neb. 180; *Jordan v. Wilkins*, 3 Wash. C. C. 110; *Bailey v. Clark*, 6 Pick. 372; *Burrill v. Dickson*, 8 Cal. 118; *Coleman v. Bellhouse*, 9 U. C. C. P. 42; *Hallitt v. Dowdall*, 18 Q. B. 1; *Robinson v. Bidwell*, 22 Cal. 379; *Dow v. Sayward*, 12 N. H. 275; *Kerridge v. Hesse*, 8 Car. & P. 200; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 28, 53 Am. Dec. 742; *Re European Assur. Soc. L. R. 1 Ch. Div. 307*; *Pollock v. Williams*, 42 Miss. 92; *Snufley v. Howard*, 7 Dana, 368; *Ensign v. Woods*, 1 Johns. Cas. 171.

Mr. Otto Kirchner, amicus curia, on behalf of defendants in error:

The act, by its terms, negatives any personal liability of the associates directly upon the contract.

Eaton v. Walker, 76 Mich. 585, 6 L. R. A. 102.

Members of a *de facto* partnership association, limited, are, by the 2d section of the act, exempted from liability for debts of the association beyond the amount of their subscription to the capital stock remaining unpaid.

Swartwout v. Michigan Air Line R. Co. 24 Mich. 889.

The act, in its relation to other acts, *in pari materia*, negatives any personal liability of the associates upon the contract.

Individual immunity from liability for the debts of the concern extends to the members or shareholders in a mere *de facto* corporation.

People, Hughes, v. May, 3 Mich. 598; *Galpin v. Abbott*, 6 Mich. 17; *People v. McKinney*,

10 Mich. 54; *Shannon v. People*, 5 Mich. 86; *People, Houghton, v. State Land Office Comr.* 28 Mich. 270; *Starkweather v. Martin*, 28 Mich. 471; *Reithmiller v. People*, 44 Mich. 280; *Simpkins v. Ward*, 45 Mich. 559; *Turnbull v. Prentiss Lumber Co.* 53 Mich. 387; *Merchants' & Mfrs. Bank v. Stone*, 88 Mich. 779; *American Mirror & Glass Beveling Co. v. Bulkley*, 107 Mich. 447; *Gow v. Collings & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007.

All persons contracting with the association as such are estopped from disputing its existence, in any matter arising out of the contract. *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 389; *Johns v. People*, 25 Mich. 499; *Monroe v. Fort Wayne, J. & S. R. Co.* 28 Mich. 272; *Merchants' & Mfrs. Bank v. Stone*, 88 Mich. 799; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 485; *Wilcox v. Toledo & A. A. R. Co.* 43 Mich. 590; *Stowell v. Stowell*, 45 Mich. 366; *Pontiac, O. & P. A. R. Co. v. King*, 68 Mich. 114; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 563; *Eaton v. Walker*, 76 Mich. 579, 6 L. R. A. 102; *American Mirror & Glass Beveling Co. v. Bulkley*, 107 Mich. 447; *Gow v. Collins & P. Lumber Co.* (Mich.) 2 Det. L. N. 1007; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238, 7 Am. Dec. 459; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Eaton v. Aspinwall*, 19 N. Y. 119; *Worcester Medical Inst. v. Harding*, 11 Cush. 285; *Dooley v. Wolcott*, 4 Allen, 406; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Congregational Soc. v. Perry*, 6 N. H. 164, 25 Am. Dec. 455; *Newburg Petroleum Co. v. Wear*, 27 Ohio St. 343; *Smith v. Sheeley*, 79 U. S. 12 Wall. 858, 20 L. ed. 430; *Frost v. Freeburg Coal Co.* 65 U. S. 24 How. 278, 16 L. ed. 637; *First Nat. Bank v. Almy*, 117 Mass. 476; *Fay v. Noble*, 7 Cush. 188; *Hawes v. Anglo-Saxon Petroleum Co.* 101 Mass. 385.

Grant, J., delivered the opinion of the court:

The defendants are the members and owners of the stock of the Grand Rapids Storage & Transfer Company, Limited, an association organized May 13, 1890, under chapter 79, How. Anno. Stat. The plaintiff is a manufacturing corporation of Chicago, Illinois. It sues for merchandise alleged to have been sold and delivered to the defendants. The declaration is upon the common counts. The bill of particulars is for merchandise sold, for which notes were given, "executed by the name of Grand Rapids Storage & Transfer Company, Limited," dated January, May, and October, 1895. No claim is made that these defendants made individual promises, upon the faith of which these goods were sold and delivered, or that they had ever expressly formed a partnership, or that they had ever held themselves out to plaintiff as copartners. The sole basis for the right of recovery against them is the failure of the original organizers to comply with the statute in organizing, and noncompliance with the statute in carrying on the business after it was organized. These defects are stated by the learned counsel to be as follows: (1) The articles did not state when and how \$7,000 were to be paid. (2) They falsely stated that \$13,000 in cash had been paid in, when, as a mat-

ter of fact, property instead of money had been paid in, without any schedule containing the names of the parties contributing, with a description and valuation of the property contributed. (3) No yearly or other meetings of the members of the association were held for five years. (4) No managers of the association were elected for upward of five years. (5) No subscription book was kept, as required by the statute. (6) The statute was not observed in the matter of contracting debts. (7) The statute was not observed in using the word "Limited" in connection with the associate name. The defendants contend (1) that the company was properly organized; (2) that the plaintiff was estopped to deny that the association was legally organized, and to assert partnership relations, because it dealt exclusively with the association, and not with its members as a partnership; (3) that partnership associations limited are corporations; (4) that the express penalties imposed by the statute for its violation exclude all others; (5) that these defendants are subsequent stockholders, are innocent purchasers, and therefore not liable for irregularities in the organization or its management.

1. The Original Organization. There is no evidence of any dishonesty or bad faith in the formation of this association. It was organized under the advice of eminent counsel, who drew the articles. On March 29, 1890, eight citizens of Grand Rapids signed an agreement to form an association to be known as the Grand Rapids Storage & Transfer Company, Limited. This agreement specified the amount each was to contribute, \$12,800 were thus contributed, and, when the articles were formed, this was so stated therein. This money was invested in the purchase of property and the erection of a building for the business of the association. The capital stock was fixed at \$20,000. \$7,200 remained unpaid, and the articles did not specify when or how it should be paid. Technically, the \$12,800 of capital was not paid in cash at the time of the execution of the articles. It was, however, paid in shortly before, and for the purpose of forming the association, and had been expended in the purchase of property for it, and to use in its business.

Subsequent Management. It is true that meetings were not held, and managers elected, and debts incurred, in strict compliance with the statute. The business was conducted in the name of the association, and without any fraudulent intent or acts.

2. The Provisions of the Law. This act was passed in 1897, and is entitled "An Act Authorizing the Formation of Partnership Associations, in Which the Capital Subscribed Shall Alone Be Responsible for the Debts of the Association, Except under Certain Circumstances." Section 1 declares that "the capital shall alone be liable for the debts of such association. . . . Contributions to the capital stock may be made in real or personal estate, at a valuation to be approved by all the members subscribing to the capital of such associations." It also requires a schedule containing the names of such contributors, and the description and valuation of the property so contributed. Section 2 provides that the mem-

bers shall not be liable on any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, otherwise than is provided by the act. This section further provides for proceedings in such cases, and makes the members liable for labor debts. It limits the liabilities of stockholders to the amount of their unpaid subscriptions, and requires a subscription list to be kept, which shall be open to inspection by creditors and members at all reasonable times. Section 6 prohibits division of profits to diminish or impair the capital of the association, and makes anyone consenting to such a division liable to any persons interested or injured thereby, "to the amount of such division or impairment." Section 3 provides that "the omission of the word 'Limited' in the use of the name of the partnership association shall render each and every member of such partnership liable for any indebtedness, damage, or liability arising therefrom."

3. Plaintiff's action is based upon contract, not upon tort. It insists that the letter of the law, in the formation and conduct of the partnership association limited, has not been complied with, and therefore the law makes the defendants either partners or members of a joint-stock company at the common law, and therefore individually liable. Neither of these defendants was interested in this association at its organization. The husband of Mrs. Blake was one of the principal stockholders. She advanced to him the money which he originally paid in, and also the money with which he purchased, soon after the organization, most of the other stock. The stock was assigned to her as security. Subsequently, she discharged the liability of her husband, and took the stock, and now owns all but \$200 worth, owned by the defendants Aldrich and Pantland. None of these were aware of any irregularity in the original organization or in its subsequent management. Plaintiff had for several years dealt with this association as such. Its correspondence was carried on with it. Its contracts were made with it. It had no belief that it was making any contract with these defendants, or that they were individually liable, for the correspondence and course of business refute any such conclusion. The very name of the association implied a warning to plaintiff that it was not dealing with the members or stockholders of this association in their individual capacity, but in their associate capacity, with their liability limited. It is presumed to know the law, and a reading of the statute would have shown it that the members of this association could only be held liable for the amount of stock subscribed. It therefore dealt with this association with full knowledge of the extent of the liability of its members. The liability fixed by statute is still open to it. If the managers or members of the association committed a fraud by which the plaintiff or any other creditor suffered damage, the law provides a remedy in tort, but not in contract. The law does not make contracts for parties. The law takes the contracts which have been made, and interprets them. The law does not permit A to deal and make contracts with B in one capacity, and then hold him liable in another. A partnership can only be held to

exist *inter se* when the parties have so agreed. When no such partnership in fact exists, but a party has held himself out as such to third persons, who have dealt with him upon the faith of that relation, the law estops him to assert the true relation in order to avoid liability. Under no other circumstances does the law hold one liable as a partner who is not in fact a partner. This court said, speaking through Justice Cooley in *Beecher v. Bush*, 45 Mich. 193, 40 Am. Rep. 455: "If parties intend no partnership the courts should give effect to their intent, unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts, and upon special equities." See also *Webb v. Johnson*, 95 Mich. 330. We cite no other authorities, as the rule is elementary.

These defendants have never agreed to be partners, and have never held themselves out to plaintiff or to the world as such. By the purchase of stock, they became members of a body, organized under a law, which made its capital and assets alone liable for its debts. This is the legal entity—and it is immaterial what name you give it—with which plaintiff dealt, made contracts, and to which it gave credit. The statute contains not a sentence from which any individual or partnership liability can be inferred. Upon what principle of common sense, justice, or equity can it now be held that plaintiff, having trusted this entity, can recover its entire debt from one with whom it never contracted, and who never promised to pay? It is unnecessary to determine whether these associations are corporations under our Constitution, which provides that the term "corporations" "shall be construed to include all associations, and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." Article 15, § 11. It is the established rule that those dealing with corporations are estopped to deny the lawful existence thereof, and cannot, therefore, hold the stockholders individually liable, unless such liability is imposed by the statute. This rule is based upon two grounds: (1) That it is against public policy to permit the existence of these corporations to be attacked collaterally in suits between them and others. It is reserved for the state alone to question their legal existence through its law department. (2) Because parties have dealt with it as a corporation, and not upon the faith of the individual liability of its stockholders. We see no reason why the doctrine of estoppel should not be applied in the one case as well as in the other. There is no difference in principle between the two. Each is a legal entity, whose sole warrant for existence is found in, and whose powers and liabilities are fixed by, statute. The doctrine of estoppel in this case need not, however, be based upon the determination of the question as to whether the Grand Rapids Storage & Transfer Company, Limited, was a corporation. If these defendants, in the absence of any statute, had associated themselves together upon the same terms as those provided by this statute, had limited their liability in the same manner and for the same amount, had furnished plaintiff with a copy of that agreement, and it had sold them goods,

the law would not permit him to recover against them, either as individuals or as partners. It had dealt with them and trusted them upon the strength of their limited liability. It had agreed to look to this alone, and the law will hold it to its undertaking. This rule is founded in good morals, as well as good law. The policy of the law for partnership associations, limited, is to relax the common-law rule, to permit parties to limit their liability, and exempt themselves from a liability which may be ruinous. Whether the policy is wise or unwise is a question for the legislature, and not for the courts.

The injustice in sustaining the plaintiff's contention is manifest. The law, as construed by counsel for plaintiff, says to A who does not wish to actively engage in business, and be held responsible for its management: "You may invest \$1,000 in the stock of one of these associations; and, although the law limits your liability to the amount of capital subscribed, still if there has been any defect, however innocently made, in the original articles of association, or in its subsequent management, you can be held liable for all the debts of the association." Such a rule is not founded in justice, common sense, sound logic, or good morals. Even in construing the statutes for the formation of limited partnership, no such harsh rule is always applied. *Buck v. Alley*, 145 N. Y. 488, 496. The law of Michigan prohibited a corporation from doing any business before filing its articles of association. A corporation was formed under this law, but, before it had completed its organization by filing its articles, its prudential committee purchased goods. Suit was brought against this committee, who were directors, based upon the personal liability of the members. The court, in deciding the case, said: "It seems to us entirely clear that both parties understood and

meant that the contract was to be, and in fact was, with the corporation, and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Ulley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54. . . . The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it." *Whitney v. Wyman*, 101 U. S. 892, 396, 25 L. ed. 1050, 1051. See also *American Mirror & Glass Beveling Co. v. Bulkeley*, 107 Mich. 447.

We are aware that this decision is not in harmony with the decisions of the supreme court of Pennsylvania, but in so far as those decisions adopt the rigorous rule that the members of these associations are liable as partners because of some irregularity or defect in their organization or management, and thereby read into the statute a penalty which it does not impose, but which, by a fair construction of the statute, is excluded, we cannot follow them.

Other interesting and important questions are raised and ably discussed by counsel, but, inasmuch as the entire controversy is disposed of by the above opinion, we refrain from discussing them.

In one instance, in dealing with the plaintiff, the manager of this association omitted the word "Limited." No testimony was introduced on the part of plaintiff to show that any "indebtedness, damage, or liability" arose to it in consequence of this single act, and therefore no right of action from this cause was shown to exist.

The judgment is affirmed.

Montgomery, J., did not sit. The other Justices concur.

CONNECTICUT SUPREME COURT OF ERRORS.

GUARANTEE TRUST & SAFE-DEPOSIT COMPANY

v.

PHILADELPHIA, READING, & NEW ENGLAND RAILROAD COMPANY.
James K. O. SHERWOOD, Receiver,
etc., *Appl.*

(69 Conn. 709.)

1. An appeal may be taken from an order directing a receiver to restore a schedule of wages to employees, although it is in the nature of a mere administrative direction which ordinarily lies within the discretion of the court, if the question of the power of the court to appropriate the funds in his hands for the purposes covered by the order is distinctly raised and decided.

NOTE.—For rights of receiver as to property outside the state in which he is appointed, see generally *Gilman v. Hudson River Boat & Shoe Mfg. Co.* (Wis.) 23 L. R. A. 52.

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2. The jurisdiction of a state court which has appointed a railroad receiver to direct him as to the wages to be paid for operating the road within the state is not defeated by the fact that the employees in operating the road crossed the state boundary and incidentally performed some services in another state, although the receivership is ancillary to a receivership in such other state.

(November 2, 1907.)

APPEAL by the receiver of the Philadelphia, Reading, & New England Railroad Company from an order of the Superior Court for Hartford County directing him to restore the schedule of wages for operatives which had been in operation on the road and which he had changed to the detriment of the employees. *Affirmed.*

The facts are stated in the opinion.

Messrs. Arthur L. Shipman and Charles E. Gross for appellant.

Messrs. Buck & Eggleston, for petitioners:

The statute of 1897, chapter 194, does not permit questions arising after final judgment has been rendered to be taken to this court for review.

In the case of corporations formed by the concurrent action of two states, or of consolidated lines operated by the same corporation in two states, it is held that a receiver appointed by the courts of one state may exercise jurisdiction over the property in both states; and the courts of the other state will yield all necessary aid to give and maintain the receiver's possession of the property.

8 Wood, Railway Law, p. 1655, §481; *North-ern Indiana R. Co. v. Michigan C. R. Co.* 56 U. S. 15 How. 233, 14 L. ed. 674.

But the fact that the property over which a receiver is sought is located partly in one state and partly in another, as in the case of a railway corporation whose line extends through two different states, the company being incorporated in both, will not prevent the courts of one of the states from appointing a receiver to take charge of the railway in a case otherwise appropriate for the relief.

High, Receivers, 2d ed. p. 40, § 44.

Property controlled need not be within the jurisdiction. Nor is the right to confer such authority to be questioned upon any theory that the receiver's power is limited to property found within the state where he is appointed; for it is not necessary that the property should be within the jurisdiction of the court.

20 Am. & Eng. Enc. Law, p. 66; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 184.

The acts of the receiver in carrying out this proposed order within the state of New York would not be interfered with or disturbed by reason of the laws which, for a better name, has been termed "comity between statutes."

High, Receivers, 2d ed. p. 42, § 47.

In the following cases, wages of railroad employees have been required to be paid by receivers for services rendered both inside and outside of the jurisdictional lines of the courts making the decisions:

Ames v. Union P. R. Co. 62 Fed. Rep. 7, 4 Inters. Com. Rep. 619; *Waterhouse v. Comer*, 55 Fed. Rep. 149, 19 L. R. A. 403; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 62 Fed. Rep. 17; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514; *Frank v. Denver & R. G. R. Co.* 23 Fed. Rep. 757; *United States Trust Co. v. Omaha & St. L. R. Co.* 63 Fed. Rep. 737; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. Rep. 273; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 69 Fed. Rep. 871; *Northern Indiana R. Co. v. Michigan C. R. Co.* 56 U. S. 15 How. 233, 14 L. ed. 674.

Hamersley, J., delivered the opinion of the court:

This is an appeal by the receiver from an order of court directing him to restore the schedule of wages existing at the time of his appointment in respect to persons employed by him in operating the railroad in charge of the court. The order was made in response to a petition by Silas N. Smith and others, being the employees whose wages were reduced by

the receiver; and the court ordered that the petitioners be made parties to the record for the purposes of the petition. Smith and others have filed in this court a plea in abatement, which we must consider before disposing of the appeal.

A question might have been raised as to the standing of these petitioners in this court. The superior court has the power to direct a receiver in respect to the wages to be paid in the management of a property under its charge. But it is a power to be exercised only in clear cases of necessity, and with exceeding caution. A main purpose of appointing a receiver is to remit to him those details of management which cannot well be administered by the court. Where plainly necessary, the power may be exercised either by an order establishing a schedule of wages or by the appointment of a receiver in whose discretion the court can place greater confidence. The court may act on the application of a receiver, or without any application. The situation may be such as to justify the employees of the receiver in bringing the subject to the attention of the court by an appropriate petition, and, if an investigation is deemed requisite, they may properly be heard. But that such petition and hearing, in a case like this, where no execution of an existing contract is sought to be enforced, but simply a direction as to the terms of future contracts, can make the proceeding an adversary one, in the legal sense, so that the petitioners are parties to the original action for the purpose of an adjudication, is by no means clear. Some decisions in Federal circuit courts seem to support the theory of a power in the court to determine upon complaint, pleadings, and trial, as in a judicial proceeding, all grievances suffered by the employees of a railroad receiver in the operation of a road. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 59 Fed. Rep. 514, 517; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 62 Fed. Rep. 17, 18, and cases there cited. If these decisions go farther than a recognition of the admitted power of a court to adjudicate and enforce contracts its officer has made, and to direct his conduct as to the terms of those he shall make, they would seem to involve a power in court over all persons who may be employed by the receiver inconsistent with that individual freedom of action and contract deemed essential in all other relations. We express no opinion on this question. Although apparently involved, it has not been raised by the parties. In view of the final conclusion reached, it is of no practical importance in this case, and, under the special circumstances, may properly be treated as waived. Assuming, then, that the petitioners are entitled to appear as parties and file the plea in abatement, it follows that, for the purpose of disposing of this plea, the order appealed from must be regarded as a final adjudication of the rights of parties involved in a judicial proceeding of an adversary nature.

In the course of an action on the equity side of the court in which a receiver is appointed, it is often necessary for the court to make an order which constitutes an adjudication by a judicial finding, separable from the main ac-

tion, affecting in some instances persons who are parties to the action only for the purposes of that proceeding, and which cannot be reviewed unless by an appeal from that order. Orders of such a character, which are in fact a final adjudication of the rights involved, may generally be reviewed by an appellate court. The reasons for the rule are well stated in *Blossom v. Milwaukee & C. R. Co.* 68 U. S. 1 Wall. 655, 17 L. ed. 678. Under our statute, when a party to such a final order thinks himself aggrieved by the decision of the court on any question of law arising in the trial, he may appeal and remove the question for review in this court. We have heretofore acted on this construction of the statute, and do not doubt its correctness. *Leonard v. Charter Oak L. Ins. Co.* 65 Conn. 529. Even in actions on the law side of the court, a "final judgment," within the meaning of our statute of appeal, may include a judgment in its nature final and separable from any other judgment that may be rendered in the action, although not finally disposing of the action. *Bunnell v. Berlin Iron Bridge Co.* 66 Conn. 24, 37. But it is claimed that the order in question is not final as to its subject matter: that it is a mere administrative direction, lying in the discretion of the court, and open to modification at any time. There may be orders of this nature which are not appealable, but without discussing the limits of that discretion which the court has in making a merely administrative order, we think in this case the receiver was entitled to appeal, because the question of jurisdiction, involving the power of the court to appropriate the funds of the estate for the purposes covered by the order, was distinctly raised and decided. The order thus becomes a final judgment in the case, determining the power of the court in the application of funds, and directly affecting the interest of parties to the main action. An appeal from a void order affecting the rights of owners and creditors who are represented by the receiver may be permitted under the general rules of chancery practice, and by the broad language of our statute in respect to receivers (Gen. Stat. §§ 1322, 1342). It is difficult to see how the receiver personally can be aggrieved by the present order; but we cannot say that, as representative of the defendant corporation and creditors, he may not be aggrieved, until the question of law involved is decided. The right of appeal does not depend upon an actual grievance, but on a belief that the decision of a question of law, which, if erroneous, may constitute a grievance, is erroneous. Possibly the insignificance of any effect the present order can have upon interests represented by the receiver might be pressed as sufficient ground for holding that in fact the appeal was taken by him personally, and not in any representative capacity. We think, however, the plea in abatement should be overruled.

The order appealed from relates solely to the wages of engineers and firemen employed by the receiver in running the engines used in operating the road in this state, under the direction of the superior court. Is the order, upon the facts appearing in the record, within the jurisdiction of that court? This is the only question of law presented by the appeal.

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The material facts appearing in the record and found by the court below are as follows: The defendant corporation owned a railroad within the state of New York. It also was lessee of other railroads, including that belonging to the Hartford & Connecticut Western Railroad Company, a corporation incorporated under the laws of this state. The road belonging to the last-named corporation extends from Hartford, in this state, to Rhinecliff, in the state of New York, and constitutes the principal part of the railroad system of the defendant. The other roads owned and controlled by the defendant were operated in connection with the Hartford & Connecticut Western. On August 13, 1893, the supreme court of the state of New York, second judicial department, appointed Mr. James K. O. Sherwood receiver of the property and effects of the present defendant, upon application of the present plaintiff; and Mr. Sherwood has since operated some portion of the railroads owned and controlled by the defendant under the orders of said court. The parties to the action and the nature of the action in which the appointment was made and the terms of the order making the appointment do not appear. On October 28, 1893, Mr. Sherwood was appointed by the superior court for Hartford county receiver of the defendant corporation in the state of Connecticut. The nature of the action in which this appointment was made does not appear. On November 7, 1893, Mr. Sherwood, by virtue of the order of the superior court, took control of the defendant corporation and its leased lines in the state of Connecticut and is still managing and operating said railroads and said leased lines subject to the orders and direction of said court. The record is not clear as to the portions of the railroad operated under the controlling direction of the New York and Connecticut courts, respectively; but it must be taken as a fact found that the Hartford & Connecticut Western Railroad, in this state, has, since November 7, 1893, been operated by Mr. Sherwood, as receiver appointed by the superior court, in accordance with the directions of that court. Upon taking possession of the Connecticut road and property of every description belonging to the defendant, and having a situs in Connecticut, Mr. Sherwood found a schedule of wages existing in respect to the engineers and firemen employed in running the engines used in operating the road, and this schedule he followed until May 1, 1897, when (as appears by necessary implication), without any direction of the superior court or of the New York court, he altered the schedule, by reducing the amounts paid for each day's work. Upon this state of facts, the superior court passed the order in question, restoring the rates of pay, and directing Mr. Sherwood, as receiver of the defendant corporation, under appointment of the court, to pay the engineers and firemen in his employ, as such receiver, the same wages they had received previous to the reduction on May 1. It appears that, in operating the Connecticut road, some of its engines are run from places in this state to places in New York state, by the engineers and firemen employed by the Connecticut receiver, and to that extent the services rendered to the receiver in pursuance of that employ-

ment are actually performed within the territorial limits of New York; and it is on this ground, and on this ground alone, that it is claimed the order is void for want of jurisdiction.

It seems very plain that if the receiver, in operating the road, finds it necessary to send his employees into another state, he may do so, and the fact that he does so does not affect the jurisdiction of the court to direct them as to their wages. And it is equally clear that a receiver appointed in one state may be directed by the court of that state in respect to such matters in the operation of the road as must, for the interest of all concerned, follow one rule, although a portion of the line affected by the direction is situate in another state, in which he has also been appointed receiver of the same road. It is true that no court can enforce its orders beyond the territorial limits of its jurisdiction; but it is also true that, by a rule of comity, based in part upon paramount necessity, the authority of receivers appointed in one state will be recognized in many ways by the courts of another state within whose jurisdiction it may be exercised (*Blake Crusher Co. v. New Haven*, 46 Conn. 478; *Cooke v. Orange*, 48 Conn. 409); and that, ordinarily, a railroad receiver acting under appointment in different states in respect to the same property may be directed by the court of one state in respect to the management of the railroad under the charge of that court; and, if such direction affect portions of the line in other states where he is receiver, the courts of those states, where unity of action is essential to the best interests of all concerned, will refrain from any action interfering with the direction, or will aid its execution by an independent order. In such cases an order of court cannot be held void for want of jurisdiction, because the court may rely for its full enforcement upon an application of this rule of comity by the courts of another state. It appearing, therefore, as it clearly does by the record in this case, that the superior court is the court charged with the direct operation of the Hartford & Connecticut Western road in this state, which is the main part of the defendant's railroad system; that it is the proper court to direct the receiver in respect to the wages of the engineers and firemen employed in the operation of that road; that it is for the interest of all concerned that the employment of these engineers and firemen should include their services in running engines over those portions of the line in New York essential to the beneficial operation of the road by the court,—it follows that the superior court might properly rely upon such application of the rule of comity by the New York court as would aid, and not obstruct, the full effect of the order.

The receiver alleged that any changes in the wages by the superior court would conflict with the business of the road within the jurisdiction of the New York court. This allegation was in issue, and by its judgment the court has found the allegation untrue. The finding may be justified by the facts in the record. Mr. Sherwood was appointed receiver by both courts for the very purpose of preventing such conflict. For four years the receiver has operated the road without such con-

flict, under the very schedule the court now orders him to restore. Possibly some conflict might arise through the disobedience of the receiver or the failure of a court to apply the rules of comity, but these are contingencies not to be considered in framing the order. Assuming, as we must, upon this record (for it is found by the court, and admitted by all the parties), that the superior court was the proper court to make an order regulating the wages of those employed by the receiver in running the engines used in operating the Connecticut road, there was no error in making the order appealed from.

Our only doubt has been whether the court and all the parties before us have not erred in so conducting the proceedings as to make this assumption imperative; i. e., whether a full examination of all relevant facts might not show that the proper course was to seek the direction of the New York court in respect to the whole matter. That is the court of initial proceeding. The order appointing the receiver in Connecticut recites that he is appointed as ancillary to the receiver in New York, and without such recital, unless it otherwise distinctly appeared, he would, ordinarily, by force of the rule of comity, act as ancillary receiver. In matters of management in respect to a property impracticable or difficult to be managed otherwise than as a whole, the direction of the court of initial proceeding, establishing rules which of necessity must apply to the whole property, will ordinarily be followed by the courts appointing the same receiver in other states. But while the court in New York, as the court of initial proceeding, is presumptively the proper court to direct as to the wages of employees, whose services are rendered as a whole in both states, nevertheless it is possible that the interests of the property may require, and the nature of the proceedings in both courts justify, the direction of the Connecticut court as to the wages of these employees, and such is the condition shown by this record. If the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment. *Schlesinger v. Chapman*, 52 Conn. 271; *Rogers v. Rogers*, 58 Conn. 121, 150, 55 Am. Rep. 78.

As the record shows the primary and independent regulation of the wages of the engineers and firemen employed by the receiver in running the engines used in operating the Connecticut road is lawfully in the superior court, and it being evident that the services rendered in the course of their employment within the territorial limits of New York are a necessary incident to the principal employment, and that the treatment of the employment as a whole is essential to the beneficial operation of the road, the same rule of comity which would require the superior court to aid in enforcing the directions of the court of initial proceeding in respect to matters essential to its management of the property as a whole would require that court to recognize as binding on the receiver within its jurisdiction this order made in the administration of that portion of the management committed to the control of the superior court. The rules of comity may not be departed from unless, in

certain cases, for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy. Such considerations do not enter into the present case, and the limitations of an order passed for that purpose need not be discussed. Upon the facts appearing in the record, the order passed

by the superior court is not void for want of jurisdiction, and must be obeyed. The plea in abatement is overruled.

There is no error in the order complained of.

The other Judges concur.

KENTUCKY COURT OF APPEALS.

George W. DALE *et al.*, Appts.,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

The pardon of an accused whose bail bond has been forfeited for a departure from court contrary to the conditions of the bond does not affect the forfeiture.

(September 24, 1897.)

APPPEAL by defendants from a judgment of the Circuit Court for Lewis County holding them liable on a forfeited bail bond. *Affirmed.*

The facts are stated in the opinion.

Messrs. George N. Thomas and W. B. Pugh, for appellants:

The pardon relates back to the offense itself, and terminates all proceedings uncompleted, and relieves from the effects of any proceedings completed that will tend to punish the accused for his offense in any manner direct or collateral.

The undertaking for which these appellants are sought to be amerced was and is one without the tinge or shadow of a consideration saving such as the law implies in such cases. Now, if there is no vested right in any person to any portion of the proceeds of a forfeiture here, what good reason can be advanced, legal, equitable, or moral, for insisting that notwithstanding the executive pardon and its pretty extensive effect, the innocent sureties should be required to contribute out of their property to the personal wealth of the various officers who might be entitled to share in a distribution of the proceeds of this forfeited bond upon a final judgment.

Com. v. Spraggins, 18 B. Mon. 514.

If a man be deprived or convicted or otherwise punished for an offense during a session of parliament, and at the same session an act pass which pardons the offense, it seem agreed that the conviction or deprivation, etc., are *ipso facto* avoided.

5 Bacon, Abr. 296, tit. *Pardon*; 1 Co. Litt. 126 B; *Com. v. Bush*, 2 Duv. 265; 1 Bishop, Crim. L. § 916; *King v. Greenwell*, 12 Mod. 119;

NOTE.—As to the effect of a pardon on fines, forfeiture, or costs, see *Fischel v. Mills* (Ark.) 15 L. R. A. 395, and note.

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Strickland v. Thorpe, Yelv. 126; *Re Deming*, 10 Johns. 232; *Diehl v. Rodgers*, 169 Pa. 816.

On petition for rehearing.

Nothing can make a covenant several which is by its express terms made joint, and where the language of the covenant is ambiguous the interest of the parties will determine.

Parsons, Contr. pp. 12-15, notes.

A bond authorizedly entered into by principal and sureties is joint, and the liability thereon is joint, and consequently a remission in favor of one would operate in favor of all.

Ex parte Garland, 71 U. S. 4 Wall. 833, 19 L. ed. 866.

These sureties were deprived by the pardon of doing what they might otherwise have done; under § 93 of the Criminal Code they might have rearrested the accused, or he might have surrendered himself for sentence.

There was no way in which they could apply for the judicial remission, for arrest or surrender has been held essential to its exercise.

Little v. Com. 3 Bush, 22.

Mr. W. S. Taylor for appellee.

White, J., delivered the opinion of the court:

Azariah Dale was indicted by the grand jury of Lewis county for a felony, and, being permitted to give bail in the sum of \$200 for his appearance to answer said charge in the Lewis circuit court, the appellants, Dale and Pollitt, became his sureties, with the usual covenants and conditions for the appearance of said Azariah Dale in the circuit court to answer said charge. At the September term, 1896, the case was called for trial, and a jury impaneled and sworn, and thereupon appellants appeared, and consented to remain bound on the bond during trial; and about the time the case was concluded the said accused, Azariah Dale, departed from the court. Whereupon the said Azariah Dale was solemnly called, and, failing to answer, an order was made forfeiting his bail bond, and summons awarded against appellants as his sureties, which was duly issued and executed, and at the next term of the Lewis circuit court judgment was rendered on said bond for the sum of \$200, the amount of the bond; and from that judgment this appeal is prosecuted, and a reversal is asked. The name of the accused, Azariah Dale, is not signed to the bail bond, nor does he in that bond undertake to do anything, but

the sole undertaking is by appellants. The forfeiture of the bail bond was taken September 9, 1896; and on the 18th day of the same month the acting governor issued and delivered to the said Azariah Dale, accused, a full and complete pardon for said offense, and restoring him to all privileges of citizenship. This pardon the appellants, Dale and Pollitt, pleaded and relied on as a bar to any recovery on said bail bond by reason of any order forfeiting same. This plea the circuit court adjudged bad on demurrer, and, appellants failing to plead further, judgment was rendered.

The question of the extent and effect to be given to a pardon issued by the governor to an accused, as it affects a forfeited bail bond or recognizance, has never been before this court, and able counsel has not been able to furnish us with any direct authority in this state. This question, however, was before the supreme court of Kansas in the case of *Weatherwax v. State*, 17 Kan. 428. In that case the sureties had pleaded as a defense to a recovery on the forfeited bail bond of the accused a full pardon issued by the governor of the state of Kansas. The court says: "Nor can we see how a pardon could reach a matter wholly independent of the criminal offense charged, or of the punishment therefor. Even if the defendant had been acquitted on the criminal charge, still this action on the forfeited recognizance might be maintained." In the case of *State v. Davidson*, 20 Mo. 212, 61 Am. Dec. 603, cited in 8 Am. & Eng. Enc. Law, p. 716, the supreme court of Missouri held that the liability of principal and surety in a recognizance is several, and not joint; and a remission by the governor, after forfeiture, in favor of the principal, does not discharge the surety. We cannot see how it can be that the pardon issued to the accused, Azariah Dale, can affect the forfeiture of the bond of the appellants. The appellants had covenanted to have the accused present when required by the court. The accused was in their custody, in law, at the time he left the court-house, and his bond forfeited, and no reason is given why he so departed. Appellants' counsel contend that, by the pardon of the governor, the same related and had the effect to cancel the forfeiture of the bail bond, and made the accused a new creature, as if born again. In the case of *Mount v. Com.* 2 Duv. 95, Judge Robertson, in commenting on the pardon of Mount, says: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more," and approved the judgment of conviction, by which Mount was given a greater penalty by reason of the second offense notwithstanding the first offense was pardoned. We are of opinion the pardon issued to the accused did not have the effect to relieve the bail. That question was entirely in the discretion of the circuit judge who tried the case. No reason is given why the accused left the court while being tried, and no statement is made to the court negating, at least, the idea that his departure was with appellants' consent and knowledge.

Wherefore the judgment of the Circuit Court is affirmed.

Rehearing denied.

88 L. R. A.

Adolph SCHMIDT, Trustee, etc., Impleaded with Northern Division of Cumberland & Ohio Railroad Company, *Appt.*,
v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*

(.....Ky.....)

1. A company which purchases all the property and rights of another railroad company, including a lease, and which takes charge of the leased road, operates it for a long time, and elects to sue and recover money due the lessee from the lessor, must be held to have assumed the obligations of the lease, and not to be a mere tenant by sufferance.
2. A trustee for the bondholders of a railroad company has a right to maintain an action for the enforcement of a contract leasing the road for the benefit of the bondholders.
3. An abandonment of a railroad lease by a company which has acquired the lessee's property and rights is not authorized by the mere failure of the lessor to pay money due under the lease when the contract gives the lessee a lien therefor, and does not provide that it shall be a ground of forfeiture, although there are other conditions of forfeiture expressed.
4. A railroad lease is not so uncertain and indefinite that it cannot be specifically performed where a fair construction of it will authorize such an operation of the road as the business interests of the community may require.
5. The operation of a railroad for a term of years under a lease may be required by mandatory injunction compelling the specific performance of the contract of lease.
6. The mere fact that a contract having a number of years to run may turn out a losing investment affords no reason for refusing specifically to enforce it.
7. A contract fair when made may be specifically performed, although it has become a hard one by force of subsequent circumstances or changing events.

(June 15, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Shelby County refusing to compel defendants to operate the Northern Division of the Cumberland & Ohio Railroad under a contract by which they were alleged to have leased it and undertaken to operate it. *Reversed.*

The facts are stated in the opinion.

Mr. G. G. Gilbert, for Northern Division of Cumberland & Ohio Railroad Company:

The charter granted by the state to the Northern Division of the Cumberland & Ohio Railroad Company is not only a contract, but it presents three contracts:

1. It is a contract between the state and the corporation.
2. It is a contract between the corporation and each and every stockholder of that corporation.
3. It is a contract between the state and each and every stockholder of this corporation.

NOTE.—For specific performance of contract to run street railway, see *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* (N. Y.) 20 L. R. A. 610.

Cook, Stock & Stockholders, §§ 493, 665.

The purpose of the organization of this corporation is to construct and operate a railroad. This is a public highway, in which the state at large, and the counties through which it passes, and the public generally, are both concerned and deeply interested.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265.

During the period of thirty years the lessee stands in the shoes of the lessor, and is in full possession of all of this property and of these franchises.

This lessee therefore for the period of thirty years assumes the duties and obligations growing out of the charter, and out of the triple contract created between the state, the corporation, and the stockholders, above named.

When the defendant, the Louisville & Nashville Railroad Company, acquires by purchase, by conduct, or otherwise, the property and franchises of the original lessee, it necessarily assumes the shoes of that lessee, and becomes in fact the lessee itself.

During the existence of this lease, the Louisville & Nashville Railroad Company stands as much bound to respect these contract obligations, as the original corporation under the charter.

Guif, C. & S. F. R. Co. v. Newell, 78 Tex. 834; *Louisville & N. R. Co. v. Smith*, 87 Ky. 501.

A railroad company has no right to abandon a public highway of this kind without the consent of the state.

State, Lessee, v. Atchison & N. R. Co. 24 Neb. 143; *Noll v. Dubuque, B. & M. R. R. Co.* 83 Iowa, 66; *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 464; *People v. Albany & V. R. Co.* 24 N. Y. 261, 83 Am. Dec. 295; *Atty. Gen. v. West Wisconsin R. Co.* 36 Wis. 466; *People v. Northern R. Co.* 53 Barb. 98.

To permit the lessee to abandon this lease is to permit one party to the contract to confiscate or destroy this valuable property without the consent of the other party.

Ferguson v. Meredith, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Knorrville v. Knorrville & O. R. Co.* 22 Fed. Rep. 758; *Orr v. Bracken County*, 81 Ky. 593; *Cook, Stock & Stockholders*, § 500.

It is the policy of the law to shield this defendant from being harassed by numerous suits when the remedy can be reached in one action.

10 Am. & Eng. Enc. Law, pp. 975, 976, notes 5, 6, pp. 977, 978.

Equity will restrain any corporation as well as any citizen from interfering with a bridge, which is a part of a public highway.

Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co. 165 Pa. 87.

Even a mandatory injunction will issue to force any company or any citizen to remove obstructions from a highway.

Boyd v. Woolwine, 40 W. Va. 282; *Bland v. St. John's Schools*, 163 Mass. 229; *Rock Island & P. R. Co. v. Dimick*, 144 Ill. 628, 19 L. R. A. 105.

A mandatory injunction will be granted against a railroad company to compel it to perform the covenants of a lease, and to operate its trains.

88 L. R. A.

Chicago & A. R. Co. v. New York, L. E. & W. R. Co. 24 Fed. Rep. 516; *Coe v. Louisville & N. R. Co.* 3 Fed. Rep. 775; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 19 L. R. A. 387, 5 Inters. Com. Rep. 522; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. Rep. 16; 10 Am. & Eng. Enc. Law, p. 789.

The fact that the defendant had been in possession of and operating this road for so many years is an estoppel against its denying the existence of the lease.

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843. A specific performance of this contract should be ordered, and such a remedy is not beyond the machinery of the court.

Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. Rep. 16; *Re Omaha Bridge Cases*, 10 U. S. App. 98, 51 Fed. Rep. 309, 2 C. C. A. 174; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Phillips v. Window*, 18 B. Mon. 448, 68 Am. Dec. 729.

The damages sustained by the plaintiff by stopping the operation of this road cannot be accurately estimated, and are therefore in legal technology irreparable.

10 Am. & Eng. Enc. Law, p. 989; *Dudley v. Hurst*, 87 Md. 44.

Measrs. Simrall, Bodley, & Doolan, William S. Pryor, J. C. Beckam, and William Beckam for appellant.

Measrs. Helm & Bruce and W. H. Bruce, for appellees:

Equity will not undertake to enforce specific performance of such a contract as the one alleged by the plaintiffs.

The particular contract in question is too uncertain and indefinite, as to the obligation of the defendant to operate the road in question, to be specifically enforced.

In the contract sued on there is certainly no express obligation on the part of the Louisville, Cincinnati, & Lexington Railway Company, the lessee, to operate the road of the lessor at all. If there is any obligation of this character it is only an implied one. And it is by no means certain that an obligation to this effect can be implied.

Minturn v. Baylis, 88 Cal. 129; *Pom. Spec. Perf. Contr. § 145*; 1 Story, Eq. Jur. § 767; *Dalzell v. Dueber Watch Case Mfg. Co.* 149 U. S. 315, 37 L. ed. 749; *Potter v. Hollister*, 45 N. J. Eq. 518; *Ham v. Johnson*, 55 Minn. 117; *Walcott v. Watson*, 53 Fed. Rep. 435; *Zeringue v. Texas & P. R. Co.* 34 Fed. Rep. 243; *Ikerd v. Beavers*, 106 Ind. 455; *Louisville, N. A. & C. R. Co. v. Bodenschatz-Bedford Stone Co.* 141 Ind. 251; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Woolenak v. Briggs*, 20 Ill. App. 58, Affirmed in 119 Ill. 453.

The contract contains no specification or details as to how the road is to be operated, but leaves that entirely to the discretion and judgment of the lessee.

For the court to solemnly decree that the lessee shall specifically perform the obligation of this contract by operating this railroad seems almost an absurdity. The contract does not say how it shall be operated.

The contract in question, accepting the appellant's construction of it, is a contract call-

ing for the rendition of continuous services, requiring the exercise of skill and judgment, and is of a character which a court of equity will not attempt to specifically enforce, even if it were more definite and certain than it is.

Pom. Spec. Perf. § 812; 3 Pom. Eq. Jur. § 1343; *Waterman*, Spec. Perf. § 49, p. 68; *Bispham*, Principles of Equity, § 877; *Wheatley v. Westminster Brymbo Coal & C. Co.* L. R. 9 Eq. 538; *Blackett v. Bates*, L. R. 1 Ch. 117; *Johnson v. Shrewsbury & E. R. Co.* 3 De G. M. & G. 914; *Powell Duffryn Steam & Coal Co. v. Taff Vale R. Co.* L. R. 9 Ch. 335; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 19 L. ed. 955; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 554; *Ross v. Union P. R. Co.* 1 Woolw. 26; *Texas & P. R. Co. v. Marshall*, 136 U. S. 408, 34 L. ed. 390; *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Atlanta & W. P. R. Co. v. Spencer*, 33 Ga. 553, 79 Am. Dec. 305; *McCann v. South Nashville Street R. Co.* 2 Tenn. Ch. 773; *Lattin v. Hazard*, 91 Cal. 87; *Louisville, N. A. & C. R. Co. v. Rodenschatz-Hedford Stone Co.* 141 Ind. 251; *Electric Lighting Co. v. Mobile & S. H. R. Co.* 109 Ala. 180; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa. 486; *Iron Age Pub. Co. v. Western U. Tel. Co.* 63 Ala. 498; *Ewing v. Litchfield*, 91 Va. 575; *Margo v. New York & N. E. R. Co.* 3 Misc. 205; *Wharton v. Stutenburgh*, 35 N. J. Eq. 277; *Kendall v. Frey*, 74 Wis. 26; *Kidd v. McGinnis*, 1 N. D. 331; *Shackley v. Eastern R. Co.* 98 Mass. 94; *Alworth v. Seymour*, 42 Minn. 526; *Campbell v. Rust*, 65 Va. 653; *Woo'ensak v. Briggs*, 20 Ill. App. 58, affirmed in 119 Ill. 453.

Even if the contract were one which a court of equity will undertake to enforce specifically, plaintiffs in the case at bar have not shown themselves entitled to the relief prayed.

Pom. Spec. Perf. § 823; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.* 98 Ky. 152, 36 L. R. A. 880.

The lessor railroad company, the Cumberland & Ohio Railroad Company, has no standing in a court of equity to ask that the lessee be compelled to continue the operation of the road under this lease, under which the lessor is over \$400,000 in default to the lessee.

A court will not enforce the specific performance of this obligation by the lessee in behalf of these bondholders, even though they may not themselves be in any default; for it is plain that the court cannot enforce the specific performance of the entire contract.

Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 87; *Hewitt v. Berryman*, 5 Dana, 166; *Campbell v. Harrison*, 3 Litt. (Ky.) 293.

There are many contracts as to which a court of equity will say to a complainant that, even though his remedy at law may be difficult, a court of equity will refuse to lend its aid to the enforcement thereof, on account of the harsh results that will follow from the specific performance of the contract.

Pom. Spec. Perf. § 185; *Willard v. Tayloe*, 75 U. S. 8 Wall. 587, 19 L. ed. 504; *Pope Mfg. Co. v. Gormully*, 144 U. S. 236, 36 L. ed. 419.

This contract provides a remedy for these bondholders, independent of and in addition

to the ordinary common-law action for damages for breach of contract.

Chicago & V. R. Co. v. Fosdick, 106 U. S. 68, 27 L. ed. 54.

Guffy, J., delivered the opinion of the court:

This action was brought in the Shelby circuit court by appellant, Schmidt, trustee, and the Northern Division of the Cumberland & Ohio Railroad Company, against the Louisville & Nashville Railroad Company, etc., to compel said Louisville & Nashville Railroad Company, by mandatory injunction, to continue to operate the Northern Division of the Cumberland & Ohio Railroad, from Shelbyville to Bloomfield, in accordance with a lease and contract set out in the petition. It appears from the allegations of the petition that the Northern Division of the Cumberland & Ohio Railroad Company, in 1879, leased to the Louisville, Cincinnati, & Lexington Railway Company its road from Eminence to Bloomfield, as set out in the lease, which reads as follows:

Lease of C. & O. to L., C. & L. Ry. Co.

This indenture of a lease made and entered into by and between the Northern Division of the Cumberland & Ohio Railroad Company, of the first part, and the Louisville, Cincinnati & Lexington Railway Company, of the second part, both railroad corporations duly organized under the laws of the state of Kentucky, witnesseth: That for and in consideration of \$1 cash in hand by the party of the second part, and in consideration of the mutual covenants and stipulations hereinafter contained, the said party of the first part does hereby lease to the said party of the second part all that part of the first party's unfinished roadbed, right of way, with improvements and appurtenances, depots, and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, including unpaid subscriptions to capital stock, dues, and demands belonging to or in any wise appertaining to the said first party's line of railway at the town of Eminence, Kentucky, thence southwardly, through a portion of Henry county, and the counties of Shelby and Spencer, and to Bloomfield, in the county of Nelson and the state of Kentucky, for the period of thirty years from the date of full execution hereof, upon the terms, conditions, and stipulations hereinafter set out:

(1) Under direction of the stockholders of said first party, its president and directors will execute a mortgage upon all the property, rights, and franchises belonging to or in any wise appertaining to said first party's line of road hereinbefore described, for the security of \$350,000 of mortgage coupon bonds, having twenty years to run, and bearing interest at the rate of 7 per cent per annum, interest payable on the 1st days of June and December of each year, all of which is fully set out in said mortgage. Now, said bonds and coupons are to be fully prepared, signed, and countersigned, and made ready for use, as in the charter of said first party and said mortgage provided, and the same will be delivered

to said second party within sixty days after the delivery of this lease.

(2) Said second party hereby binds and obliges itself that said bonds, or proceeds of such as are sold, shall be used by it in the construction of said first party's line of railway, as provided in this lease, and for no other purpose whatever. It is agreed that enough of said bonds may be sold or used in and about contracts for work, labor, or materials to complete said line of railway, at not less than — cents to the dollar; and whatever of said bonds or proceeds, after deducting all sums due said second party, may not be so used, shall, after said completion, after cancelation of bonds, be turned over to said first party, and such surplus bonds destroyed.

(3) A fundamental condition of this lease is that if said second party shall not be able to dispose of bonds amounting at their face value to \$250,000, the proceeds to be in money, material, or labor, by or before the 1st day of September, 1880, then this lease terminates, and the parties hereto are released, and said second party is to restore to said first party all bonds: provided, however, that no absolute sale of any of said bonds shall be made by said second party unless and until it can place not less than two hundred and fifty thousand dollars in the value thereof in money or its equivalent; and, when that quantity of said bonds has been disposed of by said second party, it shall as soon as practicable, and not later than the 1st day of September, 1880, begin the construction of said first party's said line of railway, and a failure to begin work within said time shall operate as a termination of this lease. Whenever said \$250,000 of said bonds shall have been disposed of as aforesaid, this contract becomes absolute and binding on the parties hereto, and the construction of said line of railway from Eminence to Bloomfield shall be commenced; and, when the construction of said line of railroad is begun, the same shall be pushed to completion as rapidly as possible; and a failure on the part of the party of the second part to so complete the same as to allow the safe and regular passage of trains to and from Eminence and Bloomfield within two years from the commencement of work thereon shall, at the option of said first party, after six months' notice of its election so to do, operate as a forfeiture of this lease. None of said bonds shall be sold with past-due coupons annexed thereto; but, before selling, all past-due coupons shall be cut off, canceled, and returned by said second party to said first party.

(4) When commenced, said construction shall be pushed as rapidly as possible, with due regard to the greatest economy; and the work and superstructure is to be as for a first-class single track railway, with the same gauge as the track of said second party's line of railway.

(5) It is further agreed that said second party shall furnish all necessary locomotive engines and rolling stock to operate said line of railway; and for the use of same said second party is to receive, out of the gross earnings of said first party's line of road, the cost of wear and tear to such engines and rolling stock as may be so furnished. But the first party reserves the right to furnish all or so much as it can of

said rolling stock, and, when so furnished, said first party shall receive the same compensation therefor as is received by said second party on its rolling stock used on said line.

(6) It is further agreed and understood that, in the operation of said line of railway, said second party will make to said first party quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping roadbed in order; and the net profits arising therefrom shall be applied to the payment of interest, and providing for sinking fund, and retiring said mortgage bonds. But out of the gross earnings shall be first deducted annually the sum of \$1,000, which shall be paid to said first party, with which to pay the expense of keeping up its organization; and, if the net earnings do not prove sufficient to pay the interest and provide for the sinking fund on said mortgage bonds, then said second party, if all other sources of raising money of said first party prove insufficient, will supply the deficiency, so far as it may be done, by appropriating the net earnings, or so much as may be needed, on its own line, which may accrue by reason of business coming to it from or over said first party's line. This pledge and assignment shall be made effectual by mortgage properly executed, acknowledged, and recorded; and should it become necessary to use any of the net earnings on the lines of the second party to pay said interest and sinking fund, or any part of either, then all amounts so used, as well as all moneys paid for said first party by said second party, shall be treated as interest-bearing debts, interest at the same rate with said mortgage bonds, payable half-yearly, and to run from date of such payments, the debt and interest to be repaid out of said net earnings thereafter accruing to said first party on its own line, which may be so appropriated consistently with the other provisions of this lease; and, for all sums or any sums of money that may become due from said first party to said second party on its or any account, a lien is hereby created upon all the property, rights, and franchises of said first party owned or to be acquired in favor of said second party, to stand next in priority to said mortgage and bonds for \$350,000 as aforesaid. But said second party shall not enforce the collection of said debts, or any of them, by enforcement of said lien, until at least eight years have elapsed from and after the date of the creation of the same.

(7) It is further agreed and understood that whenever the net earnings from the leased premises shall be sufficient to pay off the interest and sinking fund on said mortgage bonds for \$350,000, or such portion thereof as is outstanding, and to repay said second party all dues and demands then due or owing, the surplus net earnings, unless used in retiring said bonds, as provided in said mortgage, less one tenth thereof, shall be paid over to said first party, the one tenth of said net earnings to be retained by said second party for its own use.

(8) It is further agreed and understood that, so long as said second party may operate said leased line of railway, no greater rate of charges, either for freight or passage thereon, shall be demanded or received, under its regu-

lar tariff, on its own lines of railway for local freight and passage.

(9) It is further agreed and understood that said first party assigns, transfers, and sets over to said second party all claims, dues, and demands, choses in action, unpaid subscriptions to capital stock (except private subscriptions and all evidences thereof), of every kind and character, to be by said second party collected by suit or otherwise, with power to settle, compromise, arbitrate, or adjust as to it may seem best; but this assignment and transfer does not become absolute (except to so much thereof as may be necessary to refund and indemnify to said second party the cost of printing and issuing said mortgage bonds, or incidental thereto, which is absolute) until said second party give notice in writing to the president of said first party that said \$250,000 of said mortgage bonds have been disposed of as hereinbefore provided; and then and after such notice said second party may at once proceed as provided under the clause of this lease.

(10) It is further agreed and understood that this lease is not assignable without the consent of the grantor; that, during the existence of said lease, the second party will pay all taxes lawfully assessed against said leased premises, the amount thereof to be charged to operating expenses; and, at the termination thereof, said leased premises shall be restored to said first party in good repair, unless the same be extended or renewed by mutual consent, or unless prevented by unavoidable casualty, legal proceedings, or operation of law.

(11) The second party hereby agrees to furnish any means necessary to complete said first party's line of road from Eminence to Bloomfield, which may not be derived from the sale of the bonds to be issued by said first party, and also to furnish any means necessary to pay any interest which may become due on said mortgage bonds previous to the completion of said first party's line of road, which may not be derived from the earnings of said line of road. Any means so furnished by said second party is to become a lien debt due to said second party by said first party, and payable upon the same terms and conditions as hereinbefore provided as to the other indebtedness.

(12) If said second party be hindered or delayed in beginning or completing said line of railway by act or omission of said first party, or by legal or equitable proceedings, then the period or periods of such delay shall not be counted as part of the time within which said second party is to do or perform any acts or things under this contract.

In testimony whereof, the said second party, acting under authority and approval of its stockholders, duly had in stockholders' meeting assembled, on the 24th day of June, 1879, has caused these presents to be signed in duplicate, in its corporate name, by its president, and countersigned by its secretary, and its corporate seal hereto affixed; and the said second party, acting under authority and approval of its stockholders, duly had in stockholders' meeting assembled, on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name, by its president, and countersigned by its secretary, and

its corporate seal hereto affixed, this — day of —, 1879.

It will be seen from said lease that it first contemplated building the road from Eminence to Bloomfield, but afterwards the contract was modified, as shown by the contract, which reads as follows:

Modification of Lease.

This contract, made and entered into by and between the Northern Division of the Cumberland & Ohio Railroad Company, of the first part, and the Louisville, Cincinnati, & Lexington Railway Company, party of the second part (both railway corporations duly incorporated under the laws of the state of Kentucky), and Joshua F. Speed, trustee, party of the third part, witnesseth: That for and on account of the difficulties of carrying into effect the contract of the parties of the first and second parts hereto, in relation to the lease, construction, and operation of said first party's proposed line of railway from Eminence to Bloomfield, of date the 28th day of July, 1879, said parties have and do hereby agree upon the following changes and modifications of said contract and the mortgage therein named, to take effect when and as soon as this change and modification shall have been duly and properly approved by a majority of the stockholders of each of said companies, and fully executed and recorded in the proper offices, when, to all intents and purposes, the said contract so amended and modified shall be regarded and taken as the true contract and agreement between the parties hereto.

(1) Whenever said second party shall be able to dispose of said mortgage bonds provided for in said contract and mortgage, amounting at their face value to the sum of \$150,000 (one hundred and fifty thousand dollars), and said bonds numbered from 1 to 150, inclusive, the proceeds in money, labor, or materials, the same may be done; and then this contract as amended, and in all its particulars, becomes absolute, and the construction of that portion of said first party's line of railway between Shelbyville and Bloomfield shall be commenced and pushed to completion as rapidly as possible; and a failure to complete said road so as to permit the safe and regular passage of trains between Shelbyville and Bloomfield within two years from the commencement of the work thereon shall, at the option of said first party, after six months' notice thereof, operate as a forfeiture of said lease; but no disposition of any of said bonds shall be made until not less in amount than \$150,000 (one hundred and fifty thousand dollars) of the face value thereof, numbered as aforesaid, can be placed for money or its equivalent.

(2) Not more than \$250,000 (two hundred and fifty thousand dollars) of the face value of said bonds, numbered from 1 to 250, inclusive, shall be used or disposed of in and about the construction of said railroad between Shelbyville and Bloomfield, and \$100,000 (one hundred thousand dollars) of the face value of said bonds, numbered from 251 to 350, both inclusive, shall be set apart and faithfully preserved in such manner as the board of directors of the

first and second parties may agree, for the ultimate construction of said first party's road between Eminence and Shelbyville; but said second party shall not be bound to begin the construction or operation of said last named portion of said railroad until, in the judgment of the board of directors of the said second party, the operation of the same would result in sufficient earnings to pay operating expenses and interest and sinking fund on the amount required to complete the same; and the mortgage heretofore made to Joshua F. Speed, trustee therein, is hereby so modified that the said 250 bonds to be used in constructing said railroad between Shelbyville and Bloomfield shall constitute no lien on that part of said company's road between Eminence and Shelbyville, until said 100 bonds set apart for its construction shall have been used for that purpose, and then all of said bonds issued shall be a joint and equal lien on the whole property, as set out in the original mortgage; and the said Speed, as trustee, is made a third party hereto, and shall sign this contract as evidence of his consent to the modification in this respect of the said mortgage. It being agreed and understood that at this date none of the said mortgage bonds have been sold or disposed of, but remain in the hands of the said second party; provided that, unless the second party shall complete the construction of so much of said first party's road as lies between Shelbyville and Eminence within five years from the 1st of September, 1880, then the lease of said last-named part of said road shall determine and terminate, at the option of said first party, after six months' notice; and, in the event of such termination of the lease, said bonds, numbered from 251 to 350, both inclusive, as aforesaid, and the coupons thereof, shall at once be canceled, so as to prevent their circulation, or, if the boards of the parties aforesaid so order it, they shall be destroyed.

(3) Before any of said bonds, numbered from 1 to 250, both inclusive, shall be sold or disposed of, each shall have a printed or lithographed indorsement thereon, to the effect that none of them or their coupons have any lien upon the company's property or franchise or line of road from north of Shelbyville until the one hundred bonds aforesaid are issued or used, and that portion of said road between Shelbyville and Eminence shall have been completed, and then all of said bonds and coupons shall have a common and joint lien on the whole property.

(4) The boards of directors of the first and second parties may agree to the use of second-hand rails to be sufficient for the safe transmission of trains, and to be removed and replaced as fast as they become unsafe. The price of said second hand rails to be agreed upon by said boards before being used.

(5) In all respects in which this contract is inconsistent with the original contract or mortgage, said originals are abrogated, and the contract as modified and amended by this agreement shall be taken as the true existing contract between the parties.

In testimony whereof, the said first and second parties, acting under directions of their respective stockholders, have each caused this contract to be signed with their corporate
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names and seals annexed by their respective presidents, and countersigned by the secretaries, and also duly signed by the said Joshua F. Speed.

Mortgage of C. & O. R. Co.

This indenture, made and entered into this the 2d day of July, in the year of our Lord 1879, between the Northern Division of the Cumberland & Ohio Railroad Company, a corporation duly organized under the laws of the state of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part, witnesseth: That for and in consideration of \$1 cash in hand paid by the party of the second part to the party of the first part; and whereas, it is provided in the charter of said party of the first part that it might issue mortgage bonds to complete its road, to the extent of \$15,000 per mile, upon all its property, rights, and franchises; and whereas, the stockholders and board of directors of said first party have determined to issue such mortgage bonds to the extent of \$350,000, bearing interest at the rate of 7 per cent per annum, interest payable half-yearly, and bonds being of even date with the said mortgage, and to be paid at the end of twenty years from their dates, and have determined that such mortgage shall be executed and bonds issued by minutes duly entered upon their record books, and have directed the preparation of said bonds, and the same have been prepared, aggregating the said sum of \$350,000, and divided into bonds of the denomination of \$1,000 each, making 350 bonds, numbered from 1 to 350, both inclusive, and lettered A; all of said bonds have interest coupons annexed thereto, to fall due on the 1st day of June and December of each year, interest and principal payable in the city of New York; and the said bonds have been duly executed, and are now about to be delivered, for the purpose of being sold, in order to complete their line of railway as specified in the lease this day made, from said Northern Division of the Cumberland & Ohio Railroad Company to the Louisville, Cincinnati, & Lexington Railway Company:

Now, therefore, for the equal security of each of said bonds at maturity, and the payment thereon of interest as the same matures, the said first party has this day bargained and sold, and does hereby bargain, sell, and convey, unto the said party of the second part, all the property, rights, and franchises of the said Northern Division of the Cumberland & Ohio Railroad Company, including all the right, title, and interest of said company, free from all liens, mortgages, or claims of any kind, and in and to its line of railroad, from its point of intersection with the line of road of said Louisville, Cincinnati, & Lexington Railway Company, in the town of Eminence, and the county of Henry, and state of Kentucky, through the counties of Henry, Shelby, and Spencer, and to Bloomfield, in Nelson county, Kentucky, together with all its improvements and appurtenances, right of way, lands adjacent thereto, machinery, tools, implements, fixtures, furniture, and materials, and supplies of every description, so as to vest in the said party of the second part all the right, title, and interest

of the said Northern Division of the Cumberland & Ohio Railroad Company in and to all the property owned by it, or in which it has any interest at the date of the execution of this instrument, or hereafter to be acquired by the said first party. To have and to hold the same to the said party of the second part, his successors and assigns, forever. It is expressly to be understood, and is hereby declared to be the true intent and meaning of these presents, that the said second party shall have and hold the premises hereby granted or covenanted so to be, as trustee, for the joint and equal benefit and security of all such persons as may hereafter become the legal holders of any of the bonds aforesaid, and for the security of the principal and interest of each of said bonds, without regard to the time at which the said holders may become possessed thereof; provided, always, that the said first party, its lessees or assigns, shall have and retain exclusive possession, control, and management of said premises until default made as hereinafter provided, and possession taken in consequence thereof, and may, with the approval and concurrence of said second party, sell or lease and make conveyance of any portion of said premises which may be found unnecessary to the workings of said road, the proceeds of such sale being reinvested in other real estate, subject to the same trust, or in liquidation of so much of the bonds issued hereunder; such reinvestment being made also with the approbation of said second party but without the purchaser being required to look to the reinvestment; and provided, further, that if said party shall well and truly pay the several instalments of interest on said bonds, and each of them, as the same shall become due, then this indenture shall become void and of no further effect.

In the event of the failure of said first party to pay any part of any instalment of said interest for more than sixty days after the same shall have become due and been demanded at the place where the said interest shall be properly payable, or in the event of its failure to pay any portion of said principal for more than ninety days after the same shall have become due and payable, and been demanded at the place where same shall be payable, then and in either event, it shall and may be lawful for the said second party, and his successors in the trust hereby created, upon request thereto made in writing by any person holding any of said bonds, in the payment of principal or interest of which default shall have been made as aforesaid, to enter upon and take possession of the railroad, property, and franchises hereby granted or covenanted so to be, and to hold, use, operate, and manage the same for the joint and equal benefit of all the holders of said bonds. And upon such default, and request made and possession taken, the profits arising from the operation and use of the premises shall be appropriated by the party of the second part as follows, to wit: (1) To the payment of the expenses of the trust, including a fair and reasonable compensation to the trustee for his services. (2) If there be any surplus remaining, then to the payment of the interest in arrears on said bonds. (3) If there be still a surplus, then to the payment of the accruing interest on said bonds as it falls due, and to the

payment of the principal of said bonds as it shall fall due. But in the event that, after such default and request made and possession taken, it shall become necessary or desirable to sell the premises in order to the more prompt payment of the interest and principal of said bonds, then it shall and may be lawful for said second party (upon request made in writing by persons legally holding said bonds to the extent of a majority of the bonds outstanding) to sell the said premises to the highest bidder, upon such terms as, not being inconsistent with this indenture, or the tenor or effect thereof, may be determined on by said second party and the person or persons holding said bonds. Said sale may be made for the whole amount of the principal and interest then accrued upon the whole issue of said bonds outstanding, treating the principal as become due by reason of the default in the payment of interest. And the whole purchase money may be required to be paid by the purchaser in the payments not less favorable to him than one third in cash, and the remainder in one and two years from day of sale, with interest from said day; or the purchaser may be required only to pay in like brief periods the interest then accrued and in arrears, and to secure the payment of the principal and accruing interest as they shall become due. But in any sale which may be made a lien shall be retained on the premises to secure the unpaid purchase money, and there shall likewise be reserved a power of resale in case of default in the payment of the purchase money. Said sale shall be made in the city of Louisville, and notice of the time, place, and terms of sale shall first have been given by public advertisement for at least four months in one or more newspapers published in each of the cities of Louisville, Lexington, Cincinnati, and New York. The money arising from any such sale shall be applied (1) to the payment of any interest which may be in arrears upon said bonds, and the expenses of executing the trust, including herein a fair and reasonable compensation to the trustee for his services; (2) to pay the principal of said bonds, or, if there be not sufficient to pay them in full, then to their payment *pro rata*. And, on such sale being made, it shall and may be lawful for said second party, by the execution of all needful and proper instruments of conveyance, to vest in the purchaser the full and perfect title to the premises, subject only to the lien and power of resale aforesaid. And said first party does hereby covenant to and with said second party, his successors and assigns, that it will, on reasonable request thereto, make, do, and execute such other and further deeds of conveyance and assurance of the premises, and particularly of the property, rights, and franchises hereafter to be acquired by them, as to the said second party, his successors and assigns, shall seem necessary and proper fully to effectuate the true meaning and intent of this indenture. And it does further covenant to and with the said second party, his successors, etc., that it will annually, commencing not later than the 1st day of January, 1883, appropriate from the earnings of said road a sum not less than \$5,000, which sum shall be annually expended in the purchase and redemption of said bonds,

or in the purchase of other interest-bearing securities approved by said second party, so as to form a sinking fund for the payment of the principal of said bonds when it shall become due.

It is further agreed and understood that said first party, or its lessee or assigns, shall have the option, at any time after the 1st of January, 1888, to redeem and take up said bonds, or any of them, by paying par and accrued interest to date of notice of redemption therefor. If election is made so to redeem, notice thereof shall be sufficient if given by advertisement in some daily newspaper published in the city of Louisville for thirty days; and, after the expiration of said thirty days the bonds called for and the sums due as interest shall cease to bear interest. But said bonds shall be called for in the order of their numbers, beginning at number 1, and following in numerical order. In order to the identification of the bonds whose payment it is intended hereby to secure, it is now declared that they shall each be sealed with the corporate seal of said first party, attested by the signature of the president, and countersigned by its secretary, and each certified on its face by the second party or his successor to be one of the issue intended to be protected.

And it is further agreed by and between the parties to this indenture that in the event of the death, resignation, or failure or refusal to act of the said second party, trustee, as aforesaid, then it shall and may be lawful for the Shelby circuit court, upon the application of the parties holding said bonds to the amount of \$70,000 or more, to appoint a trustee or trustees in lieu and stead of said second party; and the trustee or trustees so appointed shall thereupon succeed to and be vested with all rights, powers, and privileges which are by this indenture conferred upon said second party, or intended so to be.

In testimony of all which, the said party of the first part, by its president and board of directors, and in pursuance to action of its stockholders duly had, has caused these presents to be sealed with its corporate seal, and signed with its corporate name, and countersigned by its secretary, this 2d day of July, 1879.

Mortgage of Earnings of L. C. & L. R. Co.

This indenture of mortgage, made and entered into by and between the Louisville, Cincinnati, & Lexington Railway Company, a railway corporation under the laws of the state of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part, witnesseth: That whereas, by authority of an act of the general assembly of the commonwealth of Kentucky, approved the 18th day of March, A. D., 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction, and operation of the latter company's line of road from Eminence, in Henry county, Kentucky, though a part of said county and the counties of Shelby, Spencer, and into Nelson county, as far as Bloomfield, all in the state of Kentucky, said lease to continue for thirty years

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upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein that if the net earnings of said leased premises do not prove sufficient to pay the interest, and to provide for the sinking fund of 350 bonds of \$1,000 each, bearing interest at the rate of 7 per cent per annum, payable half-yearly, on the 1st days of June and December, and having twenty years to run from the 2d day of July, A. D., 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company, and if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed, on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company; and whereas, said contract or lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulations as to said net earnings: Now in consideration of \$1 cash in hand paid by said second party to said first party, and the premises, the said first party has this day, and does hereby, mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company, to the said Joshua F. Speed, as trustee, aforesaid (who is the trustee in the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said 350 bonds of \$1,000 each), conditioned that, if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency, so far as it may be done, by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines, for the purpose of discharging said interest and sinking fund as they severally fall due.

In testimony whereof, the said first party, acting under the authority and approval of its stockholders, duly assembled in stockholder's meeting on the 28th day of July, 1879, has caused these presents to be signed in duplicate in its corporate name by its president, and countersigned by the secretary, and its corporate seal hereto affixed, this 28th day of July, A. D. 1879.

It will further be seen that an order to better secure the holders of the bonds stipulated for in said lease, the Louisville, Cincinnati, & Lexington Railway Company executed a mortgage upon its net earnings derived from business coming to it from the lines of the said Cumberland & Ohio Railroad Company. It further appears that the trustee for the bondholders

and the other contracting parties all united in the modified agreement, which, together with said mortgage, constitute one entire contract and agreement. Afterwards the appellee the Louisville & Nashville Railroad Company purchased the entire property, rights, and franchises of the Louisville, Cincinnati, & Lexington Railway Company, including the lease from the Cumberland & Ohio Railroad Company of its line of railroad from Shelbyville to Bloomfield; and it is claimed that the said Louisville & Nashville Railroad Company assumed and became bound to perform all the duties and incur all the obligations undertaken by the said Louisville, Cincinnati, & Lexington Railway Company. It appears that said Louisville and Nashville Railroad Company took possession of said railroad from Shelbyville to Bloomfield, and entered upon the execution of the contract aforesaid, and up to the filing of the petition herein had been operating said road from Shelbyville to Bloomfield, but had given notice of its intention to abandon the operation of said road; and thereupon the said Cumberland & Ohio Railroad Company and appellant Schmidt, trustee for the bondholders, instituted this action for the purpose aforesaid. It will be further seen from the contract aforesaid that the lessee was empowered to sell \$250,000 of bonds of the Cumberland & Ohio Railroad Company for the purpose of raising funds for building the road; and various other stipulations as to the operation of said road, including the net earnings thereof, were to be applied to the payment of the interest and principal of said bonds, and, in the event that the earnings should not be sufficient, that the net earnings on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company should also be applied to the payment of the bonds aforesaid. It was also provided that the lessee should furnish various sums of money, which, if not repaid by the earnings of the Cumberland & Ohio Railroad Company, should be a debt in favor of said lessee against the lessor; and it appears that the lessor, by reason of the failure of the road to meet the demands and expenses aforesaid, had become largely indebted to the lessee, for which a personal judgment has been obtained against the lessor in behalf of the appellee the Louisville & Nashville Railroad herein, and same returned, "No property found." It will be seen that, by the terms of the lease, the lessee was to operate said road from Shelbyville to Bloomfield for the term of thirty years. It is alleged in the petition that great and irreparable damage will be sustained by appellant if appellee should cease to operate the road in question, and it is made to appear that no adequate remedy, except a mandatory injunction, can be obtained by appellant. It is further claimed in the petition that the earnings of the Louisville, Cincinnati, & Lexington Railway derived from business coming to it over the Cumberland & Ohio Railroad have always been large, and there is now in the Louisville law and equity court a suit, appealed to this court, brought to enforce the claim of said trustee and said bondholders.

The answer of appellee admits that it purchased from the Louisville, Cincinnati, & Lexington Railway Company all its property rights which that company had the right to convey or assign, except the franchise to exist as a corporation, and that the Louisville, Cincinnati, & Lexington Railway Company undertook to assign and transfer to the appellee the lease from the Northern Division of the Cumberland & Ohio Railroad Company, referred to in the petition, but that said lease, by its express terms, provided that it shall not be assigned without the consent of the lessor, and the consent of the Northern Division of the Cumberland & Ohio Railroad Company was asked, and refused by said company, and said company has never given its consent to the assignment of said lease. But the answer admits that the appellee took possession of said leased property, and has operated same ever since, but claims that it has done so as tenant at sufferance, and not by virtue of the assignment of the lease. It denies that it has made any net earnings on the line of the Northern Division of the Cumberland & Ohio Railroad, or appropriated same to its own use, or that there ever have been any net earnings, but alleges that the necessary cost of operation has exceeded the receipts in the sum of \$199,411.70. It is admitted that the appellant instituted suit against the Northern Division of the Cumberland & Ohio Railroad Company, and recovered judgment against it for \$419,808.85, and that said company was justly indebted to appellee under the lease referred to, but which it failed and refused to pay. The answer also shows that the execution for said sum was returned "No property found," and judgment was rendered for the sale of the leased road subject to the prior mortgage of the bondholders, but that no one would bid anything for the road subject to the lien of the bondholders; hence no sale was made. It is also alleged that the court refused to give a judgment for sums which the appellee had lost in the necessary operation of said road, but confined its recovery to the amount that had been necessarily paid out by the Louisville, Cincinnati, & Lexington Railway Company in completing the construction of the road, and paying interest on the mortgage bonds. It is also denied that appellee completed the construction of the Northern Division of the Cumberland & Ohio Railroad, but is claimed that it was so completed by the Louisville, Cincinnati, & Lexington Railway Company before the assignment of the lease to the appellee. It also denies that appellant will suffer great or irreparable damages on account of appellee's ceasing to operate the road on December 31, 1895. It is admitted that the charter of the Cumberland & Ohio Railroad Company enjoins upon it the duty to operate its road, and appellee is entirely willing that said Northern Division of the Cumberland & Ohio Railroad Company shall discharge the duty imposed upon it by its charter, but denies that any such duty is imposed upon this appellee under said lease, and insists that no duty rests upon the lessee, except such as grows out of the lease itself, and is to the lessor. It is also claimed that, even if appellee was originally bound by the covenant of said lease, it would be harsh and inequitable to compel it to

perform its onerous duties while said Cumberland & Ohio Railroad Company is continually in default in its covenant to repay to this appellee large sums of money. It also charges that the Cumberland & Ohio Railroad Company is insolvent. Appellee also denies that it owes any duty to the public or the bondholders represented by appellant to operate said road; claims that, if it owes any duty at all, it is only to the Northern Division of the Cumberland & Ohio Railroad Company; and, if it ever owed any duty to said company under said lease, it has been absolved therefrom by the default of the lessor, as aforesaid. It is claimed that appellee owes no duty to the bondholders, unless it is bound by the lease, and only so long as it is bound under and by the terms of said lease to operate said road; that whatever duty the Louisville, Cincinnati, & Lexington Railway Company undertook to perform to the bondholders was by reason of and growing out of the contract of lease with the Cumberland & Ohio Railroad Company; and it only bound itself during the term of said lease to account for the net earnings arising from the operation of said leased line, and to use the same as provided in the lease so far as it might be done towards the payment of the interest and the aggregation of a sinking fund for the retirement of said bonds, and it was only during the term of the lease, or that the lease should be in existence, and the said appellee operated said road under the lease, that it agreed to meet, so far as might be done from the profits on its own line on business coming to it from or over the Northern Division of the Cumberland & Ohio Railroad, the interest on the bonds aforesaid. It is claimed by the terms of the lease that the lessee was given the right to terminate the lease, and the duty of the lessee thereunder, and the rights of the lessor thereunder, by the sale of the franchise of the said Cumberland & Ohio Railroad Company, subject alone to the mortgage of \$250,000 resting upon said property and franchise; and, appellee having a right to so terminate said lease and the duties of said lessee thereunder by sale, it also had the right of exhausting all means to compel performance by the Northern Division of the Cumberland & Ohio Railroad Company of its covenant to abandon said leased premises after eight years without sale: that appellee in good faith endeavored, through means of court, to sell the same; and, after failing to sell the same, appellee claims it has a right to abandon the lease, and all rights and duties thereunder, and submits to the court that, under all the circumstances, it would be inequitable, at the instance of the Northern Division of the Cumberland & Ohio Railroad Company or the bondholders, to compel it to continue the operation of said road at great loss to itself, when it is not within the power of the court to compel the Northern Division of the Cumberland & Ohio Railroad Company to perform its material covenants under the lease.

The defendant the Louisville, Cincinnati, & Lexington Railway Company, by its answer, shows that on the first day of November, 1881, it, by deed, sold and conveyed to its codefendant, the Louisville & Nashville Railroad Company, all its property, rights, and franchises,
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except the franchise to exist as a corporation; that since that day it has had no property, money, or credit, and, as a result, is unable to operate the Northern Division of the Cumberland & Ohio Railroad, or do anything else which requires money or credit. It also has no power to comply with the order of this court, even if it should be made, to operate said road.

The replies of appellant may be considered a traverse of the affirmative allegations of the answer, and the affirmative allegations of the replies are controverted of record. A temporary injunction was granted by the Shelby circuit court, and upon motion to modify or dissolve the injunction thereto before Judge Hazelrigg, of this court, the appellant was required to give an additional bond, and, having failed to do so, the injunction was dissolved. Upon final hearing, the circuit court dismissed the petition, and Adolph Schmidt, individually and as trustee for the bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, has appealed.

It is contended by the appellee that the contract as claimed is too indefinite to be specifically enforced by a court of equity, and, even if the contract was more definite and certain, yet equity will not undertake to specifically enforce performance of a contract calling for continuous service requiring skill and judgment, and calling for continuous supervision upon the part of the court. It is also contended that the lessor in this case being in default, and having failed to comply with its obligation, the contract should not be enforced. It is also contended that this contract should not be specifically enforced because of harsh results that would follow its enforcement. It is further claimed that the appellee the Louisville & Nashville Railroad Company never became bound to operate the road in question for the term of thirty years. It is contended for appellant that appellee the Louisville & Nashville Railroad Company became bound to perform the covenant of the Louisville, Cincinnati, & Lexington Railway Company; secondly, the only way in which the rights of the bondholders under the contract can be protected is through the operation and maintenance of the Louisville, Cincinnati, & Lexington Railway and the Cumberland & Ohio Railroad; thirdly, this is a case of specific performance.

It seems to us that the appellee, having purchased all the property and rights of the Louisville, Cincinnati, & Lexington Railway Company, including the lease in question, and having taken charge of the road in question, and operated the same for a long time, and having elected to sue and recover the sums due to the Louisville, Cincinnati, & Lexington Railway Company from the Cumberland & Ohio Railroad Company, conclusively establishes the fact that it assumed whatever obligations the Louisville, Cincinnati, & Lexington Railway Company were under by virtue of the lease aforesaid; and it further seems clear that the appellee the Louisville & Nashville Railroad Company operated the road under and by virtue of said lease, and not as tenant by sufferance, and thus assumed all the obligations then resting upon the lessee. *Wiggins Ferry Co. v.*

Ohio & M. R. Co. 142 U. S. 408, 35 L. ed. 1059. The leases and mortgages hereinbefore referred to were for the benefit, not only of the lessor and lessee, but also for the benefit of the bondholders of the lessor company; and, this being true, it follows that the trustee for the bondholders has a right to maintain an action for the enforcement of the contract for the benefit of the bondholders. It is true that the lessor has not paid sums of money falling due under the lease to the appellee, but it by no means follows that such failure authorizes the lessee to abandon the contract, and cease to operate the road in question. It will be seen from the lease that certain acts or omissions to act should be held to terminate the lease, but the failure to pay the sums of money falling due from the lessor is not one of the conditions provided for as authorizing an abandonment of the lease. It is provided in the lease that, for the sums of money becoming due to the lessee from the lessor, the lessee might sue and recover the same, and is given a lien, subject to that of the bondholders, upon the road in question; and it may be well argued, this remedy being expressed in the lease, that a forfeiture of the lease was not intended to be allowed either as a remedy or punishment for nonpayment. Moreover, it was a statutory duty of lessor to operate the road, and, the lessee having for a term of thirty years agreed that the lessee should operate the same, it cannot be released therefrom on account of the failure of lessor to pay its indebtedness to the lessee, unless same had been one of the stipulations named in the lease. We are clearly of the opinion that the contract required the lessee to operate the road for the term specified. No other construction seems reasonable or tenable, and this view is sustained by the further fact that the lessee continued to operate the road for many years. But, be this as it may, the bondholders having an interest in the contract in question, and being in law a party thereto, the failure of the lessor to pay the sums due from it to the lessee cannot defeat the rights and interests acquired by the bondholders under and by virtue of the contract aforesaid.

It is earnestly insisted by appellee that the contract is not sufficiently certain to be specifically enforced. It seems, however, to us that the terms of the lease are sufficiently certain and definite to enable the court to compel specific performance. It would not be difficult for the court to safely and intelligently fix and determine the number of trains to be run upon the road, and arrange the various details necessary for the operation of the road; and a fair construction of the lease would authorize such an operation of the road as the business interests of the community from time to time would require. *Robinson v. United States*, 80 U. S. 18 Wall. 365, 20 L. ed. 654.

It is further insisted by appellee that a court of equity will not enforce specific performance of a contract calling for continuous service, involving skill and judgment, and requiring continuous supervision on the part of the court. Many authorities are cited in support of this contention, among which are the following: 8 Pom. Eq. Jur. § 1848, which reads as follows: "Contracts for Personal Services or Acts. Where a contract stipulates for special, unique, 88 L. R. A.

or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person. It is, however, a familiar doctrine that a court of equity will not exercise its jurisdiction to grant the remedy of an affirmative specific performance, however inadequate may be the remedy of damages, whenever the contract is of such a nature that the decree for its specific performance cannot be enforced and its obedience compelled by the ordinary processes of the court. A specific performance in such cases is said to be impossible, and contracts stipulating for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel an actor to act, a singer to sing, or an artist to paint. Applying the same course of reasoning, the English courts formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. Those courts have, however, entirely receded from this latter conclusion. The rule is now firmly established in England that the violation of such contracts may be restrained by injunction, whenever the legal measure of damages would be inadequate, and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations." It will be seen from the foregoing that the contract here sought to be enforced is essentially different from the illustrations or cases cited in the section quoted. *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 358, 19 L. ed. 961, is cited. It will be seen from the opinion in that case that the contract was to deliver a quantity of marble of certain kinds, and in blocks of a kind; and the court there held that specific performance ought not to be granted, on account of the great difficulty of enforcing the same, and, further, that one party had the right at any time to terminate the contract on one year's notice. The case of *Texas & P. R. Co. v. Marshall*, 186 U. S. 406, 34 L. ed. 390, is relied on by appellee. It appears from that case that the city of Marshall agreed to give the Texas Railway Company \$800,000 in bonds, and 66 acres of land for shops, etc.; and the company, in consideration of the donation, agreed to permanently establish its eastern terminus and offices at Marshall, and to establish and construct its machine shops, car works, etc., in said city. The city performed its agreement, and the company made Marshall its eastern terminus, and built a depot, etc., there. After the expiration of a few years, Marshall ceased to be the terminus of the road, and some of the shops were removed. The city filed its bill in equity to enforce the agreement, both as to the terminus and as to the shops. The court held

that establishing the shops, etc., and keeping them there for eight years, and until the interest of the company and the public demanded the removal of some or all of them to some other place, satisfied the contract. It is true that the court also stated in substance that the various duties and acts to be performed were such as a court of equity would not undertake to specifically enforce, if the contract had required perpetual performance. It may be conceded that some of the authorities cited by appellee sustain its contention, but we deem it unnecessary to notice them any further in detail.

It is also insisted by appellee that the enforcement of the contract under consideration would result in great hardship, and equity will not enforce specific performance of a contract that will result in great hardship. We do not think the facts in this case bring it within the rule announced in any of the decisions cited. It is manifest that the loss to appellee by reason of expense incurred in building the road, and for which it has obtained judgment against the Cumberland & Ohio Railroad Company, will remain unaffected by operation of the leased line. A court of equity might refuse to enforce a contract that at the time of its execution involved hardship or was unconscionable; but the mere fact that one having a number of years to run might turn out a losing investment or contract affords no reason of refusal to specifically enforce it. Moreover, if we are to regard the judgment referred to in the pleadings in the case of *Schmidt v. Louisville, O. & L. R. Co.* 95 Ky. 289, and 301, the operation of the leased line has by no means been a total loss to the appellee.

It seems clear to us that there is no adequate relief for the bondholders to be had, except by specific enforcement of the contract; hence the important question to be considered is the power of the court to enforce specifically the contract, and whether the same, in equity, should be enforced. As before said, there is some authority cited which sustains the contention of appellee that courts of equity cannot or ought not to specifically enforce a contract requiring skill and long or continuous supervision of the court; but it is insisted by appellant that the weight of recent decisions sustains its contention that such contracts can and ought to be enforced, and he cites several decisions in support of this contention, among which is the case of *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 152, 26 L. R. A. 610. It appears that the plaintiff granted to the defendant the use of certain of its tracks in the city, from a point named to said depot, for twenty-one years, from June 1, 1883, free of charge, and defendant covenanted to run cars to plaintiff's depot to connect with trains run to and from the island. The contract contained the provision that, in case defendant should use steam as a motive power on its line between the city and the island, either party could terminate the contract on six months' notice. The parties acted under the contract until October, 1889, when defendant adopted the trolley system of running cars by electricity for use upon its road between the city and the island, ceased to run its cars to said depot, and advised plaintiff that it did

not intend to do so. The plaintiff instituted suit to compel specific performance of the contract. In the opinion the court said: "As a final point the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run which requires the exercise of skill and judgment and a continuous series of acts. While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar. The special term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff. The provisions of this contract are neither complicated nor difficult, and are such as a court of equity can enforce in its discretion. A few of the cases may be referred to as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer v. Great Western R. Co.* 2 Younge & C. Ch. Cas. 48, the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In *Wilson v. Furness R. Co.* L. R. 9 Eq. 28, the defendant was compelled to erect and maintain a wharf. See also *Green v. West Cheshire R. Co.* L. R. 13 Eq. 44. In *Wolverhampton & W. R. Co. v. London & N. W. R. Co.* L. R. 16 Eq. 438, the agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement develop and accommodate the local and through trade thereof and carry over it certain specific traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made that the court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice. The injunction issued and Lord Selborne said (p. 438): 'With regard to the argument that upon the principles applicable to specific performance no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which in cases of this character those words "specific performance" are used. . . . The common expression, as applied to suits known by that name, presupposes an executory as distinct from an executed agreement. . . . Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the court requiring something or other to be done in specie. . . . Ordinary agreements for work and labor to be performed, hiring and service and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for "specific performance;" in other words, the nature of the contract is not one which requires the performance of some definite act, such as the court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. . . . The question is whether, the de-

fendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession.' The American cases are equally clear. In *Lawrence v. Saratoga Lake R. Co.* 36 Hun, 467, the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed, the court holding that, although under the agreement the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined from running any regular trains which did not stop at the station. The objection that the judgment in this case involves continuous acts and the constant supervision of the court is well met by the reasoning in *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 546, being affirmed as *Joy v. St. Louis*, 188 U. S. 1, 47, 50, 34 L. ed. 848, 858, 859, where Judge Blatchford wrote the opinion. As to inconvenience or circumstances which affect the interest of one party alone constituting a reason why performance should not be decreed, the case of *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339, 358, 19 L. ed. 955, 961, furnishes a clear discussion of the general principles involved. The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into; and if fair when made the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. See also *Stuart v. London & N. W. R. Co.* 15 Beav. 518; *Mortimer v. Capper*, 1 Bro. Ch. 156; *Jackson v. Lever*, 3 Bro. Ch. 605; *Paine v. Meller*, 6 Ves. Jr. 349; *Paine v. Hutchinson*, L. R. 8 Eq. 257; *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 472, 478, 36 L. ed. 776, 780, 781. A large number of other cases might be cited sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary. There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether, in the exercise of a wise discretion and in view of all the circumstances, specific performance should be decreed. After a most careful consideration of this case we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed. The order of the general term is reversed and the judgment of the special term is affirmed, with costs in all the courts."

The case of *Joy v. St. Louis*, 188 U. S. 1, 34 L. ed. 848, seems also to sustain the contention of appellant. *Union P. R. Co. v. Chicago, R. I. & P. R. Co.*, and *Union P. R. Co. v. Chicago, M. & St. P. R. Co.* (decided May 25, 1896) 163 U. S. 564, 41 L. ed. 265, were cases seeking specific enforcement of a contract for the use of certain railroad trackage rights. It was urged in those cases that courts of equity would not undertake to enforce specific performance of a contract requiring skill, and having a long time to run. The court, in discussing that question, said: "(3) The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting par-

ties to refuse performance of their contracts at pleasure by electing to pay damages for the breach. It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interest of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment, and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail, and not of the essence of the contract. It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies, 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and the expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. § 111. We regard the case of *Joy v. St. Louis*, 188 U. S. 1, 34 L. ed. 848, as determining that this contract was one within the control of a court of equity to specifically enforce. In that case the St. Louis, Kansas City & Colorado Railroad Company acquired by succession under a contract the right of running its trains over the line of the Wabash Company from a point on the northern line of Forest Park, through the park and into the Union Depot at St. Louis, together with the right to use side tracks, switches, turnouts, and other terminal facilities. It was a continuing right and unlimited in time, and the contract contained provisions regulating the running of trains and prescribing the duties of superintendents, trainmasters, and other officers. The objections that are urged against the specific performance of the contract under consideration were urged against the specific performance of that contract and were severally overruled, and it was held that nothing short of the interposition of a court of equity would provide for the exigencies of the situation. This case was cited with approval in *Franklin Teleg. Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776. The contract there was one for the use by Harrison Brothers & Co. of a wire of the Franklin Telegraph Company between Philadelphia and New York. It appeared that Harrison Brothers & Co. had been in possession of a certain valuable contract with the Insulated Lines Telegraph Company, to the rights of which company the Franklin Telegraph Company had succeeded. Desiring to have that contract terminated, the Franklin Company entered into a new contract with

Harrison Brothers, by which the Franklin Company agreed to allow Harrison Brothers the right to put up, maintain, and use a telegraph wire on the poles of the Franklin Company. At the expiration of ten years thereafter the wires were to become the property of the telegraph company, after which time the telegraph company was to lease the same to Harrison Brothers for \$600 per annum, payable quarterly, and with all the other terms and conditions as they existed before. The ten years having expired, Harrison Brothers continued to use the wire, paying the stipulated sum of \$600 per annum therefor; but after this had gone on for about three years the telegraph company served notice on Harrison Brothers putting an end to the agreement, whereupon Harrison Brothers filed a bill to restrain the telegraph company from terminating the contract and to have the same specifically enforced, and this court held that the contract was one proper for specific performance. The same rule was laid down in *Prospect Park & C. I. R. Co. v. Coney Island & B. R. Co.* 144 N. Y. 252, 26 L. R. A. 610, where many authorities are cited. In *Denter & R. G. R. Co. v. Alling*, 99 U. S. 468, 25 L. ed. 428, this court directed an injunction against the Cañon City Railway Company from preventing the Denver road from using the right of way through the Grand Cañon, and said: 'If in any portion of the Grand Cañon, it is impracticable or impossible to lay down more than one roadbed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 8, 1875, to use the same roadbed and track, after completion, in common with the Denver Company. In *Express Cases*, 117 U. S. 1, 29 L. ed. 791, the express companies sought to restrain the railway companies from refusing to carry express matter on the terms of contracts which had expired, which the court held could not be done, and it was said: 'The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but unless a duty has been created either by usage, or by contract, or by statute, courts cannot be called on to give it effect.' It was objected in *Joy's Case* that the court was proposing to assume the management of the railroad 'to the end of time;' but Mr. Justice Blatchford, speaking for the court, responded that the decree was complete in itself, and that it was 'not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective un-

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der altered circumstances.' And the court applied the principle that considerations of the interests of the public must be given due weight by a court of equity, when a public means of transportation, such as a railroad, comes under its jurisdiction. 'Railroads are common carriers and owe duties to the public,' said Mr. Justice Blatchford. 'The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions.' Clearly the public interests involved in the contracts before us demand that they should be upheld and enforced."

It seems to us that the weight of modern authorities sustains the contention of appellant, and a court of equity can enforce specific performance of the contract under consideration. It is pretty well known history of the country that many railroads, and for long terms, have been operated under the direct supervision and control of courts of equity. It does not seem to us that it would be difficult to enforce specific execution of the contract under consideration. The court might enforce its orders by attachment or rule according to equity practice, or, if deemed best, it might place the road in the hands of a receiver, to be operated at the cost and expense of the appellee the Louisville & Nashville Railroad Company.

For the reasons indicated, the judgment of the court below is reversed, and the case remanded, with directions to enter judgment requiring the appellee the Louisville & Nashville Railroad Company to operate the leased line until the expiration of the thirty years' lease aforesaid, and for proceedings consistent with this opinion.

PENNSYLVANIA SUPREME COURT.

FARMERS' BANK of Springville, New York, *Appl.*,

J. B. SHIPPEY *et al.*

(182 Pa. 24.)

Payments indorsed on the back of a note before its transfer to the payee do not destroy its negotiability.

(*Sterrett, Ch. J., dissents.*)

(July 15, 1897.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Wyoming County in favor of defendants in an action to enforce payment of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. W. E. Little, C. A. Little, Joseph Moore, and Ross & Dersheimer, for appellant:

The transfer of a negotiable note by indorsement under seal does not destroy the negotiable character of the note.

Ege v. Kyle, 2 Watts, 222.

A note payable "on or before a certain time" is negotiable.

Ernst v. Steckman, 74 Pa. 18, 15 Am. Rep. 542.

A note payable in instalments is negotiable.

Carlton v. Kenealy, 12 Mees. & W. 189

Payment of an instalment cannot destroy that negotiability.

Ege v. Kyle, 2 Watts, 222; *Dunning v. Heller*, 103 Pa. 269; *Second Nat. Bank v. Morgan*, 165 Pa. 199.

A note may be on interest and retain its character of negotiability.

Woods v. North, 84 Pa. 407, 24 Am. Rep. 201.

A note payable in instalments, all to become due on default being made in the payment of the first instalment, does not make the amount uncertain nor the instrument non-negotiable.

Zimmerman v. Anderson, 67 Pa. 421, 5 Am. Rep. 447.

A note "payable twelve months after date" (or before, if made out of the sale of a machine) is negotiable.

Ernst v. Steckman, 74 Pa. 18, 15 Am. Rep. 542.

A note accompanied by the statement "that it is accompanied with certain collateral" is negotiable.

Valley Nat. Bank v. Crowell, 148 Pa. 284.

A note similar to the one in suit was declared negotiable.

Second Nat. Bank v. Morgan, 165 Pa. 199.

A note transferred as collateral for a debt then created does not lose its negotiability so as to let in evidence of failure of consideration, where the holder took without notice.

Munn v. M'Donald, 10 Watts, 270.

NOTE.—Payments indorsed on note as affecting negotiability.

FARMERS' BANK OF SPRINGVILLE V. SHIPPEY seems to be the first case in which the question of the effect of indorsements before its maturity of payments upon a note upon its negotiability has been directly considered. There seems to be no doubt that the fact that a note is payable by instalments does not destroy its negotiability. *Oridge v. Sherborne*, 11 Mees. & W. 374; *Carlton v. Kenealy*, 12 Mees. & W. 189, 1 Dowl. & L. 331, 12 L. J. Exch. N. S. 64, and cases cited in FARMERS' BANK OF SPRINGVILLE V. SHIPPEY.

But, on the other hand, it has been held that a note giving the right to pay at any time before maturity, deducting the interest until due, is not negotiable. *Way v. Smith*, 111 Mass. 523.

But neither of those decisions has any material bearing upon the question under consideration. In case of an instalment note the time for the payment of each instalment is fixed so that it is within the rule requiring certainty as to time of payment. On the other hand, the general right to pay at any time before maturity destroys the certainty as to the time of payment. So that such cases are within well-established rules.

In *Knebelcamp v. Smith*, 8 Ill. App. 244, a default was taken against the maker of a note so that the question of the execution of the note was foreclosed, but the court held that the maker might, on the assessment of damages, show that payments had been indorsed upon the note before its transfer for the purpose of reducing the face of the note by the amount of payments.

In *Emerson v. Cutts*, 12 Mass. 78, where a note had been returned to the payee after having been negotiated by him, and it was then renegotiated to the one who brought the suit, it appeared that payments had been indorsed on it, but the defense was not made in regard to them, but upon the ground 38 L. R. A.

that the note could not be renegotiated after having been returned to the payee.

In *Johnson v. Kenyon*, 2 Wils. 282, where the action was by an indorsee who had been paid a portion of the claim by his indorser, Gould, J., says where the drawer of a bill has paid part it may be indorsed over for the residue.

In *Dryden v. Britton*, 19 Wis. 23, where a note in favor of a third person which had been transferred to defendant was claimed as a set-off in a suit, it appeared that the payee was to ascertain and indorse upon the note the amount of payments which had been made, and the court held that until such payments were ascertained and indorsed the title did not pass so as to make the note available as a set-off, but there is no claim that the negotiability of the note was destroyed by such indorsement.

The implication from the above cases, so far as it goes, would seem to be in favor of the continued negotiability of the note after the indorsement of payments thereon.

The case which comes nearest to an actual decision is *Ege v. Kyle*, 2 Watts, 222, in that the head-note states that an indorsement on a negotiable note of a receipt on account of a quantity of iron, "the net proceeds of which are to be credited on the within," does not destroy its negotiable character; but the point is not brought out in the report of the case, although the fact of credit appears in the statement.

The cases in which payments would be indorsed upon the note prior to its maturity are doubtless few, but in a respectable number of cases notes have changed hands after payments have been indorsed on them. No question as to the negotiability of the note has been raised in such cases, however, so that, although the general opinion seems to have been that the negotiability was not affected by such indorsements, the question does not appear to have been previously raised and decided.

H. P. F.

A bona fide holder of a negotiable note, for value, without notice, can recover, though he took it under circumstances which ought to excite the suspicion of a prudent man.

Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; *Second Nat. Bank v. Morgan*, 165 Pa. 199; *Lancaster County Nat. Bank v. Garber*, 178 Pa. 91.

Messrs. Charles E. Terry, Edwin J. Jordan, and James W. Platt, for appellants:

The essential element of a negotiable promissory note is that it should be certain. Certainty is required, first, as to the payee; second, as to the maker; thirdly, as to the amount to be paid; fourthly, as to the time when the payment is to be made; and fifthly, as to the fact itself of payment.

8 Wait, Act. & Def. 165; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; 1 Wait, Act. & Def. 538.

Certainty is a great object in mercantile instruments.

1 Wait, Act. & Def. 548; *Bunker v. Athearn*, 35 Me. 364; *Hays v. Gwin*, 19 Ind. 19; *Overtorn v. Tyler*, 3 Pa. 347, 45 Am. Dec. 645.

The indorsement of payments on the back of the note destroyed its negotiability.

Payments were made by persons who had not signed the note. Why did not this create uncertainty as to the terms, conditions, and persons who were to pay the note?

Overtorn v. Tyler, 3 Pa. 348, 45 Am. Dec. 645; *Sweeney v. Thickett*, 77 Pa. 181; 1 Parsons, Notes & Bills, 87; *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201; *Johnston v. Speer*, 92 Pa. 227, 87 Am. Rep. 675; *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190; *Philadelphia Bank v. Newkirk*, 2 Miles (Pa.) 442; *Iron City Nat. Bank v. McCord*, 189 Pa. 52, 11 L. R. A. 559; *Lamb v. Story*, 45 Mich. 488; *Fralick v. Norton*, 2 Mich. 180, 55 Am. Dec. 56; *Way v. Smith*, 111 Mass. 523; *Hubbard v. Mosely*, 11 Gray, 170.

The amount of this note, moreover, could not be ascertained by calculation.

These defendants were sued and declared against jointly.

Where a note is joint and several the holder may bring separate actions. But he must proceed against all jointly on their joint contract or against the several makers separately.

8 Randolph, Com. Paper, ¶ 1667; *Hart v. Withers*, 1 Penn. & W. 285, 21 Am. Dec. 382; *Rowan v. Rowan*, 29 Pa. 181; *Coughenour v. Suhre*, 71 Pa. 462.

Dean, J., delivered the opinion of the court:

The action was assumpsit upon a note of which the following is a copy:

\$833.¹¹/₁₀₀. Tunkhannock, July 8th, 1891. One year after date, for value received, we or either of us promise to pay J. Thompson & Co., or order, eight hundred and thirty-three ¹¹/₁₀₀ dollars, at the Wyoming National Bank of Tunkhannock, Pa., with interest at 6 per cent per annum, interest payable annually.

This was signed by all of defendants, fifteen in number. On the back of the note were these indorsements: "July 11th, 1891. Rec'd 88 L. R. A.

of J. C. Reed thirty-three and ¹¹/₁₀₀ dollars, to apply on within note." There was a like indorsement of payment of a like amount as to seven others of the drawers, and indorsement of payment by one other in sum of \$66.66, and one other in sum of \$16.66. Then followed the indorsement of the payees, "J. Thompson & Co." On notice by defendants, before trial, the plaintiff proved it was bona fide holder, for value, before maturity, without notice of any defense by the drawers. The defendants offered evidence tending to prove that the note represented a part of the purchase price of a horse sold to twenty-five persons by Thompson & Co., through an agent, Shaw: that the whole price was \$2,500. for which three notes of a like amount, \$833.33 payable in one, two, and three years, were given, and that these notes were not to become obligatory on any one of the purchasers until the whole twenty-five had signed; that this note was not so signed; further, that gross misrepresentations had been made to them by Shaw as to the age and soundness of the horse. The court below, being of opinion that the indorsements destroyed the negotiability of the note, submitted the evidence to the jury on both particulars set up by the defendants. There was a verdict for defendants, and judgment having been entered thereon, plaintiff now appeals, assigning for error the refusal of the court to affirm its first point, as follows: "The note in suit is a negotiable instrument, and its negotiability is not destroyed by reason of the indorsements of payments thereon."

The reasons for denying the point fairly appear in the language of the court below, as follows: "Here was a note dated 8th July, 1891, due one year from date, and called for the payment of \$833.33. Now, nothing can be paid on that note until the year is up, unless by the agreement of the parties and a modification of the contract which the parties then enter into. It seems from the face of the note, by the indorsements that were upon it at the time the plaintiff purchased it, that on the 11th July, 1891, the sum of \$33 was paid by various parties, and indorsed upon the back of the note. That was before the note was due, and could only have been placed there by the consent of those who held the note at the time, through a modification of the contract as originally written. Now, the parties have agreed to modify this contract, and that they would agree to treat certain portions of this note as due before the year was up, and permit payments to be made. That reduced the amount of the note from \$833.33 to a different amount, which is not stated on the face of the paper or anywhere else upon it. A note or instrument cannot be negotiable unless the amount due upon it is stated in writing or figures. The amount due upon the note in suit is nowhere stated in figures or writing upon it. When this note left the hands of these parties, it was negotiable paper, and remained such until it was modified by a different contract by the parties who held it. When they received any amount before the note was due, it modified the contract; so it is no longer a negotiable instrument, for the reason that the amount due is no longer stated on the face of the paper." The ruling of the court is based on the as-

sumption that the note was executed on the 8th, and the contract modified by accepting payment on the 11th, three days after; that is, the payees of the note, to whom it was delivered on the 8th, subsequently, on the 11th, agreed to a change of contract with part only of the drawers, thereby rendering the amount due uncertain, a certain amount no longer appearing either in words or figures, on the face of the note. Taking the date as of the 8th, and the indorsements as of the 11th, the presumption that the indorsements were made after delivery would be warranted; but the court below seems to have overlooked the undisputed fact that the final execution of the note by delivery did not take place until the 13th. Three of the drawers signed after the indorsement of the payments. So, there was no modification of the contract, as between the drawers and the payee, after delivery. The indorsements were made as between the drawers themselves. Therefore, what would be the effect as to other drawers if part of them, after delivery to the payee, with his consent, modified the original contract, does not arise. When executed by delivery the contract was precisely what it now appears.

The note, on its face, being negotiable, and indorsed by the payee to plaintiff, who took it for value, without notice of any fraud, as between the original parties to it, did the indorsements on the back destroy its negotiability, so that plaintiff took it subject to any defense the drawers had as between them and the payees? "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency."

Woods v. North, 84 Pa. 407, 24 Am. Rep. 201. The note in question in that case had a clause "and 5 per cent collection fee if not paid when due." This court held that these words imported into the paper an undoubted element of uncertainty, because the amount of the collection fees could not be arbitrarily determined by the parties. A reasonable compensation was all that could be recovered, notwithstanding the stipulation. Unquestionably, if the 5 per cent was not unalterably fixed, if only a reasonable compensation, which might be 2, 3, or 4 per cent, could be added, then the face of the note signified no certain amount. It might just as well have been written "with reasonable charges for collection." But how does the indorsement of a payment before execution render the amount called for on the face of the note uncertain? It is a mere matter of computation, which, by reason of numerous payments, may be burdensome, but nevertheless the mathematical result is absolutely certain. In *Ege v. Kyle*, 2 Watts, 222, there was indorsed on the note, "Received on the within note, six tons nine hundred one-quarter and nineteen pounds of bar iron, the net proceeds arising from the sale of which are to be credited on the within, which is \$397.50." The court below ruled that this indorsement did not affect the negotiability of the paper. And while, as argued by appellee,

the principal contention in this court was whether the suit had been properly brought in the name of Kyle, nevertheless that was not the only one, for this point must have been passed on when this court decided: "The other errors are not supported." Although the case is meagerly reported, it is quite obvious that counsel had but little confidence in his point, and it was probably not pressed in either court. *Ege v. Kyle* was approved as a precedent on this point, in *Dunning v. Heller*, 103 Pa. 269, Paxson, J., delivering the opinion, saying: "It was held in *Ege v. Kyle* [2 Watts, 222], that an indorsement on a negotiable note of a receipt on account of a quantity of iron, 'the net proceeds of which are to be credited on the within,' . . . did not destroy its negotiable character." Such indorsement could not render the amount less certain than a promise to pay with interest; yet such a stipulation does not destroy the negotiability of the paper. "A negotiable note may be made payable with interest from its date, and, if more than lawful interest is stipulated for, it does not in Pennsylvania make the contract void, but only the usury." *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201. In the case of *Second Nat. Bank v. Morgan*, 165 Pa. 199, the suit was on a note of the precise amount of this one, and given for a like consideration. The question was as to the sufficiency of an affidavit of defense averring precisely the same misrepresentations and fraudulent conduct on part of payee, and that plaintiff had notice of the same, as were set up by the drawers in this case. It was held by this court that the note was negotiable, and the affidavit was insufficient. But, although a credit was indorsed by the payees on the back of the note of \$116.66, neither the affidavit, the counsel for defendants, the court below, nor this court, intimate that that fact affected its negotiability. All assume it did not. The rarity of cases on a question which must be of such frequent occurrence as indorsements of payments on negotiable paper only indicated that since *Ege v. Kyle*, decided more than sixty years ago, the profession generally has assumed that such indorsements do not affect the negotiability of such paper. We are of the opinion that these indorsements did not take from the note its character as commercial paper, and that the learned judge of the court below erred in deciding otherwise. It is wholly immaterial who made the payments. When made, they were to that extent in relief of the drawers' liability, and, being made while the paper was still in their possession, the presumption, as between them and a bona fide holder, is absolute that they were made with their authority. The note being negotiable, the suit in favor of this plaintiff can be sustained jointly against all the drawers.

The judgment is reversed, and a v. j. d. n. awarded.

Sterrett, Ch. J., dissents.

President, etc., of DELAWARE & HUDSON
CANAL COMPANY, *Appls.*,

v.

David HUGHES *et al.*

(188 Pa. 66.)

Adverse possession of the surface of land for sufficient time to give title, by one who has actual notice that a third person has purchased the underlying coal and is using the vein as part of his mine, which includes a larger tract, does not give title by adverse possession to the coal under the surface.

(October 25, 1897.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Lackawanna County in favor of defendants in a suit brought to enjoin defendants from mining coal on plaintiffs' land. *Reversed.*

The facts are stated in the opinion.

Messrs. William H. Jessup and James H. Torrey, for appellants:

This is a case of first impression. We have been unable to find a decision upon the exact point in any of our reported cases.

Where a severance has taken place of the surface from the underlying strata of coal or other minerals, no possession of the surface constitutes any possession of the underlying strata.

Plummer v. Hillside Coal & I. Co. 160 Pa. 483; *Kingsley v. Hillside Coal & I. Co.* 144 Pa. 618; 1 Am. & Eng. Enc. Law, p. 262, note 1; *Puinam Free School v. Fisher*, 84 Me. 172; *Caldwell v. Copeland*, 87 Pa. 481, 76 Am. Dec. 486.

How, then, may one in possession of the surface merely obtain title by the statute of limitations to the minerals or strata of coal lying underneath?

Tyrwhitt v. Wynne, 2 Barn. & Ald. 554; *Lord Cullen v. Rich*, Bull. N. P. 1026; *Rich, Lord Cullen, v. Johnson*, 2 Strange, 1142; *Armstrong v. Caldwell*, 58 Pa. 284.

Title to mines or quarries, whether open or unopened, as a separate subject-matter, is capable of acquisition under the limitation acts if the person claiming them has already the exclusive right to the surface, and if his acts show such a possession of them as, if he were not already entitled to the surface, would have enabled him to acquire a title to them as part of the entire *solum* from the surface down to the center; they will enable him to acquire a title to them as a separate subject-matter.

MacSwinney, Mines, pp. 27, 526, 527; *Thew v. Wingate*, 10 Best & S. 714, note; *M'Donnell v. M'Kinty*, 10 Ir. Law Rep. 527; *Eari Dartmouth v. Spittle*, 19 Week. Rep. 445; *Ashton v. Stock*, L. R. 6 Ch. Div. 726; *Seaman v. Vawdrey*, 16 Ves. Jr. 892; *Barnes v. Mawson*, 1 Maule & S. 84.

To constitute a continuous possession of mines, it is only necessary that the operations be prosecuted as continuously as the nature of the business and the custom of the country permit.

NOTE.—For running of statute against action for removal of coal, see *Lewey v. H. C. Frick Coke Co.* (Pa.) 28 L. R. A. 233.

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Stephenson v. Wilson, 50 Wis. 95; *Wilson v. Henry*, 40 Wis. 594.

Messrs. S. J. Strauss, Thomas P. Duffy, and John T. Lenahan, for appellees:

Whoever owns the surface is presumed to own, and would originally actually own, whatever might be beneath the surface, until he shall have granted away the one or the other and thus separated their ownerships.

2 Washb. Real Prop. 3d ed. 345; *MacSwinney, Mines*, London ed. 1884, 26.

Whatever is in a direct line between the surface and the center of the earth belongs to the owner of the surface.

Dallas's Bainbridge, Mines, 1871, *5; *Caldwell v. Copeland*, 87 Pa. 480, 76 Am. Dec. 436; *Armstrong v. Caldwell*, 58 Pa. 284; *Kingsley v. Hillside Coal & I. Co.* 144 Pa. 618; *Plummer v. Hillside Coal & I. Co.* 160 Pa. 483.

Actual possession is superior to constructive possession as the substance is superior to fiction. There is not in this case a conflict between two actual possessions, but between one actual and one constructive.

If any principle in the law of Pennsylvania can be regarded as settled by argument and authority, it is that which affirms that the legal title to uncultivated lands draws to it the possession, and that this possession is to be deemed actual for all purposes of remedy until it is interrupted by an actual entry, and adverse possession taken by another.

Miller v. Shaw, 7 Serg. & R. 184; *Barr v. Gratz*, 17 U. S. 4 Wheat. 213, 4 L. ed. 553; *Hols v. Rittenhouse*, 25 Pa. 493.

A mere physical possession of one seam of coal does not of itself create a presumption of the possession of all the other seams of coal lying thereunder.

MacSwinney, Mines, pp. 41, 42.

Williams, J., delivered the opinion of the court:

This case presents a question of considerable importance to the owners of mineral lands, which does not seem to have been decided by the courts, or to have been discussed by text-writers, so far as I have been able to discover. It will be readily understood from a brief statement of the facts out of which it arises. The plaintiff company is engaged in mining and selling anthracite coal. As early as 1825 it was the owner of a considerable body of contiguous lands which had been purchased by it because of the coal underlying it. A tract known as the "Porter Tract," containing 200 acres, was part of this body of coal land. The coal upon it was opened by the company at some time between 1830 and 1835, and mining operations begun under it. From that time to the present the company has been in the possession of its mineral deposit under the surface of the Porter tract by actual mining and by the use of the openings and gangways for purposes connected with the removal of coal from adjoining lands belonging to it. The defendant derives his title from one Alexander McDonald, who was an employee of the plaintiff, and who entered upon the surface of the Porter tract in 1836 or 1837, and began a residence upon and the cultivation of a small portion of it. It does not seem to admit of

serious doubt that from 1850, and perhaps somewhat earlier, down for a period of more than twenty-one years, the possession of McDonald and his vendees of the land in controversy has been open, notorious, hostile, and exclusive. As to the surface, therefore, the defendant has acquired a title under the statute of limitations. The question raised by this record is whether he has also, under the circumstances just stated, acquired a title to the underlying coal. The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downward to the center of the earth and upward indefinitely. So long as mineral deposits remain in place, they are part of the freehold, and pass with it by deed, gift, or other form of conveyance; but when the minerals are removed from their position or bed by mining they become personal property, and are sold like other personal chattels. If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in the land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place. The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner, and by the same words of grant, made use of in conveyances of the surface. When such a conveyance has been made of the coal or other mineral it works a severance of the estate so conveyed from the surface; and, if the deed be recorded, it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose, and reside upon his estate for any length of time, but his possession will not extend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed. In like manner the owner of the mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward, and attach to the surface. Each estate may be occupied, conveyed, encumbered, sold by the sheriff, or allotted in partition, without any effect upon the other. If a trespasser enters either estate, and maintains possession, he can acquire title by the statute of limitations after twenty-one years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive, and continuous manner. *Caldwell v. Copeland*, 87 Pa. 427, 78 Am. Dec. 436; *Armstrong v. Caldwell*, 88 L. R. A.

58 Pa. 284; *Kingsley v. Hillside Coal & I. Co.* 144 Pa. 618. A covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of anyone. *Levey v. H. O. Fricke Coke Co.* 166 Pa. 536, 23 L. R. A. 268; *Scrantom Gas & Water Co. v. Lackawanna Iron & C. Co.* 167 Pa. 136. Possession, to be adverse, must be open as well as continuous. The intruder must keep his flag flying in a visible and hostile manner. *Plummer v. Hillside Coal & I. Co.* 160 Pa. 488. So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, May there be a severance of the mineral estate from the surface by the acts of the owners of the original freehold? And, if so, May there be notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of the deed? It is very clear, as we have seen, that if the deed to the plaintiff had been for the coal under the Porter tract only, the entry of McDonald upon the surface, and his inclosure of a part of it, would have had no effect upon the lower estate. The rule is well settled by the cases cited above. The reason of the rule is that the sale of the coal severed it from the surface, and the recording of the deed gave constructive notice to McDonald of such severance, whether he had any knowledge of it or not. But the plaintiff's deed was for the whole of the land, including the soil and minerals. The company had the right, however, to develop and operate the mineral estate alone, if that was to its interest, and leave the surface untitled and uncleared. It elected to do so. It erected its breakers, opened its mine, extended its gangways, arranged its tracks and sidings, and began the production of coal for the market from beneath the surface of the Porter tract and its adjoining lands. In this manner it entered upon the actual possession of its mineral estate. For more than sixty years it has continued its possession without interruption in a manner that has been obvious to all persons in the neighborhood. No person could pass or enter upon the land without being confronted with the unmistakable proofs of the possession and active operations of the plaintiff in this, its subterranean estate. These proofs, including the structures, the culm piles, the prepared coal, the movements of men and cars about the pit's mouth, brought the knowledge of the plaintiff's operations to even the most casual observer in a much more effective and satisfactory manner than it could have been done by the mere existence of a recorded deed. Why should it not have the same legal effect? In this case there is still another element of notice, for the defendant not only made his entry upon the surface with full knowledge, from the acts of the owner, of his severance, and the occupancy of

the lower estate by it, but he was in its employ, assisting in its mining operations. He was one of the persons by whose labor the plaintiff preserved its possession, and kept its own flag flying. Surely, notice, could go no further than this. The recording of a deed is notice, notwithstanding the party to be affected by it may never have known of its existence, or of the severance wrought by it, because he might have known, if he had exercised the vigilance the law requires of him, and examined the record. So, it is well settled, possession is notice, although the person to be affected did not know of it. It was his duty to take notice of the possession as well as of the record, and, if he failed to do it, it was his folly. He is held to know, because he might have known if he had made the examination which it was his duty to make. Here the possession of the owner was known. The estate in which it was at work was known, and the defendant was in its service, contributing by his own labor to the development of the mineral estate, and to the maintenance of his employer's possession. This was notice by, and because of, the clearest knowledge of all the facts. McDonald had this knowledge when he first entered upon the surface, and he was affected by it. He knew of the actual severance of the estates in the Porter tract. He knew the owners were in the exclusive possession of the lower one, and himself assisted as an employee in the work by which that possession was made visible and notorious. He never did anything to challenge their possession of the mineral estate. On the contrary, all he did, aside from the erection of a shelter on the surface, was as servant of the owner, under its direction, and in the clearest recognition of, and subserviency to, its title. Under such circumstances it is plain that, if he acquired a title to the surface of the 6 acres he claims, he could not clutch also the mineral estate, or any part of it, that lay below the surface. It would be inequitable and unjust to hold otherwise in this case. He had stolen in upon the surface while at work for the company that owned both it and the coal. He knew of the severance in fact of these estates, and aided in the general work that made the severance evident to the world. If, entering under such circumstances, he could acquire the surface, he is limited to it. Knowing all the facts, he was bound, if he desired to acquire title to his employer's mine, or any part of it, to enter upon the mineral estate at some point, take possession, hold it openly and adversely for twenty-one years, so that his position and claim could have been known to the owner. Any different holding would lead to very absurd results. It would require us to hold that constructive notice is better than actual notice. Even this is short of a full statement of the result of the contrary doctrine, for in reality it would require us to hold that notice in fact had no significance, and bound no one. If McDonald was not bound by the complete knowledge he possessed and

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the opportunity for inquiry which his relations to the owner afforded him, it would follow that actual knowledge did not so much as put him upon inquiry. It would be much more reasonable to strike down the constructive notice which the law raises from the recording of a deed than thus to put it out of the power of an owner to protect himself by the clearest disclosure of his possession of his estate, and its purpose, to one of his own employees. But it is said that the company was not engaged in mining immediately under the 6 acres of surface occupied by McDonald, and that there was considerable unmined coal in place directly below his inclosure. McDonald entered upon the surface of the Porter tract knowing of the severance of the coal under it from the surface. The plaintiff's mineral estate was protected as fully by this actual knowledge as it would have been by constructive notice, and no title by the statute of limitations could be acquired within the limits of that estate without an entry upon it. An entry upon another estate—that upon the surface—can have no effect outside the estate entered. If there is no severance, an entry upon the surface will extend downward, and draw to it a title to the underlying minerals; so that he who disseises another, and acquires title by the statute of limitations, will succeed to the estate of him upon whose possession he has entered. But, if a severance is made before his entry, and he has notice of that severance, either by the record, or by the state of the possession acquired both by observation and by years of service in the employment of the owner, his entry upon either of the estates will not affect the other. Possibly the question of the extent of the possession of a trespassing miner acquired by reason of his entry upon the mineral estate may sometime be presented. If so, it will be time to consider it when it comes before us. It is not in this case. As applicable to the facts now before us, we hold that the Porter tract, or so much of it as was accessible from the pit's mouth in use, so that coal could be mined and removed therefrom by the ordinary methods of mining, was in the actual possession of the plaintiff, and that no inclosure upon the surface of that tract by one who had notice of the severance would draw to it any part of the mineral estate within its limits. This disposes of the suggestion that the unmined coal under the 6 acres has been or could be acquired by McDonald by virtue of his possession on the surface. He acquired the surface because he put his actual possession against the constructive possession of the owner. He did not acquire the coal because he had actual notice of its severance from the surface by the owner. This limited his possession to the estate on which he entered.

These views require us to reverse the decree of the court below, to restore the preliminary injunction, and upon the facts that are undisputed to make the injunction perpetual; the costs of this appeal to be paid by the appellees.

INDIANA SUPREME COURT.

Benjamin F. WAMPLER, *Appt.*,

v.

STATE of Indiana, *ex rel.* Virgil H. ALEXANDER *et al.*

(.....Ind.....)

1. The facts stated in an alternative writ of mandamus may be supplemented by those stated in the application in determining whether or not they are sufficient to withstand a demurrer.
2. Mandamus may be invoked to force a township trustee to meet with others for the purpose of appointing a county superintendent as required by law, when they have met on a day fixed by law for that purpose, and have adjourned from day to day for want of a quorum.
3. The court knows judicially the proper biennial year in which the law requires trustees of each county in the state to meet and elect officers.
4. The statutory provisions naming the time for trustees to convene in order to appoint a county superintendent are directory only, and the failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day.
5. An applicant for the writ of mandamus need not show any legal or special interest in the result, but only that he is a citizen and as such interested in common with other citizens in the execution of the law when the object of the action is to enforce the performance of a public duty or right in which the people in general are interested.

(October 26, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Blackford County in favor of relators in a mandamus proceeding to compel him to meet with relators in his official capacity of township trustee for the purpose of transacting township business. *Affirmed.*

The facts are stated in the opinion.

Mr. Jay A. Hindman, for appellant:

In the earlier practice it was held that the application, petition, or affidavit for the writ constitutes the complaint, and that the alternative writ is in the nature of a summons or notice.

Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; *Draper v. Cambridge*, 20 Ind. 288; *State, Fullheart, v. Buckles*, 89 Ind. 272; *Lewis v. Henley*, 2 Ind. 332.

Later, a rule of practice was declared that the alternative writ constitutes the complaint, and must, within itself, state a prima facie cause of action.

Clarke County Comrs. v. State, Lewis, 61 Ind. 75; *Boone County Comrs. v. State, Titus*, 61 Ind. 379; *Jessup v. Carey*, 61 Ind. 584; *Johnson v. Smith*, 64 Ind. 275; *Smith v. Johnson*, 69 Ind. 55.

NOTE.—As to quorum, see also *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308, and note; *Tillman v. Otter* (Ky.) 29 L. R. A. 110; and *State, Stanford, v. Ellington* (N. C.) 30 L. R. A. 532.

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This rule was modified in the case of *Gill v. State, Ripley County Comrs.*, 72 Ind. 266, where it was held that the application and the writ constitute the complaint, and that the office of the alternative writ is to notify the defendant what it is sought to have him commanded to do, and to give him an opportunity to show cause against such mandate. This rule seems to be a departure from the established practice in almost every other jurisdiction, and is evidently not well supported by authority or fundamental principles of pleading.

In ordinary actions the rules of pleading are not so lax.

Farris v. Jones, 112 Ind. 498.

To adopt a rule of practice in extraordinary proceedings that would not be tolerated in ordinary actions seems to be without sanction of law, and in violation of fundamental principles of pleading.

Clarke County Comrs. v. State, Lewis, 61 Ind. 75; *Caffyn v. State, Rader*, 91 Ind. 324; *State, Sigler, v. Madison County Comrs.* 92 Ind. 133.

The application, strictly speaking, is not a part of the pleadings in the case.

High, *Extr. Legal Rem.* 3d ed. §§ 508-510, 514.

The alternative writ being regarded as the foundation of all the subsequent proceedings in the case, and resembling, in this respect, a declaration in an ordinary action at common law, it must show upon its face a clear right to the relief demanded, and the material facts upon which the relator relies must be distinctly set forth, so that they may be admitted or traversed by the return.

High, *Extr. Legal Rem.* §§ 536-538; *Hambleton v. Dexter*, 89 Mo. 188; 14 Am. & Eng. Enc. Law, p. 212; *Florida C. & P. R. Co. v. State, Tavares*, 31 Fla. 483, 20 L. R. A. 419.

In many jurisdictions a private citizen must have some special interest or right to be protected, independent of that which he holds in common with the public at large, to entitle him to mandamus.

Mitchell v. Boardman, 79 Me. 469; *People, Russell, v. Inspectors & Agents of State Prison*, 4 Mich. 187; *Heffner v. Com., Kline*, 28 Pa. 108; *Reedy v. Eagle*, 23 Kan. 254; *State, Bamford, v. Hollinshead*, 47 N. J. L. 439.

In other jurisdictions a more liberal rule obtains, and when the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has a special interest in the subject-matter of the action. But in these jurisdictions, where the rule is most liberal, it must at least be shown that the relator is a citizen and as such has an interest in the execution of the laws.

Decatur County Comrs. v. State, Hamilton, 86 Ind. 8.

The demurrer to the alternative writ called in question the right or authority of the relators to institute or maintain this suit.

Farris v. Jones, 112 Ind. 498.

The averments in the writ should show that the thing asked can be done, that its performance is not impossible, and that the relators

have a clear right to the granting of the writ.

State, Officer, v. Grubb, 85 Ind. 218.

The writ of mandamus only issues where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed, and where there is no other specific and adequate legal remedy.

High, Extr. Legal Rem. 8d ed. § 9.

Since the act in question could be performed only in conjunction with other persons, a time ought to have been fixed in the writ for the doing of the thing commanded, otherwise the mandate could not be obeyed by the respondent.

Especial care should be taken in framing the mandatory clause of the alternative mandamus, since the writ must be enforced in the terms in which it is issued, or not at all, and the relator is concluded by its terms.

High, Extr. Legal Rem. § 589; *Florida C. & P. R. Co. v. State, Tavares*, 31 Fla. 482, 20 L. R. A. 419.

The courts are powerless to award the peremptory writ of mandamus in any other form than that fixed by the alternative writ.

High, Extr. Legal Rem. § 548; 14 Am. & Eng. Enc. Law, p. 214.

Mandamus will not lie to compel the appointment of a county superintendent at a time other than that fixed by statute.

State, Fry, v. Martin County Comrs. 125 Ind. 247; *Williamsport v. Kent*, 14 Ind. 806; *State, Walden, v. Vanosdal*, 181 Ind. 888, 15 L. R. A. 832; *State, Laughlin, v. Porter*, 118 Ind. 79.

Mr. John A. Bonham for appellees.

Jordan, J., delivered the opinion of the court:

This was a proceeding in the lower court on the part of the relators, Virgil H. Alexander and Alexander Gable, to obtain a writ of mandate against the appellant, a township trustee of Blackford county, Indiana, to compel him to meet with them (who are also township trustees) for the purpose of electing a county superintendent of schools. On the filing of the application the court awarded an alternative writ. After being served with this writ the appellant appeared in court, and demurred, for insufficiency of facts, (1) to the application; (2) to the alternative writ; (3) to the application and alternative writ taken as one pleading. Each of these demurrers was overruled, and the proper exceptions were reserved. Appellant refusing to plead further, the court granted a peremptory writ of mandate, as prayed for by the relators, commanding the appellant to meet at the auditor's office at 9 o'clock A. M. on June 28, 1897, for the purpose of appointing a county superintendent. The several rulings of the court upon the demurrers are assigned as errors.

The following facts, among others, are substantially alleged in the application, and in part recited in the alternative writ: At and for more than one year prior to the filing of the application, on June 8, 1897, the relators were resident citizens and taxpayers of Blackford county, Indiana, and were each township trustees of said county. That there are four townships in that county, and no

more; and appellant at the beginning of this action, and for more than one year prior to said time, was the duly elected, qualified, and acting trustee of Harrison township, of said county. That these relators and appellant, as such trustees, were, in pursuance of law, required to meet at the office of the county auditor on the 1st Monday of June, 1897, for the purpose of appointing a county superintendent. That in pursuance of the statute, and a previous written notice given by the county auditor to each and all of said trustees to meet at the time and place aforesaid stated, the relators, as such trustees, did on the 1st Monday in June, 1897, the same being June 7, 1897, at 9 o'clock A. M. meet at the office of the said auditor for the purpose of appointing a superintendent, but appellant, as such trustee, failed and refused to meet at said hour on said day, or at any other time during said day. That, by reason of the fact that there were four township trustees, it was necessary for three, at least, of that number to meet, in order to organize and proceed with the business of electing a superintendent. During all of said day none of the trustees except these relators met at said auditor's office, whereby they were prevented from perfecting an organization and appointing a county superintendent. That relators, from the time they met as aforesaid with the auditor at his office, remained there, ready to organize and appoint a superintendent, until the hour of 12 o'clock midnight on said day; and no other trustees having appeared at said meeting, or being present thereat, and that they being unable to transact any business, by reason of the absence of the other two trustees, they adjourned to meet at the same place on the day following (June 8, 1897) at 9 o'clock A. M. The relators again met at the time and place, in accordance with their adjournment, but neither the appellant nor the other trustee appeared at said meeting on said following day. It is further shown that these relators continued their meeting at the auditor's office on the day last mentioned, up to the time of filing their application herein; and it is alleged that they intend to meet for the purpose of electing a county superintendent, and adjourn from day to day, until a quorum is secured, etc. They aver that the business of appointing a superintendent cannot be effected without the appellant being present with them at said meeting, and that no other adequate remedy exists.

The first contention of counsel for appellant is that the facts as alone recited in the alternative writ are not sufficient to withstand a demurrer. Prior to the decision of *Clarke County Comrs. v. State, Lewis*, 61 Ind. 75, a practice of treating the application as the complaint, in actions for mandate, even where the alternative writ had been issued, seems to have been recognized by this court. In the case above cited a departure was made from this practice and it was there held, in view of the provisions of the Code of 1852 relative to mandamus suits, and upon the authority of *Moses on Mandamus*, that the alternative writ must be taken as in the nature of a complaint in the cause, and the facts stated therein must be sufficient to entitle the party to the writ. In *Gill v. State, Ripley County Comrs.*, 73 Ind. 266, the

former decisions of this court, including *Clarke County Comrs. v. State*, *Levin*, 61 Ind. 75, upon this question, were reviewed, and the rule was there stated as follows: "The alternative writ, when issued, will be taken as in the nature of a complaint in the cause, and 'must show what is claimed, and in itself, or in connection with the complaint, petition, or affidavit on which it issued, show the ground on which the claim is made; and the facts stated must be sufficient in law to entitle the party to the writ.'" The court further saying: "This, we think, in harmony with the spirit of the Code, and with the practice which has long obtained in this class of cases, and, while it does not overrule, will prevent any undue extension or misapplication of the rule enunciated in the later cases referred to." This holding was followed in *Potts v. State*, *Ogg*, 75 Ind. 386. Since the decision in *Gill v. State*, *Ripley County Comrs.*, 72 Ind. 266, it has been the practice, in at least some of the trial courts in this state, to call in question by the same demurrer, the sufficiency of the facts stated in the writ and application, taken together; and this procedure seems to have been recognized by the appellant in the lower court, by addressing, as he did, in one particular, a demurrer to both the writ and application. In the case of *La Grange County Comrs. v. Cutler*, 7 Ind. 6, this court held that it had been the practice to look into the whole record and determine whether mandamus is the appropriate remedy, as well as the question whether the allegations are sufficient to authorize the writ. While it may be and ought to be considered the proper practice, under the more recent decisions of this court, which assert a rule of practice consistent with that generally prescribed by authorities on mandamus proceedings, to treat the alternative writ, unless the issuing thereof has been waived by the defendant, as a complaint, upon which issues of law and fact may be joined, and, generally speaking, the facts therein recited ought to be sufficient to justify the court in awarding the peremptory writ, nevertheless those alleged in the verified application, upon which the alternative writ rests, may be, when necessary, used or looked to in order to supplement those embraced in the writ, and the application may be considered by the court in connection with the alternative writ to which the demurrer may have been addressed. Therefore, if the facts in the writ alone, or when supplemented by those in the application, are sufficient to entitle the applicant to the peremptory writ, a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled. This rule is in harmony with the holding in the cases of *La Grange County Comrs. v. Cutler*, 7 Ind. 6; *Gill v. State*, 72 Ind. 266, and *Potts v. State*, *Ogg*, 75 Ind. 386, and does not militate against other decisions of this court wherein, in effect, it is held that the writ, when considered alone, without reference to the application, must be sufficient. This point being settled, we are not, therefore, in this case, as insisted by appellant, compelled to confine our inquiry only to the facts in the writ, but may consider them together with those alleged in the application.

The principal question submitted for our de-

cision is, Are the facts disclosed by the alternative writ and application, when considered together, sufficient to warrant the lower court in its action in overruling the demurrer to the writ and ordering the peremptory writ of mandate to issue, requiring the appellant to meet with the relators at the auditor's office of Blackford county on the day mentioned, for the purpose of appointing a county superintendent? The theory of the insistence of appellant's counsel is (1) that relators herein are not shown to have the requisite interest to entitle them to prosecute this action; (2) that, under the facts, mandamus will not lie to compel the appellant to meet for the purpose of electing a superintendent on a day subsequent to the 1st Monday in June, or, in other words, that he did not have the power, under the statute in controversy, of meeting after the time provided therein, for the reason, as contended, that the law is mandatory in this respect, and restrains him from doing so. Hence, on this ground, the principal contention is that he cannot be mandated by the court to exercise a power which he did not possess after the 1st Monday in June, 1897, and consequently there can be no meeting and election by the trustees until the next biennial year. It is also insisted that it does not appear from the facts that any vacancy had occurred in the office of superintendent in Blackford county, which was required to be filled on the 1st Monday in June, 1897. Rev. Stat. 1894, § 5900; Rev. Stat. 1881, § 4424, provides: "The township trustees . . . of each county shall meet at the office of the county auditor of such county, on the 1st Monday in June, 1878, and biennially thereafter, and appoint a county superintendent . . . whose official term shall expire as soon as his successor is appointed and qualified. . . . Whenever a vacancy shall occur in the office of county superintendent, by death, resignation, or removal, the said trustees, on notice of the county auditor, shall assemble at the office of such auditor, and fill such vacancy for the unexpired portion of the term . . . and the county auditor shall be clerk of such election in all cases, and give the casting vote in case of a tie," etc. Rev. Stat. 1894, § 1182; Rev. Stat. 1881, § 1168, being § 804 of the Code of Civil Procedure, provides: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law especially enjoins, or a duty resulting from an office, trust, or station." Under this provision of our Code, the rule is well affirmed that mandamus is the proper remedy to coerce an officer to discharge a public duty, and any person having an interest in the matter involved may apply for the writ. *Hamilton v. State*, *Bates*, 8 Ind. 452; *Henderson v. State*, *Oerman*, 58 Ind. 60; *Holiday v. Henderson*, 67 Ind. 108. Mandamus is regarded as an extraordinary remedy of an equitable nature, which will lie only where the law affords no other adequate remedy, and hence, without the aid of the writ, there would be a failure of justice. The statute, in express terms, lodges the election of a county superintendent in the township trustees of each county, and imposes upon each of them the duty of meeting on the 1st Monday in June, beginning in 1878, and on

the same day biennially thereafter, at the place designated, and of appointing a county superintendent. This being a duty enjoined upon these officials by law, therefore, in the event they refuse or neglect to discharge it, it then becomes one of the peculiar functions of a mandate to compel them to obey the law by discharging this duty, as there are no other adequate means to meet and remedy the evils and injustice which would result by reason of the failure or refusal of these public servants to respect and obey the law. Certainly, it cannot be successfully controverted but what mandamus may be invoked to force township trustees, or any one thereof, to meet with each other at the same time and place prescribed by law, and proceed with the business of appointing a county superintendent. This being true, then, if it can be said that they are not restrained or prohibited by the statute in question from meeting and performing this duty after the day prescribed, but still have the power to subsequently do so, there is no question but what, in the event of their failure or refusal to meet for the purpose mentioned after the lapse of the time fixed by law, they may also be compelled to do so by a writ of mandate, on the application of any person shown to be invested with the right in the particular instance to demand it. *People, Smith, v. Schiellein*, 95 N. Y. 124.

Having reached this conclusion, we may proceed to determine whether, in view of the facts in this cause and the law applicable thereto, the appellant still had the legal power to meet for the purpose provided by the statute after the expiration of the time therein fixed, and was it his duty to exercise this power? We may, however, first say, in answer to appellant's insistence, namely, that there are no facts alleged showing that any vacancy had occurred in the office of superintendent of Blackford county which required a meeting of the trustees on the 1st Monday in June, 1897, in order to fill the same, that we recognize no merit in this contention. Under the provisions of the statute the official term of a county superintendent extends from one biennial election to the next, and terminates as soon as his successor is elected and qualified; and anyone appointed to fill a vacancy holds only for the unexpired part of the term, and until his successor is elected and qualified at the next ensuing biennial election. We accordingly judicially know that 1897 is the proper biennial year in which the trustees of each county in the state were required to meet on the 1st Monday in June and elect successors to the superintendents then in office. In arriving at a correct interpretation of the only point now involved, we may consider it, first, in the light of our own decisions which have a bearing thereon, and next in that of other authorities. In the case of *State, Dickerson, v. Harrison*, 67 Ind. 71, it appeared that the trustees, being twelve in number, met on the 1st Monday in June, 1879, but were unable to choose a superintendent. On the morning of the next day they adjourned *sine die*. In pursuance of a notice from the auditor, eleven of them convened again at his office on June 16, 1879, and organized, and were proceeding to appoint a superintendent, when three of the number with-

drew from the meeting, and the remaining eight selected a superintendent. The election was held invalid. The question, as there involved, seems to have received but a cursory consideration, and the only reason given to support the decision is the bare mention of the fact that the appointment not having been made on the 1st Monday in June, and no vacancy existing, by reason of removal, resignation, or death, the appointment of the appellant therein was not authorized. In *Sackett v. State, Foreman*, 74 Ind. 486, the statute there involved required the common council of each city to annually elect at its first regular meeting in June one school trustee. The common council of the city of New Albany having failed to elect such trustee at its first regular meeting in June, in 1880, it performed this duty at a regular session held on July 19 of that year, and this action of the council was sustained. This court held in that case that, while the election should have occurred at the first regular meeting in June, still the statute could not be construed as limiting the power of the council to the time prescribed, but that it could be legally exercised by electing a trustee on a subsequent day. In course of the opinion, on page 489, it was said by the court, per Woods, J.: "The counsel for the appellee, on the contrary, insist that, under the law, the duty to elect is imperative, and that, in so far as it prescribes the time when the election shall be had, the statute is directory only. We concur in this position. The opposite view leads directly and necessarily to results which it is impossible to believe could have been intended by the legislature, and which an examination of the provisions of the law will plainly show were not intended. A failure to elect at the appointed time, as may well have been conceived, is liable to happen from many causes. A quorum of the common council may be wanting on account of accident, or of sickness or of absence of its members, and, when a quorum is not wanting a tie vote may defeat a choice. But if it be held that a failure to elect suspends the power to elect until the recurrence of the prescribed day, it is easy to see that corrupt motives and influences may intervene for the purpose of preventing an election at the appointed time. If reasonably possible to be escaped, an interpretation of the law which promotes or tends to such results should not be adopted." The case of *State, Dickerson, v. Harrison*, 67 Ind. 71, was distinguished in this last appeal, and in referring to it Judge Woods said: "It may well be doubted, however, whether, if an election had been accomplished upon the second day, or upon the day of an adjourned meeting, held within a reasonable time, it would have been declared invalid; and possibly, after the adjournment without day, a mandamus might lawfully have issued to compel a reassemblage, in order to perform the work which they ought to have done before adjourning." In *State, Walden, v. Vanosdal*, 181 Ind. 388, 15 L. R. A. 832, the trustees met on the 1st Monday in June of the required year, and remained in continuous session until after midnight on that day, after which hour they elected a superintendent. This election was held valid. In *People v. Allen*, 6 Wend. 486, the militia law

of the state of New York made it the duty of certain commanding officers to appoint brigade court martials on or before the 1st day of June in each year. The commanding officer omitted to appoint the court-martial in that case until July next following the time fixed by the law. The appointment was held valid. In reviewing the question of the power of the officer to appoint the court-martial the court said: "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time was intended as a limitation of the power of the officer." This statement of the law, at least in five appeals, has been expressly approved by this court. See *Nave v. King*, 27 Ind. 356; *Day v. Herod*, 38 Ind. 197; *Jones v. Carnahan*, 63 Ind. 229; *Sackett v. State, Foreman*, 74 Ind. 486; *Jones v. Swift*, 94 Ind. 516. In *Dill. Mun. Corp.* 3d ed. § 859, the author says: "In this country it has been decided that an election for municipal officers may be held after the charter day, and that a mandamus may be granted to compel the proper officers to give notice thereof." In *State, Parker, v. Smith*, 22 Minn. 218, the common council of the city of Duluth was invested by law with the appointment of a city assessor. The time fixed for his election by the city charter was at the first meeting of the council after the annual city election, or at an adjournment thereof. In 1874 the annual election was held on the 1st Tuesday in April. After this election the common council met, on the 14th of that month, and adjourned *sine die*, without having elected an assessor. On the 29th of April in the same year the council convened pursuant to an irregular adjournment, by a less number than a quorum, from a previous regular meeting, and elected an assessor. It was held that the latter was legally elected and entitled to the office. The court, in considering the point raised in the case, said: "In our judgment, the meeting held on April 14, 1874, with the presumed assent and participation of all of its members, was a valid meeting. Assuming that this was the proper time for the election of an assessor, the failure of the council then to act upon the matter, and its adjournment *sine die*, did not relieve it from the duty, which the law imposed upon it, of making an election. So far as relates to the time when such election should be made, the statute is simply directory. Having neglected its duty at the proper time, from whatever cause, the obligation still rested upon it to elect at the earliest opportunity."

While it is true that the statute in controversy does not in express terms provide for a meeting of the trustees on a day subsequent to the one named, neither does it expressly limit the power or right to meet on the day prescribed, and not thereafter. The duty of the trustees, under the statute, to elect a superintendent biennially, is imperative, and each of them is obligated to convene with the others on the 1st Monday in June of the proper year for that purpose. But there are no negative words in the statute, nor any features or provisions therein to indicate that the legisla-

ture, under all circumstances, intended to limit their power to meet for the discharge of the duty assigned to the day appointed, and thereby restrain or prohibit them from effectually executing it after the expiration of the time named. Upon this view of the case, under the rule so firmly settled by the authorities heretofore referred to, and others hereafter cited, the provisions of this statute naming or fixing the time for the trustees to convene must be considered as directory only, and not as prohibiting the exercise of the power or discharge of the duty imposed after the termination of the time named or appointed therein. Guided by this principle, and it is manifest, we think, that the legislature in naming the 1st Monday in June, intended it as a direction to the township trustees to meet on that day and proceed to transact the required business of appointing a county superintendent. There is nothing in the character of the particular power with which the trustees are invested to warrant the inference or belief that, on their failure to meet at the time mentioned, they could not lawfully and effectually execute it on some subsequent day, as reasonably near as possible to that fixed by the statute. The following additional authorities support this construction of the statute in controversy: *Smith, Const. & Stat. Constr.* §§ 670, 674; *Sedgw. Stat. & Const. L.* p. 316; *Potter's Dwar. Stat.* pp. 221, 228; *People, Young, v. Fairbury Trustees*, 51 Ill. 149; *State, Anderson, v. Harris*, 17 Ohio St. 608; *Webster v. French*, 12 Ill. 302; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 181; *Williams v. School Dist. No. 1*, 21 Pick. 75, 32 Am. Dec. 243; *Savage v. Walske*, 26 Ala. 619; *Lowell v. Hadley*, 8 Met. 180; *Ex parte Heath*, 3 Hill. 42; *Gale v. Mead*, 2 Denio, 160; *People, Westcott, v. Holley*, 12 Wend. 481; *Jackson, Hooker, v. Young*, 5 Cow. 269, 15 Am. Dec. 478; *Colt v. Eves*, 12 Conn. 248.

To place the interpretation upon the statute urged by the appellant would enable designing trustees to defeat its very object. By the failure or refusal of a sufficient number to meet on the day named, they might prevent a quorum from being obtained, and consequently no legal election could be effected on that day. If, then, as contended by appellant, there can be no valid meeting had or appointment made, by either compulsory proceedings or otherwise, until the same day at the next biennial period, the people would be at the mercy of such unfaithful officials, and the possible result might be to keep an incumbent in office perpetually. Under such an interpretation of this statute, a like result might follow if a sufficient number of trustees should be prevented from assembling on the prescribed day, so as to defeat a quorum, by reason of sickness, or any other legitimate cause. Such results were not intended by the legislature in the passage of the law in question. There were four trustees in Blackford county, any three of whom, had they been present, would have secured a quorum for the lawful transaction of the business before them. *State, Walden, v. Vanosdal*, 131 Ind. 383, 15 L. R. A. 832, and the cases there cited. Relators, being less than a quorum, could do nothing more than adjourn, as they did. *Roberts, Rules of Order*, § 43; *Cushing, Manual of Parliamentary Law*, § 19;

1 Beach, Priv. Corp. § 276; 1 Thomp. Corp. § 721. Appellant's presence, under the circumstances, was essentially necessary, and, having the legal ability to be present, he refused to yield his obedience to the law and meet with relators, and thereby assist to carry out its object and purpose; and now, when confronted with the strong arm of the court, compelling the performance of a wilfully omitted duty, he seeks to shield himself from its performance under the claim and upon the ground asserted that he no longer possesses the power to do so. This claim, as we have seen, the law does not support. The authorities constrain us to hold that under the facts the obligation to perform this important public duty continued to rest on appellant after the expiration of the legally appointed day, and the law did not deprive him of the power to perform it thereafter, and mandamus is the proper action to remedy the wrong perpetrated by him. In addition to other authorities on this point, see Smith, Addison, Torts, p. 648. Where the question involved in a mandamus proceeding is of a public concern, as is the one herein, and the object of the action is to enforce the performance of a public duty or right in which the people in general are interested, the applicant for the writ is not required to show any legal or special interest in the result sought to be obtained. It is only necessary that he be

a citizen, and as such interested in common with other citizens in the execution of the law. High, Extr. Legal Rem. § 431; *Decatur County Comrs. v. State*, 86 Ind. 8, and cases there cited. It follows, therefore, that the relators are shown to have the requisite degree of interest to enable them to maintain this action. It is to be regretted that appellant, as a public official, intrusted, under the law, with a public duty, should disregard its plain provisions and commands. Such neglect or refusal to perform a duty which he had sworn to discharge merits severe condemnation. When public officers charged with the execution of the law refuse to obey its mandates, or wilfully ignore them, the evil results which must necessarily follow from such acts tend to undermine the very foundation of civil government. When such officers fail or refuse to discharge their plain duties under the law, not only do they violate their official oaths, but also subject themselves to the penalty imposed by Rev. Stat. 1894, § 2105 (Rev. Stat. 1881, § 2018). It follows from the conclusion reached that the lower court was fully justified in overruling the demurrers, and in awarding the peremptory writ of mandate, as it did. So far as the holding in *State v. Harrison*, *supra*, may be in conflict with this opinion, it must be deemed and held to be overruled.

Judgment affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

Sarah A. TERRY, *Plff. in Err.*,

v.

City of RICHMOND.

(.....Va.....)

1. Permission to lay tracks under a street is within the power given to a city council to determine and designate the route and grade of any railroad to be laid in the city.
2. The caving of an excavation under a street through the negligence of the railroad company making it does not make a city liable for injuries to adjacent buildings, if the company had authority from the state to lay its tracks within the city, and the city had legally granted its permission.
3. Taking a bond from a railroad company which is about to lay tracks in its streets to save the city from the results of possible negligence of the company will not increase the liability of the city in case of such negligence.

(April 15, 1897.)

ERROR to the Richmond Law and Equity Court to review a judgment in favor of defendant in an action brought to recover damages for injuries to plaintiff's property which were alleged to have been caused by defendant's negligence. *Affirmed.*

NOTE.—As to excavations under highways, see *Babbage v. Powers* (N. Y.) 14 L. R. A. 898, and note, 88 L. R. A.

The facts are stated in the opinion.

Messrs. Pollard & Sands, for plaintiff in error:

The owners of lots abutting on the streets own the fee in those streets, subject to the lawful use thereof by the city.

Page v. Belvin, 88 Va. 985; *Hodges v. Seaboard & R. R. Co.* 88 Va. 653; *Western U. Tele. Co. v. Williams*, 86 Va. 700, 8 L. R. A. 429; *Warwick v. Mayo*, 15 Gratt. 528.

Any person or corporation which disturbs the soil of the street except for the purposes incident to the public easement is liable as a trespasser as against the abutting owner, and can be held to respond in damages for such trespass.

Petersburg v. Applegarth, 28 Gratt. 848, 26 Am. Rep. 857; *Shearm. & Redf. Neg.* § 120; 2 Dill. Mun. Corp. § 1087; *Pekin v. Herreton*, 67 Ill. 477, 16 Am. Rep. 629; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619. See also *Nevins v. Peoria*, 41 Ill. 502; *Rigney v. Chicago*, 103 Ill. 64; *Chicago v. Union Bldg. A-so.* 103 Ill. 879, 40 Am. Rep. 598; *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 638; *Salt Lake City v. Hollister*, 118 U. S. 260, 80 L. ed. 177.

Actions of trespass may be brought either against the hand actually committing the injury, or against the person or corporation by whose order or authority the act was done.

1 Addison, Torts, § 423.

The city gave its assent to the construction of an underground railroad in one of its streets, reserving the right to supervise the removal

and reconstruction of any sewer that might become necessary.

It was liable for negligence.

Fink v. St. Louis, 71 Mo. 52.

Many Virginia cases hold that a municipal corporation is liable for mere negligence in the exercise of their charter rights.

Orme v. Richmond, 79 Va. 86; *Smith v. Alexander*, 88 Gratt. 208; *Noble v. Richmond*, 81 Gratt. 280, 31 Am. Rep. 726; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Bishop*, Non-Cont. L. §§ 518, 525.

An owner whose land adjoins a public street is entitled to have the lateral support of his land remain undisturbed, and a wrongful destruction of it has been held to be a taking within the meaning of the Constitution.

Elliott, Roads & Streets, 157; *Stearns v. Richmond*, 88 Va. 992; 2 Dill. Mun. Corp. § 987.

When a municipal corporation has ample power to remove a nuisance which is injurious to the health, endangers the safety, or impairs the convenience of its citizens, it is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by it.

Elliott, Roads & Streets, p. 489; *Noble v. Richmond*, 81 Gratt. 280, 31 Am. Rep. 726; 2 Dill. Mun. Corp. § 723d; *Petersburg v. Applegarth*, 28 Gratt. 848, 26 Am. Rep. 857; *Chaikley v. Richmond*, 88 Va. 402; *Bentley v. Atlanta*, 92 Ga. 623; *Mahon v. New York C. R. Co.* 24 N. Y. 660. See also *Kiley v. Kansas*, 69 Mo. 109, 33 Am. Rep. 491; *Fort Worth v. Crawford*, 64 Tex. 202, 53 Am. Rep. 758; *Stange v. Dubuque*, 62 Iowa, 303.

The damage suffered by the plaintiff is the result of the city's failure to superintend and inspect the construction of the tunnel, and to enforce its proper construction.

Orme v. Richmond, 79 Va. 89, following *Savrey v. Corae*, 17 Gratt. 280, 99 Am. Dec. 445; *Richmond v. Long*, 17 Gratt. 875, 94 Am. Dec. 461, and *Barnes v. District of Columbia*, 91 U. S. 551, 23 L. ed. 448.

Liability arises as well from omissions of corporate authorities as from positive acts.

2 Dill. Mun. Corp. § 986; *McCarthy v. Syracuse*, 46 N. Y. 194. See also *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Fink v. St. Louis*, 71 Mo. 52.

The construction of a railway in or under a street is a nuisance, if constructed without the abutters' consent, or without proper condemnation proceedings.

2 Dill. Mun. Corp. § 723d; *Mahon v. New York C. R. Co.* 24 N. Y. 660; *Stange v. Dubuque*, 62 Iowa, 303.

Mr. C. V. Meredith, for defendant in error:

A municipality is only responsible for some failure of local executive duty, and is not responsible for failure to perform some duty pertaining to the welfare of the people of the state at large.

Richmond v. Long, 17 Gratt. 875, 94 Am. Dec. 461.

Here there was no duty upon the city of any kind.

2 Dill. Mun. Corp. § 710; *Elliott, Roads & Streets*, p. 532; *Green v. Portland*, 82 Me. 481; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 88 L. R. A.

115. See also *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307.

The city, in authorizing the railroad company to run under the street, instead of along the same at some grade to be determined, acted within her power.

Chicago v. Rumsey, 87 Ill. 848.

Riely, J., delivered the opinion of the court:

The Richmond & Chesapeake Railroad Company, a corporation created by the general assembly of Virginia, was authorized by its charter to construct and operate a railroad from the city of Richmond to a point on the Chesapeake bay, near the mouth of the Potomac river.

The council of the city, under the authority vested in it by the charter of the city, adopted an ordinance authorizing the railroad company to enter the city and use its streets for its roadway, and to build and construct a tunnel for a double railway track under Eighth street.

The company began the construction of the tunnel, and, after partly excavating it, ceased to work upon it. The tunnel, not being properly supported or arched, subsequently gave way in the center of the street, and the superincumbent earth caved in. This caused the earth to recede from the front of plaintiff's lot, and greatly injured two tenement houses thereon belonging to her. The city, after the caving in of the tunnel, caused the excavation to be filled, and the street to be repaired.

This suit was brought by the owner of the property to recover from the city the damages she had sustained. The question to be decided is whether or not the city is liable for the negligence or wrongful acts of the railroad company.

The railroad company being created and chartered by the sovereign power of the state, and authorized to construct and operate a railroad from the city of Richmond, and the council of the city being authorized by its charter to permit the railroad company to enter and use its streets for its roadway, the legality of the action of the council in granting such permission is beyond question, and no liability therefor can be maintained.

The right of the council to determine and designate the route and grade of any railroad to be laid in the city includes the authority to permit the railroad company to run under the street as well as upon it. The servitude is the same in each case. As was said in the case of *Chicago v. Rumsey*, 87 Ill. 864: "There is no principle upon which the right to locate a railroad upon a street, as a legitimate use of the street, can be sanctioned which will not also sanction the construction of a tunnel in a street. The tunnel does not change the character of the street or apply it to a new use."

The ordinance adopted by the council in granting to the railroad company the right to occupy the streets of the city, and construct the tunnel, shows that great care was taken by the requirement of proper safeguards to prevent the obstruction of or interference with the reasonable and legitimate use of the streets by the public.

The building of the railroad and the con-

struction of the tunnel were solely the undertaking of the railroad company. It alone paid or was liable for all the expense of the work. Beyond prescribing the route and grade of the road and making due provision for the safety of its streets and the preservation of its culverts, sewers, and water and gas pipes, and seeing that its requirements in respect to these matters were observed, the city exercised no control of the enterprise, nor took nor had any part in it. The improvement was not undertaken for its profit, but was a private enterprise for private profit. The railroad company was in no sense the agent of the city, but in constructing and operating the road it was acting and would act for itself, and not for the city.

The permission granted to enter and use the streets of the city for a roadway conferred no right whatever upon the railroad company to take or invade the property of any citizen without just compensation, or sanctioned any tort it might commit, any more than a license to a person to engage in some legitimate private business requiring such license would render it liable for a tort that such person might commit in the pursuit of the business he was so licensed to carry on.

In *Elliott, Roads & Streets*, p. 532, the law on this subject is thus stated: "In granting a right to occupy a street by a railroad track, a municipal corporation exercises a delegated governmental power, and for the bare exercise of such a power is not liable to abutting owners.

It is evident that the exercise of a governmental power cannot, of itself, subject the municipality to a private action, but if the municipal corporation should join the railroad company in doing an act which would so impair the easement of access or so injure the abutting property as to cause the property owner special damages, then, it may be that the owner could maintain his action for damages. Where, however, no more is done than the enactment of an ordinance granting the privilege of occupancy, it seems quite clear that no private action would lie against the municipality for damages."

In *Dillenbach v. Xenia*, 41 Ohio St. 207, it was held that where a city, under the authority given it by statute, granted to a railroad company the right to construct and use its track in a street, the city was not liable to the owner of a lot adjacent to the street for damages to his property resulting from such use of the street by the railroad company.

In *Burkam v. Ohio & M. R. Co.* 122 Ind. 344, Elliott, J., speaking for the court, said "We have no doubt that an abutting owner has a proprietary right in the street of which he cannot be deprived without compensation. . . . But it by no means follows from this that a city in granting a right to a railroad company to use a street deprives the abutter of his property. The grant by the municipal corporation transfers no proprietary rights of the abutter, it simply grants the privilege the city has power to grant. In granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such a power. . . . Notwithstanding the grant by the municipality, the abutting owner has a right to recover such damage as

he may have sustained by the additional burden imposed upon his land. . . . But the right of the abutter to compensation is against the railroad company and not against the city." See also *Prith v. Dubuque*, 45 Iowa, 406.

The bond of indemnity taken by the city of Richmond from the Richmond & Chesapeake Railroad Company did not operate to impose upon the city a liability which would not have otherwise existed, nor have the effect of making it responsible for any damage done by the railroad company, where the law would not have made it liable in the absence of such bond. The provisions of the bond show that the object of the city in requiring it was to protect itself against any loss it might be subjected to, or any expense it might have to incur, in consequence of the failure of the railroad company to comply with the requirements of the ordinance granting to it permission to construct the tunnel, and also to provide indemnity to any who might sustain injury to his person or property by the negligence or wrongful acts of the railroad company in the construction or use of the tunnel, if he chose to avail himself of it. Taking the bond did not increase the liability of the city.

A number of cases decided by this court, in which the municipality was held responsible, were cited and relied on to support the claim of liability of the city in the case at bar, but they do not support the contention of the plaintiff in error. The liability in those cases rested upon a different ground from that which underlies this case. Its solution depends upon the application of a different principle. The act of the city, which is the subject of the complaint here, was the exercise of a delegated governmental power, but it will be found upon examination that the liability in each and all of the cases referred to was based either upon a tort committed by the city itself through its officers or agents, or upon the neglect of the city to perform some ministerial and absolute corporate duty, such as not giving warning of the dangerous condition of the entrance to its sidewalk from an established walking way (*Orme v. Richmond*, 79 Va. 56); or not keeping its sidewalk in a safe condition (*Noble v. Richmond*, 31 Gratt. 280, 81 Am. Rep. 726); or for falling, when elevating the grade of its street, to make provision for the escape of surface water, and causing it to flow back upon an adjoining lot (*Smith v. Alexandria*, 33 Gratt. 208); or for neglecting to repair a sewer (*Chalkley v. Richmond*, 88 Va. 402); or for infringing, in lowering the grade of a street, upon the right of the owner of an adjoining lot to lateral support for his soil (*Stearns v. Richmond*, 88 Va. 992); or for allowing obstructions to be in the water adjacent to a wharf owned by the city, and for whose use it charged, or was entitled to charge, wharfage (*Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357). In no one of them was the question involved which is here presented. In no one of them was the claim against the city for damages for a tort committed by an individual or a body corporate in the pursuit of his or its business, and for his or its own benefit and profit.

The duty of a municipal corporation to see that its streets and sidewalks are in a safe com-

dition, and that its sewers and drains are kept in good order, and that its other like municipal obligations are cared for, is a purely ministerial and absolute corporate duty, assumed in consideration of the privileges conferred by its charter; and the law holds the municipality responsible for an injury resulting from the negligent discharge of such duty, or the negligent omission to discharge it, but exempts it from liability for the exercise of governmental or discretionary powers. *Richmond v. Long*, 17 Gratt. 875, 94 Am. Dec. 461; *Petersburg v. Applegarth*, 28 Gratt. 843, 26 Am. Rep. 357; *Mills v. Brooklyn*, 83 N. Y. 489, 497; *Hill v. Boston*, 123 Mass. 344, 23 Am. Rep. 332; *Elliot, Roads & Streets*, pp. 504, 532; 2 Dill. Mun. Corp. §§ 1046-1049; *Tiedeman, Mun. Corp.* § 849; and *Cooley, Torts*, 2d ed. pp. 738-743.

The city of Richmond, in licensing the Richmond & Chesapeake Railroad Company, a corporation created and chartered by the sovereign power of the state, to enter and use its streets for its roadway, and to construct a tunnel to that end, having the power, under its charter, to grant such permission, exercised a public or governmental power, and the law exempts it from responsibility for an injury resulting from the negligence or wrongful act of the railroad company, unless such injury was also due to the failure of the city to discharge some ministerial and obligatory duty.

The court below therefore committed no error in refusing to give the instruction asked for by the plaintiff and in giving that asked for by the defendant, nor in refusing to set aside the verdict and award the plaintiff a new trial; and its judgment must be affirmed.

TENNESSEE SUPREME COURT.

TRADESMEN'S NATIONAL BANK

v.

R. F. LOONEY *et al.* (UNITED STATES NATIONAL BANK, Impleaded, etc.,
App't.).

(.....Tenn.....)

1. Enforcement of a note given as a subscription to the stock of a syndicate organized to purchase the property of a corporation, and which is used to pay for such property, cannot be defeated for fraudulent overvaluation of the property purchased, if the parties making the representation were representatives of the syndicate and not of the vendor corporation.

2. A purchase for value in due course of trade, of a note, is made by a bank which discounts it and applies the proceeds to the payment of a prior note due by the indorser and an over draft by a bank in which the indorser is interested.

3. A note is not subjected to equities in the hands of a holder for value by the fact that it is payable to a person, "trustee," if inquiry would have disclosed the fact that the word was merely descriptive, and that the note was made to him for the purpose of enabling him to turn it over in consummation of a subscription to the stock of a syndicate, which was accomplished by his indorsement and transfer.

4. The liability of the maker of a note to an indorsee is not affected by a compromise of a suit by the indorsee against the indorser, by which the latter is permitted to substitute securities in lieu of his liability as indorser under the express agreement that the liability of the maker shall not be affected, and that when any money is collected from the maker it shall be applied to release the securities so deposited.

5. The liability of the indorser of a note is not affected by the addition of the word "trustee" to his name.

NOTE.—As to the negotiability of a note payable to trustee, see *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 673, and *note*.
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6. Notice to the indorsee that an indorser has no interest in the transaction will not relieve the indorser from liability on a note.

(March 22, 1897.)

A PPEAL by defendant United States National Bank from a decree of the Chancery Court for Shelby County dismissing its cross bill and disallowing its claim in a suit brought to foreclose a trust deed securing payment of certain notes, one of which was held by the appellant. *Reversed*.

The facts are stated in the opinion.

Messrs. William M. Randolph & Sons, for appellant, United States National Bank:

A holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, and if negotiable paper is transferred for a valuable consideration, and without notice of any fraud, the right of the holder shall prevail against the true owner.

Van Wyck v. Norvell, 2 Humph. 192; *Kimbro v. Lytle*, 10 Yerg. 417, 31 Am. Dec. 585; *Coddington v. Bay*, 20 Johns. 637; *Nichol v. Bate*, 10 Yerg. 429.

In all cases of notes indorsed, where one is fairly received in renewal of another, it discharges the first, and the second is taken in the usual course of trade, and for a good consideration passing at the time.

Nichol v. Bate, 10 Yerg. 433; *Wormley v. Lowry*, 1 Humph. 463; *Ingham v. Vaden*, 3 Humph. 55; *King v. Doolittle*, 1 Head, 77; *Rhea v. Allison*, 3 Head, 176; *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Israel v. Gale*, 45 U. S. App. 219, 77 Fed. Rep. 532, 23 C. C. A. 274; 2 Parsons, Notes & Bills, **347, 348; *Lewis v. Woodfolk*, 2 Baxt. 25.

A bank is protected as an innocent indorsee or holder, where it took a negotiable note upon the payee's indorsement, before its maturity, and without notice of defense, to hold it as collateral security for another note of like amount, indorsed by the payee and cashed for his benefit, upon the credit of such collateral security.

First Nat. Bank v. Stockell, 92 Tenn. 252,

20 L. R. A. 605; *Roach v. Woodall*, 91 Tenn. 206; *Cherry v. Frost*, 7 Lea, 1; *Hill v. Bostick*, 10 Yerg. 410; *Kimbro v. Lytle*, 10 Yerg. 417, 81 Am. Dec. 585; *Nichol v. Bate*, 10 Yerg. 429; *Craighead v. Wells*, 8 Baxt. 38, 85 Am. Rep. 685; *Lookout Bank v. Aull*, 98 Tenn. 645.

The wife has the power to mortgage her real estate held in her general right, for the payment of the debts of her husband.

Bradford v. Cherry, 1 Coldw. 57; *McFerrin v. White*, 6 Coldw. 499; *Voorhies v. Granberry*, 5 Baxt. 704; *Chadwell v. Wheelless*, 6 Lea, 812.

The transfer of the note in due course of trade and for value transferred the deed of trust, and the right to enforce it as the security for the payment of the note.

Cleveland v. Martin, 2 Head, 128; *Batesville Institute v. Kaufman*, 85 U. S. 18 Wall. 154, 21 L. ed. 776; *Ober v. Gallagher*, 98 U. S. 206, 28 L. ed. 881; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L. R. A. 668; *Carpenter v. Longan*, 88 U. S. 16 Wall. 271, 21 L. ed. 813; *Kenicott v. Wayne County Supers.* 88 U. S. 16 Wall. 452, 21 L. ed. 819.

The contracts between the syndicate and its several members, or between the syndicate and the Sheffield Land Iron & Coal Company made before the organization of the Sheffield City Company, did not become the contracts of that company, except so far as the company adopted and ratified them after its incorporation had been perfected.

Pittsburg & T. Copper Min. Co. v. Quintrell, 91 Tenn. 698.

Looney and the other members of the syndicate were the vendors, in substance, of the new company, the Sheffield City Company, with reference to the property they had agreed to buy from the old company, the Sheffield Land, Iron, & Coal Company.

So far from Looney and his coadjutors, members of the syndicate, having the right to complain of the failure to deliver the property, or of the defects in the title to the property, or of the deficiencies in the value of the property, as against the Sheffield City Company, that company had the right to make such complaint against Looney, and the other members, if, in fact, the property was not delivered, or the title to the property was not good, or its value was not such as it was represented to be, prior to the purchase.

Looney does not pretend he has ever returned the stock to the Sheffield City Company, or has ever attempted to do so, or has ever taken any step in the direction of canceling the transaction between him and the Sheffield City Company by which the stock was issued, and his notes were given, except his defense, as presented in the record of this suit, by his answers and his cross bills. That is sufficient to defeat this action.

Coffee v. Ruffin, 4 Coldw. 516; *Hill v. Harri-man*, 95 Tenn. 800; *Farmer's Bank v. Groves*, 53 U. S. 12 How. 51, 13 L. ed. 889; *Gay v. Alter*, 102 U. S. 79, 26 L. ed. 48.

Col. Looney was on the ground, and had an opportunity of ascertaining or knowing the truth of the statements made by him to Sykes, whether verbal or contained in his letters, or appearing from the schedule furnished, showing the property to be purchased, and the values set upon it.

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If he chose to rely upon the information he got, without making the proper and necessary inquiries, it was his own fault, and he cannot now urge his negligence in that respect as a ground for defeating his liability upon the note held by the United States National Bank, an indorsee, who, as already shown, has paid value for it.

Kerr, Fraud & Mistake, pp. 78, 88-85; *Anderson v. Hill*, 12 Smedes & M. 679, 51 Am. Dec. 180; *Evans v. Bolling*, 5 Ala. 550; *Hall v. Thompson*, 1 Smedes & M. 443.

Looney had information enough to charge him with knowledge that the estimates were mere opinions by those who were communicating with him, and they might or might not turn out to be well founded. If he chose to rely upon those opinions, he had the right to do so, and to make the contract he did make upon the faith of them. But, because the opinions have turned out to be ill founded, and cannot be verified, he has no right to repudiate the contracts he made.

Knuckolls v. Lea, 10 Humph. 577; *Ruohs v. Third Nat. Bank*, 94 Tenn. 77; *White v. Ewing*, 37 U. S. App. 365, 69 Fed. Rep. 451, 16 C. C. A. 296; *Maney v. Porter*, 8 Humph. 347; *Kerr, Fraud & Mistake*, pp. 82-84; 1 Parsons, Notes & Bills, chap. 6, § 2; *Solomon v. Turner*, 1 Stark. 51; *Fleming v. Simpson*, 1 Campb. 40, note; *Reed v. Prentiss*, 1 N. H. 174, 8 Am. Dec. 50; *Perley v. Balch*, 23 Pick. 283, 84 Am. Dec. 56; *Johnson v. Titus*, 3 Hill. 606; *Welsh v. Carter*, 1 Wend. 185, 19 Am. Dec. 473; *Miller v. Tiffany*, 68 U. S. 1 Wall. 293, 17 L. ed. 540.

This suit is now prosecuted, primarily, for the benefit of the United States National Bank to the extent to which its indebtedness as shown by the note has not been paid; and secondarily, for the benefit of the Sheffield City Company to the extent to which that indebtedness has been paid. There can be no objection to such an arrangement.

Ragsdale v. Gossett, 2 Lea, 729; *Richardson v. McLeomore*, 5 Baxt. 586; *Williams v. Hitchings*, 10 Lea, 326.

The addition of the word "trustee" to Mr. Sykes's name does not preclude the United States National Bank from holding him as the indorser on the note.

East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea, 742; *Erwin v. Carroll*, 1 Yerg. 145; *Patterson v. Craig*, 1 Baxt. 293; *Conn v. Scruggs*, 5 Baxt. 568; *Suyert v. Sawyer*, 7 Humph. 414; *Steele v. McElroy*, 1 Sneed, 341; *De Biau v. Gola* (Md.) 24 Am. L. Reg. N. S. 777; *Harris v. Bradley*, 7 Yerg. 310.

The facts must be shown affirmatively by the proof, if there are any such facts, that Sykes was not in a position to be bound by the note, and that the United States National Bank acted in bad faith in ignoring such facts, and taking the note without inquiry with respect to them.

Atlas Nat. Bank v. Holm, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94.

Accommodation paper is always put in circulation for the purpose of giving credit to the party for whose benefit it is intended. And although such party cannot maintain an action upon it against the accommodation maker or indorser, and would be defeated because of want

of consideration, a purchaser can maintain an action, who acquires it while still current, and gives the credit it was intended to promote, although such purchaser has knowledge of the original character of the paper.

Israel v. Gale, 45 U. S. App. 219, 77 Fed. Rep. 538, 28 C. C. A. 274; *Violet v. Patton*, 9 U. S. 5 Cranch, 142, 3 L. ed. 61; 1 Dan. Neg. Inst. § 790.

Messrs. W. D. Ruffin and W. B. Glisson for Tradesmen's National Bank.

Messrs. Thomas M. Scruggs and A. S. Buchanan for appellees.

Beard, J., delivered the opinion of the court:

The complainant, being the owner of a \$12,500 note, being one of two notes of like amount executed by R. F. Looney to the order of J. P. Sykes, trustee, and by him and the Sheffield City Company indorsed to complainant, filed this bill, seeking a decree for the amount of this note and interest, and also for a foreclosure of a trust deed made to secure it. The bill alleges that this trust deed was executed by Looney and wife on certain real property belonging to the wife, in or near Memphis, and that this property was already, in part or in whole, covered by two other trust deeds; that J. P. Sykes, the indorser of this note, was also trustee in the trust deed; and that, though complainant's note was long past due, and full power of sale on such contingency was granted to the trustee, yet he declined to execute this power. Sykes, as indorser and as such trustee, Looney and wife, the trustees and beneficiaries in the other two trust deeds, and the United States National Bank, as the alleged holder of the other of these notes, were made parties to this bill. The claim of complainant not being before us, we need not pursue it further.

The United States National Bank filed an answer to the original bill, and made its answer a cross bill, in which it asked affirmative relief. In this answer and cross bill it was averred that the United States National Bank was the holder of the other of these two notes of \$12,500, having acquired title thereto bona fide, for a valuable consideration, before maturity, and in due course of trade; that this note was also made payable to J. P. Sykes trustee; that it was by him and the Sheffield City Company indorsed; and that at maturity it was duly protested for nonpayment,—of all of which the indorser had legal notice. The cross bill prayed that the trust deed described in the original bill be foreclosed, and the proceeds of the foreclosure sale be applied to the payment of this note. To this cross bill Looney and wife and J. P. Sykes filed answers. In their answer, Looney and wife denied that the United States National Bank acquired this note in due course of trade, for value, and without notice of the makers' equitable defenses against it, and they averred that the note and trust deed to secure it were procured by fraud, and that no valuable consideration passed to them for the same. The fraud complained of, and as set out in the answer, is as follows: In July, 1892, and for some time before, there existed at Sheffield, Alabama, a corporation called the Sheffield Land, Iron, & Coal Company, which was the owner of various properties, real and

personal. The operations of this corporation seem to have become embarrassed by heavy debts, the burden of which was largely carried by some of its stockholders. Certain of these parties about that time conceived the idea of relieving themselves of this burden by organizing a syndicate to purchase the assets of the corporation, and to this end they solicited a subscription from R. F. Looney, and perhaps others; and, in order that the parties so solicited might understand the character of the assets, there was prepared a statement or schedule of the same, together with extensions showing the value. In this paper these assets were set down as worth \$1,012,676.81, and it is alleged that representations were made to Looney in this paper and otherwise by these gentlemen, that these values were in no sense speculative, but that they were real. In the answer it is also stated that it was in the same way represented that \$800,000 would pay all the debts of the corporation, and that all the assets so scheduled would be turned over to the syndicate unencumbered, save for the burden of a bonded debt of \$60,000 resting on the hotel in Sheffield and scheduled as part of these assets, which was to be taken care of by the syndicate, but that it was at the same time stated to him that the rents derived from the hotel property would be sufficient to pay the interest on these bonds. Relying on their statements, the answer avers that R. F. Looney subscribed for a share of \$50,000 of and in the syndicate which was organized to purchase these assets at the sum of \$800,000. The answer alleges that he was imposed upon greatly as to the value of these properties; that, instead of being worth over \$1,000,000, they were worth greatly less, and, instead of being unencumbered save in the single particular referred to, they were in numerous instances, and to their full value, hypothecated to the creditors of this corporation. The answer also alleges that the debts much exceeded \$800,000. It is unnecessary to enter further into the details of the misrepresentations of which he alleges he was made the victim, it being sufficient to say that they were numerous and very great. It is further stated in the answer that, by his subscription of \$50,000 to the capital of the syndicate, Looney was to be interested in the assets purchased in the proportion that this sum bore to the full amount of \$800,000, and that, to pay this subscription, he executed his notes for \$50,000, including the two notes of \$12,500 each, secured by the trust deed in question. Looney and wife also file a cross bill, in which they seek to have the notes delivered up for cancellation, and to have the trust deed removed as a cloud on Mrs. Looney's title. Sykes also answers the cross bill, and denies his liability as indorser, and avers that the United States National Bank took the note with full knowledge that his purpose in indorsing the note was simply to pass title, and in no respect to bind himself personally on it. The United States National Bank answered the cross bill of Looney and wife, denying its averments so far as they impeached its title to the note sued on, and it reiterated that it was the bona fide holder of this paper. Subsequently amended answers were filed by Looney and Sykes, in which they alleged that since the

filing of their original answer they had ascertained that this note had been paid to the holder, the United States National Bank, and that it had no right to prosecute further its suit upon it; that the debt of the bank was originally a debt due from the Sheffield Land & Iron Company, and that this debt was assumed by the Sheffield City Company when it was organized; that this note, together with the other notes of Looney heretofore described, was obtained by the false representations of the promoters of the Sheffield City Company, and that the note sued on by the United States National Bank was transferred to it in settlement of the debt of the Sheffield Land & Iron Company which it had assumed; and that subsequently the bank had made an arrangement with the Sheffield City Company, as a result of which the note was fully discharged. Upon the hearing, after much proof was taken, the chancellor dismissed the cross bill of the United States National Bank, and, upon the cross bill of Looney, ordered the note to be canceled, as well as the deed of trust securing it. From this portion of the decree the bank has prosecuted its appeal to this court.

The first question that will be considered is, Do the facts disclosed in the record afford a defense against the note in the hands of the bank, even if it be conceded that it does not occupy the position of a bona fide holder for value? That Col. Looney was induced to go into a speculating scheme which will prove disastrous to him if the note in suit is enforced against him, is true. And it may be conceded that the evidence in the case shows that the inducement which operated upon him and led him into this venture was a great overvaluation of the property and of its income, and a serious undervaluation of the encumbrances on this property, made by parties in whom he reposed confidence. And it may be granted further that the record shows that he was informed that his subscription of \$50,000 would complete the sum of \$300,000 to be raised by the syndicate, and that this amount would be sufficient to discharge the liabilities of the Sheffield Land, Iron, & Coal Company, and that in neither respect was the statement true. But, granting all these as facts clearly made out, yet they are not of themselves sufficient to relieve him from liability on this note. To work this result, these misrepresentations must have been made by the vendor of this property or by someone authorized to act for it. On this point Col. Looney says that J. C. Neely and Napoleon Hill, of Memphis, and E. W. Cole, Lewis Baxter, and others, of Nashville, were stockholders in that company, and creditors of it (the three first named, in very large amounts), and that they induced Charles Sykes, who was then its president, and also a creditor of the company, to form a syndicate for the purpose of purchasing a part of the assets of the company, the object and purpose of the originators of the syndicate being to apply the purchase money they realized to the payment of the debts of the Sheffield Land, Iron, & Coal Company, all of which were a charge upon the entire property of that company, and leave a portion of its property "free of any encumbrance whatever." He further says that these

parties solicited subscriptions from persons who were not creditors of the company, but that he knew of no one save himself, not a creditor, who took any interest in the syndicate. He also states in his deposition that he received two letters, one from Charles Sykes, whom he denominates "the promoter and organizer of the syndicate," and the other from J. C. Neely, a member of the syndicate, together with a schedule of assets that the syndicate proposed to buy, and that, relying on the truthfulness of the statements contained in these letters and in the schedule, he was induced to identify himself with the scheme. These letters were exhibited to the court by him. The letter of Sykes did not profess to come from him as the president, or in any other respect as the representative, of the selling company, but distinctly as the agent of the syndicate. He says in reference to the Sheffield Syndicate: "I beg to make the following statement: I was employed by some gentlemen who were interested in the town to go there and make an examination of the property offered, and, in addition, to make a conservative estimate of what could be realized from it. I had no idea of being interested in the company when I went down there. After looking the matter over thoroughly, I have agreed to put my money in it. I feel that, with careful management, I will get \$3 out for every dollar I put in. You, in my opinion, need not hesitate to say to your friends that this is an exceptional opportunity to make big money." In his letter Mr. Neely says: "You ask me to say what I know about the Sheffield Syndicate, and will say in reply that I have known the town of Sheffield since it was first surveyed into lots. I have seen a schedule of property offered the syndicate for \$300,000, and have seen the property, and know of its value. I think the property worth three times the amount valued above. I have subscribed myself, and would subscribe largely, had I the ready money in hand." The schedule of property referred to in these letters, and the one furnished by Sykes to Col. Looney, show the face or par value of the assets which the syndicate proposed to buy for the sum of \$300,000 to be \$2,450,023.51, and the estimated value to be \$1,012,676.81. Not only this, but Mr. Charles Sykes, the promoter of this scheme, in his deposition taken in the interest of, and read in the bill of, Col. Looney, says: "I was employed by a syndicate to purchase the assets of the said Sheffield Land, Iron, & Coal Company, and the said syndicate purchased the assets and property from the Sheffield Land, Iron & Coal Company for the sum of \$300,000, and paid the sum in cash, or the valid subsisting indebtedness of that company." It thus will be seen that whatever misrepresentations were the moving inducement to Col. Looney to enter into this unfortunate speculation came, not from the company selling these assets, but from his associates in the syndicate purchasing them. After a diligent examination of the record, we have not been able to discover a single misleading act or word of the vendor corporation, or anyone authorized to represent it, which induced this sale. It seems to have been the passive recipient of the consideration for its assets, and

whatever of wrong there may have been in the transaction was practised upon Col. Looney by parties interested with him in the speculation. This being so, we know of no rule of law which would place upon the innocent vendor the responsibility of a fraud or misrepresentation practised by one or more of a number of vendees upon others associated with them in a purchase. And, even as to these parties, Col. Looney, in his deposition, repeatedly acquits them of all intention to wrong or defraud him, but says that he is satisfied they thought they would bring him out all right. In addition, however, the record shows that the trade with the Sheffield Land, Iron, & Coal Company was consummated, and that the assets purchased were conveyed by that company to one Cheany, and that he at once conveyed them to a new corporation organized as was contemplated by the parties composing the syndicate, and known as the Sheffield City Company, and that company accepted them at the valuation of \$1,000,000, and, upon the basis of this valuation, issued \$150,000 of its capital stock to Col. Looney, as representing his interest in the institution. It is true, this stock was not actually turned over to him, but was held as collateral to his notes, yet it was receipted for by him, and was thus recognized by him as the fruit of his investment.

But, independent of the question just considered, this defense cannot be maintained against the United States National Bank. The facts with regard to the ownership of the note sued on by that bank are as follows: In October, 1892, this bank was the owner and holder of a note of the Sheffield Land, Iron, & Coal Company for the sum of \$11,891.82, besides interest; and at the same time it held a claim, in the shape of an overdraft, against the Bank of Commerce of Sheffield, Alabama, for \$3,790.91. In this latter bank the Sheffield Land, Iron, & Coal Company held a controlling interest. Mr. Sykes, representing a new corporation called the Sheffield City Company, to which the Looney notes had been assigned, proposed to the officers of the United States National Bank that, if they would discount the note of \$12,500 here sued on, the proceeds of the discount might be applied to the extinguishment, *pro tanto*, of the two debts just mentioned, and that the excess of indebtedness over the discount would be paid to it in cash. This proposition was accepted by the United States National Bank, and the arrangement suggested was carried out in every respect. The bank thus received this note and the cash necessary to complete the transaction, and at the same time surrendered to the Sheffield City Company, as an extinguished liability, the note of the Sheffield Land, Iron, & Coal Company, and certain collateral attached to it, including its claim against the Bank of Commerce. The note of Col. Looney was indorsed by its payee and by the Sheffield City Company, before its maturity, to this bank, and was taken by it without any notice of the circumstances under which it had been obtained. Premitting for the moment the effect on its negotiability of the fact that this note was made payable to "Joseph Sykes, Trustee," and so indorsed by him, there is no question but that the facts just detailed make this bank a

bona fide holder for value. The extinguishment of the note of the Sheffield Land, Iron, & Coal Company, and the surrender of the collateral to secure it, and the discharge of the Bank of Commerce from liability on its overdraft, constituted the United States National Bank a purchaser for value, in due course of trade, of this note. This proposition is clearly established in this state. *Nichol v. Bate*, 10 Yerg. 429; *Cherry v. Frost*, 7 Lea, 1; *Jordan v. Jordan*, 10 Lea, 184, 48 Am. Rep. 294, and *Lookout Bank v. Aull*, 98 Tenn. 646. But it is said that the fact that this note was payable to "Joseph Sykes, Trustee," and was so indorsed by him, of itself lets in against the bank all equities that would have attached to it in the hands of the original parties; and the cases of *Alexander v. Alderson*, 7 Baxt. 403; *Covington v. Anderson*, 16 Lea, 310; and *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 684, are cited as sustaining this contention. All of these cases involve controversies between the owners of trust funds and parties who set up a title to such funds by transfer from trustees in fraud of their trusts, and where the paper transferred or assigned on its face gave notice of the existence of a trust. *Alexander v. Alderson*, 7 Baxt. 403, was a case of a note payable to Alexander, trustee, and by him assigned in payment of an individual liability; and the question there was, Were the indorsees bona fide holders of the note, so as to be able to resist the claim of the beneficiaries? Upon the authority of *Duncan v. Jaudon*, 83 U. S. 15 Wall. 175, 21 L. ed. 145, this court held that the word "trustee" gave notice of the existence of a trust, and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed on the trustee in the management of the trust. To like effect are *Covington v. Anderson*, 16 Lea, 310, and *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 684. None of these cases, however, involve the question we have here. Similar to them is the case of *Third Nat. Bank v. Lange*, 51 Md. 188, 34 Am. Rep. 304. There a trustee violated his duty by disposing of a note payable to himself as trustee, and it was said by the court: "It [the note] cannot be read understandingly without seeing upon its face that it is connected with a trust and is a part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it." The correctness of these holdings is now conceded by the courts with practical unanimity. The effect of them is that if the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert any one who so obtained it into a constructive trustee, at the instance of the *cestui que trust*. But it is certainly true, as Mr. Perry says: "The mere fact that the word trustee is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee, with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the *cestui que trust*, or the

purchaser may be held as a trustee." 1 Perry, Tr. § 225. Here we find an intelligent statement of the rule and its limitations. The rule is that he who takes a security from a trustee, with his fiduciary character displayed upon its face, is bound to inquire as to his right to dispose of it, but if, on inquiry, it is found that there is no restriction upon the trustee's power of disposition, or (it may be added) there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith, for value and before maturing, will be protected.

In the case at bar an inquiry would have disclosed that the word "trustee," in this connection, was purely descriptive, and without any legal signification, and that the trust deed executed by Col. Looney and wife was in the ordinary form, made to Sykes as trustee, conveying to him certain real estate of Mrs. Looney's, with this recital: "That whereas, R. F. Looney, Sr., has subscribed \$50,000 towards the formation of a syndicate for the purchase of the assets of the Sheffield Land, Iron, & Coal Company, and to this end has executed his two several promissory notes for \$12,500 each, due in six months from date, payable to the order of Joseph P. Sykes, trustee, which said two notes are a part of the \$50,000 subscription: Now, in order to make certain the payment of said two notes," etc., "we hereby bargain and convey unto the said Jos. P. Sykes, trustee," etc. In other words, an examination would have disclosed neither upon the face of this trust deed, nor elsewhere in the transaction, any restriction upon the power of the payee, Sykes, nor any limitation upon his right to indorse and turn over the note in question for the consummation of Col. Looney's subscription to the syndicate, but, on the contrary, that it was made for that purpose and no other. The record showing that the note in suit and the others mentioned were delivered to Mr. Sykes, the constituted representative of the syndicate, to be transferred by him in payment of Col. Looney's subscription thereto, and that they were so used, and that the note sued on passed, under the circumstances already detailed, into the hands of the cross-complainant bank, its title will be protected. This principle or rule was recognized by us in affirming the decree of the court of chancery appeals in *Fox v. Citizens' Bank & T. Co.* (Tenn. Ch. App.) 35 L. R. A. 678. And see *Downer v. Read*, 17 Minn. 493 (Gil. 470); *Davis v. Garr*, 6 N. Y. 124, 55 Am. Dec. 387; *Westmoreland v. Foster*, 60 Ala. 448.

But it is insisted that at least a settlement made between the United States National Bank and the Sheffield City Company dated January 31, 1895, extinguished this note, so far as Looney and his accommodation indorser, Sykes, were concerned. It will be remembered that this note was transferred to its present holder by the Sheffield City Company, the last indorser. By the terms of the agreement or settlement, as it is called, the Sheffield City Company was permitted to substitute, with the bank, certain securities it owned in the place and stead of its guaranty or indorsement of this note, and the bank obligated itself not to sue on the guaranty or indorsement, but it

was expressly stipulated that this settlement was in no way to affect the liability of the other parties to the note. It was also agreed that, as money was collected from the other parties, it should be credited to the Sheffield City Company, and a like amount of its securities should be returned to it. In other words, this agreement simply substituted certain securities of the Sheffield City Company for its general liability as indorser, and secured for it a dismissal of a suit then pending to enforce this liability, but in no way affected the relations of the other parties to this note. This leaves undetermined alone the question of the extent of the obligation of J. P. Sykes on this note. Did the addition of the word "trustee" to his name limit his responsibility as its indorser? He waived demand and notice of protest by a writing when he indorsed it, so that his liability was fixed on the maturity and nonpayment of the note, unless it be that the addition of the word "trustee" relieves him. This question is settled against the indorser by the great weight of authority. *Taft v. Brewster*, 9 Johns. 384, 6 Am. Dec. 280, was a case of parties signing a bond as trustee of the Baptist Society, etc., and the court said: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church, and if the defendants are not bound, the church certainly is not. . . . The addition of trustees to the names of the defendants is in this case a mere *descriptio personarum*." In *McClure v. Bennett*, 1 Blackf. 189, 12 Am. Dec. 223, makers of a note appended to their names the words, "Trustees of the First Presbyterian Church of Madison," and yet they were made personally liable. And in *Conner v. Clark*, 12 Cal. 168, 78 Am. Dec. 529, the court held that a party signing a note with the word "trustee" added was individually bound, and evidence was inadmissible to show that at the time he affixed his signature there was an agreement that he should not be liable personally, but that the note should be paid out of a trust fund. In this last case the court quoted at length from § 63, Story, Prom. Notes, as follows: "As to trustees, guardians, executors, and administrators, and other persons acting as *en autre droit*, they are by law generally held personally liable on promissory notes; because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate, they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility by using clear and explicit words to show that intention; but, in the absence of such words the law will hold them bound." To the same effect is *Binney v. Plumley*, 5 Vt. 500, 26 Am. Dec. 813; *Clap v. Day*, 2 Me. 305, 11 Am. Dec. 99. So in this state it has been held that a note signed with the word "administrator" or "guardian" affixed to the name of the maker is the latter's personal note. *Erwin v. Carroll*, 1 Yerg. 145; *McWhirter v. Jackson*, 10 Humph. 209; *Carter v. Wolfe*, 1 Heisk. 694. Nor does it affect the liability of the indorser on this paper that the knowledge was communicated to the bank, when this note was deliv-

ered to it, that Mr. Sykes had no interest in the transaction of which it formed a part; for it is clear that notice to a bank discounting accommodation paper that the indorser is lending his credit to the maker does not affect the bank or relieve the indorser. *Philler v. Patterson*, 168 Pa. 463.

The result is that the chancellor's decree, dis-

missing the cross bill of the United States National Bank, and sustaining the respective cross bills of Looney and wife and Sykes and Buchanan and others, is reversed, and a decree will be entered here, in accordance with the prayer of the first one of these cross bills, in favor of the United States National Bank.

NORTH DAKOTA SUPREME COURT

BANK OF GILBY, *Appt.*,

S. L. FARNSWORTH, *Respt*

(.....N. D.....)

***1. A draft drawn by defendant to the order of the plaintiff was lost in transmission by mail from the city where the plaintiff was engaged in business to the city where the drawee resided, to be there presented for payment by the plaintiff's correspondent. Plaintiff failed to discover such loss for nearly six months, although it had in its possession a report from its correspondent which disclosed the fact that the draft had never reached such correspondent. Held, that the drawer was discharged from liability.**

2. When a drawer who has been discharged because of the failure to take the necessary steps to charge him, promises to pay the draft or recognizes his liability thereon, with full knowledge of the facts releasing him from liability, he thereby waives his right to insist that he has been released.

3. The giving by the drawer of a duplicate of the lost draft does not necessarily evince a purpose to waive such defense. Such duplicate does not, as a matter of law, import a promise to pay the draft. Therefore it is competent to show by parole evidence that the drawer informed the payee that he did not intend by the giving thereof to waive his rights, but merely to accommodate the payee by putting in his hands a paper which would enable him to collect the money from the drawee.

4. Such evidence does not contradict or vary the terms of the written contract between the parties, for there is only one contract between them,—4. c., the original draft,—the duplicate adding nothing to the liability of the drawer, and not constituting a new or additional contract.

(October 21, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Grand Forks County in favor of defendant in an action brought to enforce defendant's alleged liability as drawer of a draft. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by CORLISS, Ch. J.

NOTE.—As to the effect of delay in presenting a check to release an indorser, see *Kirkpatrick v. Puryear* (Tenn.) 22 L. R. A. 735, and note.

As to release of drawer, see *First Nat. Bank v. Buckhannon Bank* (Md.) 27 L. R. A. 332.

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Messrs. J. B. Wineman and Charles F. Templeton, for appellant:

The failure of plaintiff to present the original bill was caused by circumstances over which it had no control and judgment should be awarded in its favor.

Rev Codes, § 4944; *Windham Bank v. Norton*, 22 Conn. 218; *Pier v. Heinrichsoffen*, 67 Mo. 163, 29 Am. Rep. 601; *Brown v. Oimsted*, 50 Cal. 182.

The oral promise of defendant to execute a duplicate of the original bill of exchange, having knowledge of the facts, was a waiver of any laches attributable to plaintiff on account of failure to present the bill to Gagan & Company for acceptance and give notice of its non-payment to defendant.

The drawing of the duplicate draft, on April 1, 1896, and delivery to plaintiff, was a waiver by defendant of the defense which he now sets up.

Leonard v. Hastings, 9 Cal. 236; *Martin v. Lennon*, 19 Minn. 74.

Admission of liability or promise to pay, after notice of facts constituting a release waives the defense of laches.

Thornton v. Wynn, 25 U. S. 12 Wheat. 183, 6 L. ed. 595; *Sigerson v. Mathews*, 61 U. S. 20 How. 496, 15 L. ed. 989; *Yeager v. Farwell*, 80 U. S. 13 Wall. 6, 20 L. ed. 476; *Parsons v. Dickinson*, 23 Mich. 56; *Ladd v. Kenney*, 2 N. H. 340, 9 Am. Dec. 77; *Meyer v. Hibsher*, 47 N. Y. 265; *Ross v. Hurd*, 71 N. Y. 14, 27 Am. Rep. 1; *Oady v. Bradshaw*, 116 N. Y. 188, 5 L. R. A. 557; *Tebbetts v. Dowd*, 23 Wend. 879; *Third Nat. Bank v. Ashworth*, 105 Mass. 508; *Rindge v. Kimball*, 124 Mass. 209; *Hobbs v. Straine*, 149 Mass. 212; *Moyer's Appeal*, 87 Pa. 129; *Ozard v. Varnum*, 111 Pa. 193, 56 Am. Rep. 255; *First Nat. Bank v. Bonner* (Tex. Civ. App.) 27 S. W. 699; *State Bank v. Bartle*, 114 Mo. 276; Dan. Neg. Inst. §§ 1147 et seq.; *Curtis v. Sprague*, 51 Cal. 239; *Knapp v. Runals*, 87 Wis. 185.

No new consideration was necessary to support the waiver.

Sheldon v. Horton, 43 N. Y. 93, 8 Am. Rep. 669; *Mathews v. Allen*, 16 Gray, 594, 77 Am. Dec. 430; *Lockwood v. Bock*, 50 Minn. 142.

The instrument expressed a legal obligation which could not be affected by a contemporaneous parole agreement.

As to right of action at law on lost negotiable paper, see *Butler v. Joice* (D. C.) 16 L. R. A. 205, and note; also *Kirkwood v. First Nat. Bank* (Neb.) 24 L. R. A. 444.

Cowel v. Anderson, 83 Minn. 374; *Harrison v. Morrison*, 89 Minn. 319; *Farwell v. St. Paul Trust Co.* 45 Minn. 495; *Youngberg v. Nelson*, 51 Minn. 172; *Burke v. Ward*, (Tex. Civ. App.) 82 S. W. 1047; *National German American Bank v. Lang*, 2 N. D. 86; *Kulenkamp v. Groff*, 71 Mich. 875; *Thompson v. McKee*, 5 Dak. 172; Revised Codes, § 3888; *Martin v. Cole*, 104 U. S. 80, 26 L. ed. 647; *Brown v. Spofford*, 95 U. S. 474, 24 L. ed. 508.

A waiver, like any other contract, is to be construed according to the language used.

Lockwood v. Bock, 50 Minn. 142.

In this state a written contract cannot be delivered to the obligee conditionally.

Revised Codes, §§ 8389, 8390, and 8517.

Mr. Streit, the cashier of the bank, could not bind the plaintiff by any stipulation that the defendant should not be held according to the legal effect of the writing.

Thompson v. McKee, 5 Dak. 172.

Messrs. Cochrane & Feetham for respondent.

Corliss, Ch. J., delivered the opinion of the court:

The plaintiff by this action is seeking to hold the defendant liable as drawer of a draft. The plaintiff is the payee named in such draft, and it was drawn on J. M. Gagen & Co., of Grand Forks city, the defendant being a resident of Gilby, North Dakota. Defendant had been engaged in buying wheat for J. M. Gagen & Co. for some time previous to the day when this draft was drawn. It was his custom to advance the money with which to make all purchases of wheat for his principal, and at the close of the day to draw upon them a draft through the plaintiff, a state bank at Gilby, to reimburse him for such advances. On the 26th of September, 1895, the moneys he had that day expended in buying wheat for his principal amounted at the close thereof to the sum of \$612, and on that day he drew upon them, through the Gilby bank, for that amount, that bank cashing the draft, as was its custom. The draft was lost in transmission by mail from Gilby to Grand Forks, it being forwarded by plaintiff to the First National Bank of Grand Forks for collection. The fact of such loss was not discovered by plaintiff until the latter part of March, 1896, or nearly, if not quite, six months afterwards. As soon as plaintiff learned that the draft had not been received by its agent, the First National Bank of Grand Forks, it notified the defendant, and requested him to give a duplicate thereof. Defendant refused so to do until he had ascertained whether the draft had in fact not been paid. Subsequently he signed and delivered to plaintiff an exact duplicate of the lost draft, it being dated as of the 26th of September, 1895, the same as the original. Written upon the draft in two places was the word "Duplicate." Defendant testified, and his evidence was confirmed by that of his son, that he distinctly informed the plaintiff that he knew that he had been discharged from liability on the lost draft by reason of the negligence of the plaintiff, and that he did not intend, by the giving of the duplicate, to reinstate such liability. The evidence on this point is somewhat conflicting, but the learned trial judge, having all except one of

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the witnesses before him, found in favor of the defendant on this point. In a case where the evidence is so evenly balanced, we should not overthrow a finding of fact which necessarily rests in part upon a knowledge of the demeanor and appearance of witnesses which we do not and cannot possess. That the defendant was discharged from liability as drawer does not admit of doubt. Under the statute it was the duty of the plaintiff to present the bill for payment within ten days after the time in which it could, with reasonable diligence, forward it to Grand Forks for such presentation. The draft was payable on demand, and did not draw interest. Our statute declares that, "if a bill of exchange payable at sight or on demand without interest is not duly presented for payment within ten days after the time in which it could with reasonable diligence be transmitted to the proper place for such presentation, the drawer and indorsers are exonerated, unless such presentment is excused." Rev. Codes, § 4941. Nor does the loss of the paper exonerate the plaintiff from the performance of this duty, which it owed the defendant. "The loss of a bill or note is no excuse for want of a demand, protest, or notice, because it does not change the contract of the parties, and the drawer and indorsers will be at once discharged if there be failure in respect of either the demand, protest, or notice. This rule applies whether the bill has been accepted or not, for the loss of the instrument does not relax the duty of the holder to make the demand for acceptance within due season." 2 Dan. Neg. Inst. § 1464. It is possible that the time during which plaintiff remained in ignorance of the fact of such loss, without being chargeable with negligence, was not a part of the time mentioned in the statute. Probably § 4909, Revised Codes, covers such a case. This section reads: "Delay in presentment or in giving notice of dishonor is excused when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence." It may be that the holder of a draft is not responsible for the carelessness of public servants in the carrying of the mails, and therefore that he does not take the risk of such carelessness. But the moment the exercise of reasonable diligence requires him to know the fact that the paper has been lost, he must then proceed under the statute to make the demand of payment, and give notice of dishonor. This duty the section referred to clearly recognizes. It is only when the delay is caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence that he is excused. It is a mild form of expression to speak of the negligence of the plaintiff in failing to discover for six months the fact that this draft had never been paid, and had not even reached its correspondent and agent, the First National Bank of Grand Forks. Nearly six months intervened between the mailing of the draft and the discovery of its loss, during about five months of which time plaintiff's cashier admits that there was in his possession a statement from the First National Bank which would have disclosed the fact that that bank had never received the paper. From the standpoint of the defendant's rights and interest, the plaintiff was guilty of

gross and inexcusable negligence; and defendant was thereby discharged from all liability on the paper. But it is urged that to allow the defendant to prove the oral understanding between him and the plaintiff's cashier at the time of the delivery of the duplicate draft is to contradict by parol evidence the terms of a written instrument. This contention must find support, if at all, in the postulate that the duplicate draft was an independent contract, creating an additional liability. This position is not tenable. All the evidence in the case, the duplicate itself, and the plaintiff's own pleading, speak but one language regarding the paper. It is not a new agreement, but merely a written evidence of the lost instrument executed to take its place. After a contract is duly entered into, the making of a duplicate adds nothing to the liability of any of the parties to the agreement. There is still only one contract, although for convenience of the parties there may be two, or even more, original agreements, each the exact copy of all the others. Burrill defines a duplicate as "an original instrument repeated; a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original." It is immaterial when a duplicate is executed. If it is in fact a duplicate, it adds no more to the obligations and rights of the parties to the agreement, when it is executed at a subsequent date, than when its execution is contemporaneous with that of the other duplicate. Suppose that the defendant had been properly charged as drawee, and that thereafter the draft had been lost, would it be claimed that the execution by defendant of a duplicate under those circumstances would have added anything to his liability, or that the duplicate would have been a new and distinct contract? Clearly not; otherwise he would then be liable for twice the sum for which he had received consideration. The mere fact that the duplicate was executed after he had been discharged cannot make it a separate and independent agreement, although the execution thereof might, under some circumstances, be cogent evidence that the drawer had intended to admit his liability, and thus, under a familiar rule, waive his discharge. That, however, is another question having no connection whatever with the inquiry whether the defendant, by signing and delivering this duplicate as a duplicate, and as a duplicate only, has nevertheless entered into a new contract creating a distinct liability. That no new agreement was made by the execution of this duplicate cannot admit of doubt. All that was done was to furnish the plaintiff with a copy of the lost paper; a copy, however, which has all the force (and no more) of the original, because signed by the defendant, the same as this old draft. Therefore the defendant's evidence, that he stated before signing the duplicate that he did not thereby intend to add anything to his liability, was in harmony with the very nature of the act of executing a duplicate, and not in conflict therewith. His evidence was not incompetent on the ground that it tended to contradict or vary the terms of a written agreement. Clearly, his evidence, that he informed the plaintiff before the deliv-

ery of the duplicate that he knew that he had been released from liability, and did not intend to yield his vantage ground by the execution of such duplicate, was not evidence which in any manner varied or contradicted the terms of the only contract between the parties. That contract was the original draft. By signing the duplicate, the defendant, as we have before stated, did not make a new agreement or add anything to the old. He merely gave another written evidence thereof. Therefore the contract between the parties whose terms can be varied by the oral evidence in the case is the draft drawn September 26, 1895. But defendant does not seek to add to or take from this agreement one iota. He concedes that it is a fair contract, and that it means just what the law says it means. But he asserts that the condition on which the liability thereunder was to become absolute has not been fulfilled, and that, therefore, he has been released as drawer of the draft. What he sought to prove was, not that the original draft was delivered on condition, or did not represent the real intent of the parties thereto, but that, by giving a duplicate, he did not intend to waive his right to insist that he had been exonerated from liability by the laches of the plaintiff.

Counsel for plaintiff treats the duplicate as a new contract, and then reasons that it imports an absolute liability on the part of the defendant, provided the proper steps were taken to charge him as drawer. Here is the fallacy of his reasoning. The postulate is false. It is no more a distinct contract than it would have been had it been executed at the same time that the lost paper was executed. As a new contract, it would have no consideration to support it. It is undisputed that no money was paid for the duplicate by the plaintiff. Nor was defendant under any moral, much less any legal, obligation to give it. He had been discharged through the gross carelessness of plaintiff; and the circumstances of the case show that, if the bank had acted with ordinary diligence, the loss of the draft would have been discovered in ample time to insure the collection of the money from J. M. Gagen & Co., as it is uncontradicted that between the time it was given and their suspension of business through insolvency they paid seventy-four drafts drawn on them by defendant. There might have rested upon defendant a certain business obligation to accommodate the bank by giving to it some written evidence that the bank was entitled to \$612 of the funds of the defendant in the hands of J. M. Gagen & Co. But neither legally nor morally was defendant bound to pay a dollar, or in any manner help the plaintiff, by again becoming responsible, out of the dilemma in which it had placed itself by its own inexcusable negligence. If, therefore, we could treat this duplicate as an independent contract, it would be void as between the parties for want of a consideration to support it. But it is idle to talk of its being a new contract. The whole trend of the evidence, the writing of the word "Duplicate" on the paper itself, and the solemn averments of the plaintiff's own pleading, all point to one conclusion: *i. e.*, that all that the parties intended was to make a duplicate of a draft which had theretofore been executed, and de-

livered by defendant to plaintiff. Plaintiff, in its complaint, avers "that on the last day of April, A. D. 1892, the defendant executed and delivered to the plaintiff a duplicate of said bill of exchange for the purpose of presenting the same to said J. M. Gagen & Co., and collecting from said J. M. Gagen & Co. the said sum of \$612." We must, if we are not to lose ourselves in a labyrinth, take this duplicate, and assume it to have been executed as of the date of the lost draft, in considering the question whether there has been an attempt on the part of the defendant to contradict or vary by parol evidence the terms of a written agreement. But what effect the execution of this paper has to restore the liability of the defendant as drawer is another question, which must be discussed entirely separate from the question of parol evidence. On this branch of the case the time when the duplicate was executed is very important. If it had been signed when the lost draft was signed, no one would contend that it was any evidence of waiver. But, as it appears to have been executed at a time when the defendant knew that he had been released as drawer, there is a possibility of claiming that he thereby intended to admit his liability despite the fact that he had been discharged. If the paper were a note, and the defendant were an indorser thereon, his indorsing of a duplicate would be strong, perhaps conclusive, evidence that he intended thereby to admit his liability, although he had been discharged. In such a case there would be no other plausible explanation of his conduct. But in the case at bar there was a sufficient reason why the plaintiff should desire, and the defendant be willing to give, a duplicate, aside from a purpose to re-establish an extinguished liability. It was necessary that plaintiff should have some written authority from defendant to enable it to collect from J. M. Gagen & Co. \$612 of the funds of defendant in their hands. For this purpose a duplicate was a very natural paper to give, for it would keep the records of all the parties in proper business shape. An order or an assignment would have been sufficient to enable the plaintiff to collect from J. M. Gagen & Co. the \$612, but a duplicate of the original draft was the most natural document for the parties to select to effectuate this object. It was entirely competent for the defendant, at the time of giving it, to notify the plaintiff that he did not intend by the giving of such duplicate to waive his rights, but that his sole object was to put the plaintiff in shape to secure its money from J. M. Gagen & Co. According to his evidence, it was solely for this purpose that the plaintiff asked for the duplicate. It is possible that in this case the inference might be drawn from the bare fact of giving a duplicate under the circumstances of this case that defendant intended to abandon his defense that he had been released. But this would not be on account of the terms of the paper, or of its legal effect. Nor would it follow as a legal conclusion from the giving of a duplicate. That would be merely a circumstance having certain probative force, and evidence to overthrow the inference would be competent. Such evidence would only go to show that what on the face of the transaction was presumably the intention of the defendant

was not in fact his intention, and that the plaintiff knew that it was not. Unless a duplicate draft, as a matter of law, constitutes a promise to pay despite the release of the drawer, —unless this is the legal effect of such an instrument,—the parol evidence did not in any manner contradict or vary its terms. Now, it is obvious that a draft does not contain any promise by the drawer to be bound despite a prior discharge, for at the time it is given the drawer is never released. And the duplicate draft is not a new contract, but another copy of the original, signed like the original by the drawer. As a contract it imports nothing more than the original draft. As evidence of a purpose to waive a discharge it will have such force as other evidence and other circumstances in the case permit, and no other or different force. And proof of other facts bearing upon the question of waiver in no manner affects the terms or legal effect of the only contract between the parties, *i. e.*, the original draft which has been lost. The decision of the New York court of appeals in *Benton v. Martin*, 40 N. Y. 845, 52 N. Y. 570, is a direct authority in support of our decision. It is true that, when the case was before the court of appeals the last time (52 N. Y. 570), Judge Folger appears to have thought that the doctrine that it is competent to prove that a written instrument was delivered conditionally has some bearing on the case, and it may be doubtful, in view of our statutes, whether that doctrine prevails in this state. See Rev. Codes, §§ 8517, 3889, 3890. But no such foundation for the decision was stated by the court in the decision in 40 N. Y. 845. Nor can we perceive how it is possible to talk about the conditional delivery of a mere duplicate of an actually delivered and perfectly valid contract, one which had previously taken effect without condition. The delivery in that case was not conditional in the sense of the doctrine referred to, or, indeed, in any sense whatsoever. The drawer of the draft in that case merely asserted that, while he recognized the fact that he had once been liable on a draft issued by him, and which had theretofore been delivered unconditionally, and while he was willing to give the payee a duplicate to enable it to obtain its money from the drawee, yet he wished it understood that he did not intend to have his act of accommodation construed as a recognition of the very liability from which he had been, by the payee's carelessness, released. Here was no condition, but merely a refusal to have his act, which was not necessarily an admission of liability, construed as such an admission. The duplicate was not delivered as a contract. The delivery of the contract had already taken place months before. How, then, can it be said that any question of conditional delivery is involved in a case of this kind? What was done in that case and in this was not the delivering of a contract, thus for the first time making it effectual, but the furnishing of a duplicate of a contract which had been unconditionally delivered some time before. Such a thing as the conditional delivery of a duplicate, the contract already having taken effect by an unqualified delivery, is an utter impossibility. The defendant attached no condition to the delivery of the duplicate.

He merely guarded against the possibility of having his act in so doing construed as a recognition of liability, and hence, under the authorities, as a waiver of his discharge. Certainly, the furnishing of a duplicate of a lost draft is an act susceptible of two different constructions. It may indicate a purpose to reinstate an extinguished liability, or it may be an act of accommodation to the payee to enable him to obtain the funds of the drawee in the hands of the drawer from such drawee, the payee being equitably entitled thereto. Surely, evidence which throws light on this ambiguous transaction should not be excluded, nor is there any rule of law requiring this to be done. Had the defendant in express terms promised in writing to pay the draft, then it might be claimed that parol evidence tending to show that he did not mean what he said would fall within the rule excluding parol evidence to contradict a written instrument. But no such promise is found on the face of the duplicate, nor is one necessarily implied by the law. Whether such a promise was intended to be made,—whether it has, in fact, been made,—is to be gathered from all the circumstances of the case; and no act indecisive in character can control to the exclusion of other equally good, or rather of more satisfactory and explicit, evidence. It is unjustifiable to force upon the defendant an intention to yield up his defense merely because he gave the plaintiff a copy of the original draft, when such act could be and was in fact an act of pure accommodation to the plaintiff. It must be kept in mind that it does not take a contract to reinstate an extinguished liability of this character. No new consideration is necessary. No agreement on the part of the other party (the creditor) is essential. All that is needed is that the drawer should manifest a purpose to be bound notwithstanding the

fact that the holder has failed to charge him as drawer. 2 Dan. Neg. Inst. §§ 1147, 1147a, and cases cited. How, then, has the doctrine relating to parol evidence any bearing on the question whether the drawer has in fact evinced a purpose to surrender his impregnable position? It is urged that the cashier of the bank had no power to bind it by agreeing that the delivery of the duplicate should not constitute a waiver of the drawer's defense. It is certainly remarkable if a principal can in this way force upon a party an agreement or waiver he never intended. Want of power in the agent will entitle the principal to claim that he is not bound. But it has remained for counsel for the plaintiff to discover that it likewise enables the principal to insist that another who has dealt with the agent has made a contract to which he (such other party) has never assented, or has in law agreed to a waiver which he has expressly guarded against. When defendant and plaintiff's cashier came together, defendant had been relieved from all liability to the plaintiff; and whatever rights the plaintiff has obtained have accrued to it through the dealing of the defendant with such cashier. It can take only such rights as the defendant has seen fit to confer upon it. Claiming the benefit of this arrangement, it must take with it all its conditions. As the defendant declared to the cashier that he would not waive his discharge, the plaintiff cannot, on account of any want of power in the agent, transmute this refusal to waive into a waiver in fact.

As the defendant was discharged from liability, and as he has not waived his right to rely on such discharge, the judgment of the district court in his favor must be *affirmed*.

All concur.

IOWA SUPREME COURT.

J. W. NEASHAM, *Appt.*,

Anna I. McNAIR.

(.....Iowa.....)

A diamond shirt stud procured for personal use and actually used and worn by a husband, is a family expense within the meaning of Code, § 214, charging family expenses upon the property of both husband and wife or either of them.

(Robinson, J., dissents.)

(October 30, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Wapello County in favor of defendant in an action brought to recover the purchase price of jewelry sold by plaintiff to defendant's husband. *Reversed.*

NOTE.—As to liability of wife for family expenses, see *Dodd v. St. John* (Or.) 15 L. R. A. 717, and note.

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Statement by Ladd, J.

The petition alleges that the defendants are husband and wife, a family of large fortune, high social rank, and luxurious habits; that O. E. McNair purchased an article of jewelry for his personal use and adornment, and used the same for such purpose; that he afterwards executed a note therefor, no part of which has been paid. It was admitted that the article referred to is a diamond shirt stud. Anna I. McNair demurred on the ground that such stud is not an expense for the payment of which she is liable. The plaintiff elected to stand on the ruling by which the demurrer was sustained, and appeals from the judgment dismissing the petition.

Messrs. Work & Lewis, for appellant: Jewelry is a family expense chargeable to both husband and wife.

Marquardt v. Flaughner, 60 Iowa, 148.

This court has held in *Smedley v. Fell*, 41 Iowa, 588, that a piano and spread which cost \$389.80 was a family expense.

In *Frost v. Parker*, 65 Iowa, 178, this court holds that an organ is a family expense.

In *Schrader v. Hoover*, 80 Iowa, 243, a case for medical services for the wife ordered by the husband, the court made the right to recover to depend upon whether the "wife's condition was such that it was necessary and proper for her to have such attendance and service." This court holds that, thus limited, the instruction was erroneous and says: "The only question under the statute is, Was the claim of plaintiff a family expense? That it was a family expense seems to be conceded by the instruction, and there can be no doubt that thus far the instruction is correct.

Mr. W. S. Coen for appellee.

Ladd, J., delivered the opinion of the court:

Is a diamond shirt stud, worn by the husband for personal use and adornment, an expense of the family, for which the wife may be liable? Section 2214 of the Code of 1873 provides that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." At common law the husband was liable for any expense incurred in the clothing and maintenance of the wife and children, suitable to his situation in life. The term "necessaries" was not confined to food and clothing, but was construed to include articles of utility and ornament ordinarily enjoyed by families of persons of estate and station similar to that of the husband. The wife, however, was not chargeable for necessaries, and there was no remedy for articles purchased by her and used in the family, when not included in that term. The statute obviates determining the vexatious question of what are necessaries, and affords an inadequate remedy against both husband and wife. *Smedley v. Felt*, 41 Iowa, 588; *Schrader v. Hoover*, 80 Iowa, 243; *Blackley v. Laba*, 68 Iowa, 22, 50 Am. Rep. 724; *Devendorf v. Emerson*, 66 Iowa, 698. The expense, however, is limited to that of the family, and must have been incurred for something used therein or kept for use or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. *Fitzgerald v. McCarthy*, 55 Iowa, 702; *Smedley v. Felt*, 41 Iowa, 588. In the latter case a piano was adjudged a family expense. "Family" is defined as a collective body of persons who live in one home under one head or manager. *Menefee v. Chesley*, 98 Iowa, 55, and authorities cited. That husband and wife, when living together, as they are presumed to do, are both members of the family, and included in this definition, will not be questioned. Necessaries for which the husband was liable will certainly now be conceded to be a part of the family expense. Clothing seems to have been treated as such. *Finn v. Rose*, 12 Iowa, 565; *Devendorf v. Emerson*, 66 Iowa, 698; *Smedley v. Felt*, 41 Iowa, 588. It is said that this is beneficial to each member only, and not to the entire household. The clothing of every member is a source of comfort and enjoyment to all. It is as essential as the food placed on the table.

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Indeed, the services of a physician to one member of the family have been deemed a family expense; and so a watch and chain used by the wife and daughter only. *Schrader v. Hoover*, 80 Iowa, 243; *Marquardt v. Flaughner*, 60 Iowa, 148. Wearing apparel is not confined in its meaning to clothing, but includes the idea of ornamentation as well. A watch and chain have been adjudged such. *Brown v. Edmonds*, 8 S. D. 271; *Stewart v. McClung*, 12 Or. 431, 53 Am. Rep. 374; *Bumpus v. Maynard*, 33 Barb. 626. *Contra*, see *Smith v. Rogers*, 16 Ga. 480; *Rothchild v. Boelter*, 18 Minn. 361 (Gil. 831); *Gooch v. Gooch*, 83 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 252. See 29 Am. & Eng. Enc. Law, p. 38. In *Sawyer v. Sawyer*, 28 Vt. 252, a breastpin is held to be a part of the wearing apparel of a deceased husband, which, under the Vermont statute, goes to the widow. But the supreme court of New Hampshire adjudged a breastpin not to be "wearing apparel necessary for the debtor and his family." *Towns v. Pratt* [33 N. H. 345], 66 Am. Dec. 720. The question of value and necessity is somewhat controlling in some of the cases referred to. By "wearing apparel" is usually meant clothing and garments protecting the person from exposure and not articles of ornament merely. Originally it included, not only the vesture, but all the ornaments and decorations worn with it. That jewelry, when of no purpose other than that of ornament, as a ring, will not be so classified, may be conceded. But if it serves the double purpose of being an article of use, in fastening the garments, or otherwise, and also of adornment to the person there appears no good reason for not adjudging it a part of the wearing apparel; else much that is pleasing in dress must be excluded from the meaning of the word, as generally accepted. The ornamentation of a lady's wardrobe is of little utility, yet it is always included in the term. If an article of jewelry is used with and as a part of the clothing, it may well be deemed a portion of the wearing apparel. It may thus serve as necessary and useful a purpose as the garments themselves. Articles of jewelry were of ten adjudged necessities for which the husband was liable at common law. *Raynes v. Bennett*, 114 Mass. 424; *Porter v. Briggs*, 38 Iowa, 186, 18 Am. Rep. 27. These are quite as commonly worn by many people as the clothing that covers them. The make of a shirt or the taste of the wearer may be such as to require some kind of a button or stud. If the inexpensive pearl were used, no one would question the propriety of making it a family charge. But it might be as much out of place in the shirt front of a person of fashion or fortune as a diamond in that of one who earns his bread by the sweat of his face. If the cost, the utility, or the necessity is to be the criterion, then the line must be drawn on many articles of furniture, clothing, and food. What shall be the delicacies of the table, the adornments of the person, and the character of the furnishings, must be left to the better judgment and discretion of each family, which is presumed to, and ordinarily does, act as a unit in such matters. Many families would have no use for terrapin, silks and satins, or Smyrna rugs, or costly jewelry, and in such cases neither husband nor wife

would be liable for indebtedness incurred by the other therefor. But, if these are purchased for and used in the family, it is not perceived on what ground they may not be deemed a family charge. Under our statute, there is no occasion for inquiry as to the cost or necessity. Nor is there better reason to investigate the character or value of a button or stud worn, in determining whether it is a family expense, than that of a costly dress, an artistically trimmed bonnet, or a silk tile. The article may be unnecessary, or such as the family ought to have dispensed with, or of no actual utility; still, if purchased for and used in the family, the liability of the wife cannot be avoided. *Dodd v. St. John*, 22 Or. 250, 15 L. R. A. 717. If the diamond stud was worn by the defendant's husband, as is alleged, for personal use, as well as adornment, it is an expense such as is contemplated by the statute. Nor does such a

holding involve necessary hardship. It is said in the petition that the McNairs are a family of large fortune, high social rank, and luxurious habits. If this be true, the jewelry may well be deemed appropriate to their situation in life, and a source of no considerable outlay in maintaining the family according to their station, and in harmony with their associations. The price of a diamond shirt stud will not in all cases be a family expense, but where procured for personal use, and actually used and worn by the husband, it becomes such. The same rule must be applied to the diamond and the pearl, to the rich and the poor.

Reversed.

Robinson, J., dissenting:

I do not agree to what is said in support of the conclusion of the majority.

ILLINOIS SUPREME COURT.

City of CHICAGO, *Pff. in Err.*,

v.

A. Montgomery WARD *et al.*

(109 Ill. 302.)

1. Leaving land unsubdivided upon a plat with an express dedication as public ground not to be occupied by build-

ings of any description, or marking it as a street and holding it out as open ground, no buildings, to purchasers, is equivalent to a dedication for public use, and creates a restriction against the erection of buildings thereon.

2. The submergence of lands dedicated as a public park with the express condition that no buildings shall be erected thereon, as the result of heavy storms, and the subsequent rec-

NOTE.—Effect of sudden submergence upon title to land.

The statement from Hale, *De Jure Maris*, which is quoted in the opinion, that "if a subject bath land adjoining the sea and the violence of the sea swallow it up, the subject will not lose his property if there are reasonable marks to continue the notice of it, or if its extent can be ascertained,"—has been generally recognized as the true rule in cases in which it was applicable.

The statement that "if the sea overflow my land for forty years and afterwards reflow again, I shall have my land and not the King," is also found in 2 Rolle, Abr. 168.

In *Mulry v. Norton*, 100 N. Y. 424, 58 Am. Rep. 206, it is said that it is undoubtedly true that the title of a landowner may be lost by submergence, but to effect that result the submergence must be followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction. But ordinarily lands lost by submergence may be regained by reliction. Affirming *Mulry v. Norton*, 29 Hun. 600, which in turn affirmed *Murphy v. Norton*, 61 How. Pr. 197.

Though the surface of a part of an island is destroyed by the force of winds and waves, yet the owner does not lose the propriety of the remaining land covered by the water if it is regained by either natural or artificial means, and if another island is deposited on it the title is in the owner of the land previously thereon. *Morris v. Brooke* (Del.) 25 Alb. L. J. 90.

The sudden and perceptible loss of land by the action of the water of a river does not deprive the owner of the submerged land over which the water flows of his title. And if an island subsequently forms on the place where the land formerly was situated, it will belong to the former owner. *St. Louis v. Rutz*, 188 U. S. 228, 84 L. ed. 941; *Rutz v. Seeger*, 35 Fed. Rep. 188.

In *Bates v. Illinois C. R. Co.* 66 U. S. 1 Black, 204, 38 L. R. A.

17 L. ed. 158, the court says that it will not decide what are the rights of lake-shore proprietors whose fronts are swept away by the currents, nor to what extent they still own the lands covered by water, except in the case of one who proves that he owned the land before the accretion took place.

Where after a railroad company had appropriated land along a river bank for its use, and a suit to recover the damages had been brought, the land caved into the river, it was held that as to so much of the land as was washed into the river no action could be maintained against the railroad to enforce a claim for its use, or to enjoin its use until compensation was made. *Organ v. Memphis & L. R. R. Co.* 51 Ark. 235.

If after the survey of swamp lands and before the issuance of a patent therefor to a private citizen, one boundary is cut away by a river so that the bed of the river is changed one quarter of a mile, the title of the patentee will not include the bed of the river, but will go only to high-water mark, and an island formed between the old and new beds will belong to the state. *Heckman v. Swett*, 99 Cal. 308.

The person who claims the title to the land under the water has the burden of showing that the land caved off suddenly, and also the extent to which the former boundary went. *Wallace v. Driver*, 61 Ark. 423, 81 L. R. A. 817.

In Missouri there appears to have been some departure from the rule as above stated. This appears to have been caused by the adoption of the rule applicable in case of boundaries as shown by the authorities cited in the next subdivision.

In *Cooley v. Golden*, 117 Mo. 23, 21 L. R. A. 800, it is said that the ownership of land in Missouri is subject to such changes as may be wrought by the natural action of the waters of navigable rivers upon it. So that if a river leaves its bed and makes a new one on the land of a private person, the bed immediately becomes subject to public use.

lamation by the city of such land, do not destroy the restrictions.

3. **The vested right of owners abutting upon a public park, dedicated with the restriction that no buildings shall be erected upon it, fixed by the acts of dedication, the acceptance of the city, and the acquiescence of the public and abutting owners, cannot be changed by the legislature granting the city the right to convey such land for railroad purposes, as such action would be an unconstitutional impairment of such rights.**
4. **A restriction against the erection of buildings upon land dedicated as a park is not removed by the change of the use of the buildings abutting thereon from residence to business purposes.**
5. **A city acting as trustee of a public**

park bounded upon a lake by filling in submerged land adjacent thereto as a part of the park is estopped from claiming title to the same free from the park trust, and from restrictions thereof against the erection of buildings upon the park.

6. **The owners of lots abutting on ground dedicated for a public park with restrictions against the erection of buildings thereon have a right to maintain a suit to enjoin the erection of buildings.**
7. **Consent of owners abutting upon a park dedicated under restrictions against the erection of buildings to the erection of one or more buildings upon such park will not estop them from bringing suit to enjoin the erection of other buildings.**

(November 8, 1897).

In *Naylor v. Cox*, 114 Mo. 232, it is said that if a portion of a fractional section of land was washed away by a river, and the main channel of the river covered the place where it originally stood for any considerable length of time, and accretions afterwards grew from an island in the river until the land came within the former lines of the fractional section, the owner of the section would have no title to the accretions.

In *Cox v. Arnold*, 129 Mo. 337, it is said that when a riparian owner acquires his land, he acquires, as incident thereto, whatever may be added to it by gradual and imperceptible accretion, while at the same time he assumes the risk of losing it all by its being gradually washed away by the waters of the river, but his line always remains at the water's edge. The only way that plaintiff could have regained what land he lost by its being washed away and its situs submerged by the waters of the river was by gradual and imperceptible accretion beginning at his line at the water's edge. So that if a section of his land is washed away, and an island subsequently forms within what were formerly his boundary lines, he has no title to it.

But in another case it is said that if land after being washed away reforms gradually the owner of the upland may have title to the new formation by right of accretion. These were the facts in *Minton v. Steele*, 125 Mo. 181, and the court says whether the claim to the new land should properly rest upon the force of the original title, or be referred to the general law of accretion, we are not required to investigate.

Change of boundary.

In the above cases the question has been considered as between subject and sovereign, and the rule is that the sovereign gains no right to the subject's land by its being suddenly submerged by the waters if the former boundaries of the land can be ascertained. But where the question is as to a water-course forming a boundary between states or private persons a somewhat different rule has been established for the sake of convenience.

In the case of the *Arctifluous Boundaries*, 8 Ops. Atty. Gen. 175, it is said that in case of a river, the middle thread of which forms the boundary between two nations, the convenience of allowing it to retain its previous function, notwithstanding insensible changes in its channel by accretion or erosion, outweighs the inconvenience even to the injured party involved in a detriment, which happens gradually and inappreciably in the successive moments of its progression.

So, in *Nebraska v. Iowa*, 143 U. S. 380, 38 L. ed. 190, the court says that by reason of the character of the soil through which the Missouri river runs, and the swiftness of the river at times of high water, the washing causes an instantaneous fall of quite

the length and breadth of the superstratum of soil into the river, so that it may in one sense of the term be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. And the court says that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The only thing which distinguishes this river from other streams in the matter of accretion is in the rapidity of the change created by the velocity of the current; and this in the very nature of things works no change in the principle underlying the rule of law in respect thereto. The law of accretion continues, and that even in case of the boundary line of states.

And the principle of that case was followed in *Bouvier v. Stricklett*, 40 Neb. 732.

In *Willey v. Lewis*, 28 Ohio L. J. 104, it is said that if a running stream changes its channel by a gradual and progressive washing away of one of its banks the boundary follows the thread of the stream, although the change is caused by instantaneous and obvious dropping into the stream of quite large portions of the bank when such portions are not carried away in compact masses, but disintegrate and are borne away in small particles.

It will be seen from the reasoning in those cases that the question of the stream as a boundary between opposite owners, and not the question of the loss of the subject's land to the sovereign by sudden submergence, was involved. The two classes of cases are governed by distinct but well-defined rules, the only doubt being whether or not the rule in reference to gradual change applies in case the change is perceptible and covers considerable distance at one time; yet in the Missouri cases above cited, this rule, and not the correct one, appears to have been applied in cases between subject and sovereign.

The rule as to gradual change does not apply in case the river leaves its former channel and cuts a new one. That class of cases is not within the scope of this note, although attention is called to the fact that in *Re Hull & S. B. Co.*, 5 Mees. & W. 327, Lord Abinger states that in case a river suddenly leaves its course and is transferred to another person's land the owner of the bed of the river does not lose his title to the soil.

So, if a river suddenly moves sideways so as to leave a strip of the bank which had been on one side, upon the other side of it, the title will not be changed, but the former owner will still have title to such strip. *McKay v. Huggan*, 24 N. S. 514.

So the ownership of land will not be changed by the sudden change of the course of a stream so as to leave a portion of the land of one riparian owner upon the other side of the channel. *Sweatman v. Holbrook*, 18 Ky. L. Rep. 370, and 372. H. P. P.

ERROR to the Superior Court for Cook County to review a decree enjoining defendant from erecting certain buildings on Lake Park. *Affirmed.*

The facts are stated in the opinion.

Mr. Jesse B. Barton, for plaintiff in error:

The fee of all lands covered at ordinary stages of water in lakes, and at high tide in tide waters, is in the state.

Seaman v. Smith, 24 Ill. 521; *Trustees of Schools v. Schroll*, 120 Ill. 509, 80 Am. Rep. 575; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146; *People, Moloney, v. Kirk*, 162 Ill. 188; *Illinois R. Co. v. Illinois*, 146 U. S. 887, 86 L. ed. 1018; *Rugs v. Apalachicola Oyster Canning & Fish Co.* 25 Fla. 656; *American Dock & Improv. Co. v. Public Schools*, 89 N. J. Eq. 409; *Stevens v. Paterson & N. R. Co.* 84 N. J. L. 583, 8 Am. Rep. 269; *Hoboken v. Pennsylvania R. Co.* 16 Fed. Rep. 816, 124 U. S. 688, 31 L. ed. 551; *Bowley v. Shively*, 23 Or. 410; *Shively v. Bowley*, 152 U. S. 9, 38 L. ed. 835; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *Coburn v. Ames*, 52 Cal. 885, 28 Am. Rep. 684; *Eisenbach v. Hatfield*, 2 Wash. 236, 13 L. R. A. 583; *Austin v. Rutland R. Co.* 45 Vt. 243; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 399; *Mutual L. Ins. Co. v. Voorhis*, 71 Hun, 117.

The city is not estopped by its own acts or those of the state from using these lands otherwise than as a park.

Chicago v. Union Bldg. Asso. 102 Ill. 879, 40 Am. Rep. 598; *Warren County Supers. v. Patterson*, 56 Ill. 111.

The acts of 1861 and 1863 were repealed by the act of 1869 by necessary implication.

Union Trust Co. v. Trumbull, 187 Ill. 146; *Springfield Water Comrs. v. People, Springfield*, 187 Ill. 680; *Pasey v. Uter*, 182 Ill. 489.

A bill in equity will not lie to enjoin the vacation of a street or park by a city.

Parker v. Catholic Bishop of Chicago, 146 Ill. 158; *Chicago v. Union Bldg. Asso.* 102 Ill. 879, 40 Am. Rep. 598.

The legislature can authorize a city to sell property dedicated to public use.

Hebert v. Lavalley, 87 Ill. 448; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 26; *Van Ness v. Washington*, 29 U. S. 4 Pet. 283, 7 L. ed. 842.

Verbal statements of individual canal commissioners made to induce purchasers to buy are of no binding force.

Lennig v. Ocean City Asso. 41 N. J. Eq. 24.

Where restrictions on the sale of real estate have been imposed to effect a particular purpose, and the character of the property has so changed that that particular purpose cannot be effected, even with the restrictions, a violation of the restrictions will not be enjoined, and one complaining will be remitted to his remedy at law, if any he has.

Jackson v. Stevenson, 156 Mass. 496; *Columbia College v. Thacher*, 87 N. Y. 811, 41 Am. Rep. 865; *Amernan v. Deane*, 182 N. Y. 355.

A bill to enjoin a breach of a negative covenant is in the nature of a bill for specific performance.

High, Inj. 2d ed. § 1184.

Under a bill for specific performance, a court will deny relief where it would be inequitable to grant it.

88 L. R. A.

Willard v. Taylos, 75 U. S. 8 Wall. 557, 19 L. ed. 501.

Covenants in restraint of the use of real estate will be strictly construed, and will not be enlarged by construction; and the courts will not enjoin the breach of a negative covenant unless it is express and injury will result to the complainant from its breach.

Postal Teleg. Cable Co. v. Western U. Teleg. Co. 155 Ill. 835; *Hawes v. Favor*, 161 Ill. 440.

The defendants in error have no standing in a court of equity to obtain the relief sought by their bill and amended bill.

The acts of 1861 and 1863 giving owners of property abutting on Michigan avenue a right to enjoin encroachments on the Lake Front park were unconstitutional.

People, Longevecker, v. Nelson, 188 Ill. 578; *People, Graff, v. Institution of Protestant Deaconesses*, 71 Ill. 229; *Snell v. Chicago*, 188 Ill. 413, 8 L. R. A. 858; *Dolless v. Pierce*, 124 Ill. 140.

The acts of 1861 and 1863 were abrogated by the Constitution of 1870.

Mitchell v. People, 70 Ill. 188.

They were repealed by the present city charter, chap. 24, Rev. Stat.

Cairo v. Bross, 9 Ill. App. 406, 111 Ill. 475.

The city took the lands in Fort Dearborn addition in fee.

United States v. Illinois C. R. Co. 154 U. S. 225, 38 L. ed. 971.

Defendants in error have no interest in the lands in fractional section 15, except as citizens and taxpayers, and as such have no standing in court.

Kerfoot v. People, Clingman, 51 Ill. App. 409.

Equity will not do that which will be of no benefit to the party asking it, and only hardship on the party concerned.

Joliet & C. R. Co. v. Healy, 94 Ill. 416; *Green v. Green*, 84 Ill. 827.

A writ of injunction will not issue to gratify the spite or malice of a complainant, nor to be used at his discretion.

Seeger v. Mueller, 28 Ill. App. 81; *McCormick v. Jerome*, 8 Blatchf. 486.

A court of equity will not aid one who has long acquiesced in the wrong complained of.

Roper v. Williams, Turn. & R. 18; *Peck v. Matthews*, L. R. 8 Eq. 515.

Mr. George P. Merrick, for defendants in error:

Defendants in error, by virtue of their ownership of property abutting on a public square or park, may maintain a bill against the municipality to enjoin the destruction or curtailment of an easement thereover.

High, Inj. §§ 824, 855; *Neuell v. Saxe*, 142 Ill. 104; *Cihak v. Klekr*, 107 Ill. 648; *Earll v. Chicago*, 136 Ill. 277; *United States v. Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971.

The dedication by the owners and acceptance by the city of Chicago, of the Lake park property, constituted the city a trustee of said property, and impressed said property with a trust in favor of the public, and of abutting lot-owners.

Zearing v. Raber, 74 Ill. 412; *Maywood Co. v. Maywood*, 118 Ill. 61; *Earll v. Chicago*, 136 Ill. 279; *Field v. Barling*, 149 Ill. 572, 24 L. R. A. 406.

The erection by the city of Chicago of any buildings upon the Lake Front park is repugnant to the words of dedication and to the use of the property in question for the purpose for which it was dedicated.

Godfrey v. Alton, 12 Ill. 85, 52 Am. Dec. 476; *Princeville v. Auten*, 77 Ill. 325; *Davis v. Nichols*, 89 Ill. App. 610; *Jacksonville v. Jacksonville R. Co.* 87 Ill. 544; *Church v. Portland*, 18 Or. 73, 6 L. R. A. 259; *Warren v. Lyons City*, 23 Iowa, 357; *Franklin County Comrs. v. Lathrop*, 9 Kan. 453; *Leclercq v. Gallipolis*, 7 Ohio, pt. 1, p. 218, 28 Am. Dec. 641.

Accretions to a strip of land in a city along a shore, which is reserved for public purposes, partake of the same nature as the original reservations, and the city holds title to it, subject to the same uses and conditions.

1 Am. & Eng. Enc. Law, p. 188; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90.

The dedication of the plats and acceptance of them make the dedication complete, and constitute an estoppel *in pais* if not by deed, to revoke the dedication.

First Evangelical Church Trustees v. Walsh, 57 Ill. 868, 869, 11 Am. Rep. 21, and cases cited.

Carter, J., delivered the opinion of the court:

This was a bill for an injunction, filed in the superior court of Cook county, October 16, 1890, by A. Montgomery Ward and George R. Thorne, to enjoin the city of Chicago from erecting any buildings on what is known as "Lake Park," or "Lake Front Park." The bill alleges that they are the owners of the south 43 feet of lot 3, and all of lots 4 and 5, in block 15 in Ft. Dearborn addition to the city of Chicago, known as "Nos. 111-116 Michigan Avenue;" that valuable buildings are erected on said lots and occupied by them in their business of importers, manufacturers, and jobbers of general merchandise; that when said addition was platted an open space was reserved for public grounds east of Michigan avenue, and between Randolph and Madison streets, fronting on Lake Michigan, subject to the prohibition that the grounds should be kept free from buildings; that the lots owned by them are worth more on account of such vacant grounds than they would be otherwise; that they have an easement in such grounds; that it was the duty of the city to prevent encroachments on such grounds, but that it has permitted the erection of certain structures thereon, contrary to the vested rights of complainants, etc. And it prays for an injunction restraining the city from violating the terms of the dedication, and against the erection of buildings, etc., thereon. The Illinois Central Railroad Company and a number of other parties were made defendants. A temporary injunction was granted, and the city answered the bill, denying that it had committed the acts complained of, or intended to erect any structures. On May 6, 1893, the bill was amended. The amended bill alleges that that part of Lake Park south of Madison street has been for many years public grounds and park property, and the lots in Ft. Dearborn addition were sold with the understanding that all of Lake

Park should be and remain clear of all buildings; that the city had suffered the Illinois Central Railroad Company and others to occupy portions of the park, and had suffered circuses, shows, etc., upon said premises; that it is using it as a dumping ground for garbage, rubbish, etc., and has constructed a scaffold and floor for that purpose, the filth and rubbish to be carried away by the railroad company, causing a great public nuisance; that the American Express Company has built a shed thereon; that there are seven or more railroad tracks upon it, upon which cars are permitted to stand; that the city has issued a permit to the Forepaugh shows to occupy part of the same. And it prays for a temporary injunction, and for a mandatory injunction, to remove all buildings, sheds, cars, tracks, and material of every kind from the park. The city answered the amended bill, denying the alleged restrictions on the use of the park; alleging that the character of the buildings in Ft. Dearborn addition, and purposes for which they were used, has been entirely changed, for more than twenty-five years, from residence to business purposes, and that the use for which the public grounds were conveyed has long since ceased to attach thereto; denying that the property of complainants is enhanced in value by reason of its situation relatively to the park, and that the owners have any easement of light, air, or view over the same; denying that the grounds were dedicated for any specific public purpose; and alleging ownership by the city in fee simple absolute. On June 8, 1896, complainants again amended their bill, with the stipulation that the answer of the city should stand as the answer to such secondly amended bill. This amendment sets out the history of the platting and dedication of the two additions to the city of Chicago, of which Lake Park is a part, at length, and alleges that the city accepted the dedication by a resolution of April 29, 1844, which resolution ordered what is now called "Lake Park" to be inclosed as a public park, at the expense of the subscribers of such inclosure; that the city council, by ordinance of August 10, 1847, designated the public ground so fenced in as "Lake Park;" that the abutting property owners on Michigan avenue had, prior thereto, erected a fence at their own expense, around said park, and ornamented the same, etc. It recites § 64 of the act of February 18, 1861, in reference to the charter of the city of Chicago, and refers to the act of 1863 on the same subject, and alleges that the construction of buildings on Lake park, and its occupancy by railroad tracks, or for other private purposes, and the licensing of the same for circus purposes, etc., and the employment of the same as a dumping ground for filth, etc., will constitute a public nuisance and will divert the park from the purposes for which it was dedicated, and will constitute a private nuisance, and inflict irreparable damages on the property of complainants, special to the same, and distinct from that suffered by the public at large. The final decree that was entered by the court recites that all the material allegations in the various bills and amendments are true. It decrees that the injunction of May 25, 1890, be made perpetual; that the Illinois

Central Railroad Company and the city and its officers desist and refrain from occupying any buildings or structures, except such as described in the ordinance of October 21, 1895, upon the tract of land known as "Lake Park;" that they refrain from placing or causing to be placed thereon anything, except for park purposes, and from using, or permitting the use of, any portion thereof for railroad tracks, or such circuses or exhibitions to which the public will not be admitted free; that nothing in the decree shall be held to impair or diminish the rights, etc., of the Illinois Central Railroad Company under the ordinance of October 21, 1895; that the Art Institute, and all necessary improvements thereon, so long as it shall be used in accordance with the terms of the ordinance authorizing its construction, shall be excluded from the operation of the decree, and likewise the temporary postoffice building, until a new, permanent postoffice shall be completed and occupied, and also, for a period of three months, the armory buildings. To reverse this decree, the city of Chicago alone has sued out a writ of error from this court.

The evidence showed that the abutting property owners expended considerable sums of money, from time to time, as also did the city of Chicago, in protecting said park from the ravages of, Lake Michigan, and in fencing and beautifying the grounds. It was declared by the government plat of the Ft. Dearborn addition that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." By a resolution adopted April 29, 1844, the city declared that all that part of Michigan avenue lying east of a line 90 feet east of the east line of the tier of lots in § 15, fronting said avenue on the west, shall be inclosed as a public park; and the same resolution declared, in substance, that the public ground in the Ft. Dearborn addition should be inclosed as a public park, at the expense of subscribers to such inclosure. And in 1847, by an ordinance of the city, it was ordained: "The public ground east of the fence erected on the east side of Michigan avenue from the north side of Randolph street to the south side of lot 8 in block 21, fractional section 15, addition to Chicago [which was coincident with the south line of Park row], shall hereafter be known and designated as Lake Park." The city council passed another ordinance to the same effect, August 25, 1851, which declared that the public ground on the east of Michigan avenue from the north line of Randolph street to the south line of Park row should be designated as "Lake Park." Another ordinance to the same effect was passed by the city council in 1856; and in the ordinance granting a right of way to the Illinois Central Railroad Company passed June 14, 1852, it was provided that said company should not, in any manner or for any purpose, occupy or intrude upon the open ground known as "Lake Park," belonging to the city of Chicago, lying between Michigan avenue and the western or inner line before mentioned, which was a line not less than 400 feet east of the west line of Michigan avenue, and parallel thereto. And similar inhibitions were imposed in subsequent ordinances. The

existence of this park was recognized by legislation of that state, by the acts passed in 1861 and 1863, in which the act incorporating the city of Chicago and the several amendments thereto were reduced to a single act, and in which, in § 64, were the following provisions: "No encroachments shall be made upon the land or water west of the line mentioned in the 2d section of an ordinance concerning the Illinois Central Railroad (which line is not less than 400 feet east from the west side of Michigan avenue, and parallel thereto) by any railroad company, nor shall any cars, locomotives, engines, machines, or other things belonging to any railroad or transportation company be permitted to occupy the same, nor shall any cars or machinery be left standing upon said track fronting any part of Michigan avenue, nor shall the city council ever allow any encroachments west of the line above described. Any person being the owner of or being interested in any lot, or part of a lot, fronting on Michigan avenue, shall have the right to enjoin said company, and all other persons and corporations, from any violation of the provisions of this section, or of said ordinance, and by bill or petition in chancery, in his or their own name or otherwise, enforce the provisions of said ordinance and of this section, and recover such damages for any such encroachment or violation as the court shall deem just. The state of Illinois, by its canal commissioners, having declared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue."

The main question involved in this litigation is, Has the city of Chicago a right to erect, or permit to be erected, any buildings on the track of land known as "Lake Park?" Lake park is a tract of land extending from Randolph street, on the north, to Park row, on the south, and from the west line of Michigan avenue, on the west, a distance of 400 feet, to the west line of the right of way of the Illinois Central Railroad Company. Leaving out Michigan avenue, which has a width of 90 feet, the park would be 310 feet wide, and over a mile long. In order properly to determine this question, it will be necessary to advert to the history of Lake Park. In 1836 the commissioners of the Illinois & Michigan Canal, under the authority conferred upon them by the general assembly of the state, caused fractional section 15, lying along the shore of Lake Michigan, and adjoining or cornering with the original town of Chicago, to be subdivided into lots, blocks, and streets; and a plat thereof was made, acknowledged, and recorded on July 20, 1836. This subdivision consists of two tiers of blocks, of 11 blocks each, bounded on the west by State street, on the north by the center line of Madison street, and on the south by the center line of twelfth street. The lots in the east half of the eastern tier of blocks all fronted to the east, and there was an open space between such east line and the lake, excepting at the southwest corner, in which block 28 was laid off, beginning 120 feet east of the

east line of the eastern tier of blocks, and running thence east 500 feet, of a uniform depth, towards the north, of 200 feet, leaving a small space, the width of which was not marked on the map,—about 80 feet,—between the easternmost lot of block 23 and the lake. The street north of this block 23 is now known as "Park Row." The distance from the eastern tier of blocks to the lake shore was therefore about 700 feet at Park row. The distance at the north line of the section from the lake shore to the east line of the eastern tier of blocks was not marked on the plat, but appears to have been about 500 feet. All the space north of block 23 and east of the eastern tier of blocks to the lake was left unsubdivided and vacant, except that the words "Michigan Avenue" appear on the same, next to the line of subdivided blocks. J. Y. Scammon testified that he measured the width of the ground east of Michigan avenue in 1836, when the canal commissioners made their subdivisions, and it was then about 700 feet wide at the south end, and between 500 and 600 feet at the north end, and that the ground was a little wider at some places than others. Fernando Jones testified that he was employed in the office of the canal commissioners in 1836; that it was stated by and on behalf of the commissioners, to all persons purchasing lots in the subdivision, as an inducement to such purchases, that there would be no buildings to obstruct the view of the lake, and that the commissioners used a sketch to sell from, and to point out the position of lots to purchasers, and on the sketch was marked: "Open ground. No building;" that the land fronting on Michigan avenue, as well as that fronting on Wabash avenue, the next street west, sold at a higher price on account of the eastern exposure of the lake. The land north of section 15, running to the Chicago river, being the southwest fractional quarter of section 10, was used by the United States as the military post of Ft. Dearborn, as early as 1804. Under authority from the secretary of war, this fractional quarter was subdivided into blocks, lots, streets, and public grounds, and called "Ft. Dearborn Addition," and a plat of the addition was acknowledged and recorded on June 7, 1839. Michigan avenue was continued north in this plat almost up to the river, but its width is not marked on the plat. The ground between Michigan avenue and the lake was also laid off into blocks and lots from the river down to Randolph street, but from the north line of that street to the south line of the section (being the center of Madison street) the space between the west line of Michigan avenue and the lake was left vacant and unsubdivided, as was also the east half of the block just south of Randolph street, between Wabash avenue on the west, and Michigan avenue on the east; and on this blank space on the plat was written: "Public ground. Forever to remain vacant of buildings." The certificate of the Secretary of War, written on the margin of the plat, contains these words: "The public ground between Randolph and Madison streets, and fronting upon Lake Michigan, is not to be occupied with buildings of any description." The plat shows that the southernmost lot of block 11, which lies between Michigan avenue and the

lake, and on the north side of Randolph street, and is thus the northern boundary of the unsubdivided space, had a frontage of 73 feet on Randolph street. There are no figures at the south line of the addition to indicate the distance between the west line of Michigan avenue and the lake, but measuring on the plat according to its scale, it was 200 feet. Michigan avenue is 90 feet wide.

It will thus be seen that the land lying east of the west line of Michigan avenue, from Randolph street on the north, to Park row on the south, was by its original owners left unsubdivided; that that portion in fractional section 10 was expressly dedicated as "public ground," "not to be occupied with buildings of any description," and that that portion in fractional section 15 was marked near one edge "Michigan Avenue," and was held out to purchasers as: "Open ground. No buildings." That this was equivalent to a dedication for such use and purpose has been repeatedly announced by this court. *Godfrey v. Allon*, 12 Ill. 29, 52 Am. Dec. 476; *Morey v. Taylor*, 19 Ill. 634; *Smith v. Flora*, 64 Ill. 93; *Maywood Co. v. Maywood*, 118 Ill. 61. And, where nothing appears to indicate for what particular use a grant or donation of land is made to the public, parol evidence is admissible to show the object to which it was to be devoted. *Princeton v. Aiken*, 77 Ill. 325. That the city of Chicago accepted the ground thus dedicated is undisputed. The statute provides that such dedicated lands shall be held in trust to and for the uses and purposes expressed or intended; and even in a common-law dedication, which leaves the fee on the original owner, it is charged with the same rights and interests in the public which it would have if the fee were in the municipality. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25. That the land was so dedicated and accepted subject to the restrictions imposed, of being forever unoccupied by buildings, and that this restriction extended to and included all the land between the west line of Michigan avenue and the shore of the lake, as it was when these lands were platted, we entertain no doubt. But it is contended by plaintiff in error that only such land as existed between Michigan avenue and the shore of the lake as it was in 1852, when the encroachments of the lake on the land were stopped by the building of breakwaters, etc., was subject to such restrictions; that, the remainder having been carried away by the waters of Lake Michigan, the boundaries of the public land were restricted to the shore of the lake; and that all the made or reclaimed land between the shore line of 1852 and the west line of the Illinois Central Railroad Company's right of way is free from such restrictions. A consideration of this question will necessitate a further retrospect into the history of Lake park.

Referring again to the testimony of J. Y. Scammon, we find that the building of the piers of the Chicago river by the government eastward into Lake Michigan had the effect of throwing a strong current of water against the shore of section 10, and that when the piers were still further extended the current was thrown further south, against the shore of section 15; that this current would gradually undermine the bank, and then a storm would

come, and the bank would fall, sometimes 5, 10, and 30 feet in width at a time; that sometimes there would be washed away 100 feet in a single storm, and then the wind would change, and there would be a deposit of sand again; that in 1835 there were 200 or 300 feet between Michigan avenue and the shore of Randolph street, but two thirds had been washed away before the platting of Ft. Dearborn addition in 1839. Fernando Jones testified that prior to 1839 the waves cut away mostly between Randolph and Madison streets, and what was cut away there was deposited more or less south of Madison street, but after 1839 the big storms that came would wash away the banks as far down as Park row; that the "shore went off in chunks" during the storms; that sometimes after a storm there would be some accretions. The testimony of R. B. Mason shows that in 1852 the shore of Lake Michigan was distant from the west line of Michigan avenue at Park row a little over 400 feet, and thence the trend of the shore was to the west, till it was only 90 feet at Monroe street, which is the street next south after Madison; that it was the same width at Madison street, and gradually receding again to the east, it was 112½ feet at Washington street, the next street north, and the same width at Randolph street, the next street north, Michigan avenue being 90 feet wide. It will thus be seen that from the north line, at Randolph street, with a width of 22½ feet, the park extended down to about Madison street, a distance of two blocks, where the waters of Lake Michigan lapped the east side of Michigan avenue, and then the park recommenced at about Monroe street, and gradually widened out to 810 feet at Park row. In 1852 the Illinois Central Railroad Company, by an ordinance of the city of Chicago, was granted the right of way, of the width of 300 feet, from the southern boundary of the public ground near Twelfth street to the northern line of Randolph street; the inner or west line of the ground to be used by the company to be not less than 400 feet east from the west line of Michigan avenue. It was also required by the ordinance to erect, and forever after to maintain, a continuous wall or structure of stone masonry, of regular and slightly appearance, and not to exceed in height the general level of Michigan avenue opposite thereto, from the north side of Randolph street to the southern boundary of Lake park, at a distance of not more than 300 feet east from the above-mentioned west or inner line, which structure was to be of sufficient strength and magnitude to protect the entire front from further damage or injury from the action of the waters of Lake Michigan. It was further provided that the company should not in any manner, nor for any purpose whatever, occupy, use, or intrude upon the open ground known as "Lake Park," belonging to the city, and that it should erect no buildings between the north line of Randolph street and the south line of Lake park, nor place upon any part of their works between these points any obstructions to the view of the lake from the shore, and that it should make and keep open through its works such culverts or ways as would afford room for the uninterrupted flow of water from the open lake to the space inside of the inner or west

line above mentioned. In pursuance of the rights thereby granted, the railroad company placed piling in the waters of the lake from Twelfth street northward, and built its tracks thereon, and built a breakwater east of its roadway. The water space between the shore and the right of way was gradually filled up by the citizens, although at the time of the great fire of 1871 there was still a basin there, used for rowboats and sailboats. After the fire the counsel passed an ordinance permitting the dumping of *débris* resulting from the fire into this space, and the railroad having filled it under its tracks, soon there was no more water left west of the east line of its right of way. That the city made ineffectual efforts to stay the destroying power of the waters of Lake Michigan prior to the building of the railroad breakwater is not disputed. As we have seen before, the width of the open space at Park row in 1836, when it was dedicated, was about 700 feet, and at Madison street about 500 feet. The width of Lake park, including Michigan avenue, is 400 feet. There was therefore in 1836 more than enough ground lying along the lake shore between these points for this park. From Madison street to the north line of the park, when this space was dedicated, in 1839 (three years later), there was an open space between the shore and the east line of blocks of only 200 feet at Madison street, narrowing down to 163 feet at Randolph street, thus lacking from 287 feet to 200 feet of being 400 feet wide.

Did the city lose its title and right to the portions of this park submerged by the waters of the lake after its dedication, or did its subsequent reclamation restore the city to its rights? Did the temporary submergence of such portions destroy the restrictions imposed by the dedication, so that the reclaimed portion would not be subject to the same? The destruction of the shore line was not gradual and imperceptible, but was sudden, and plainly discernible after every storm, and the city made unavailing efforts to protect the shore from this destruction. In a conveyance calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land. *Seaman v. Smith*, 24 Ill. 521; *Trustees of Schools v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575; *Fuller v. Shedd*, 161 Ill. 462, 33 L. R. A. 146; *People v. Kirk*, 162 Ill. 138. In Harg. Law Tracts (Sir Matthew Hale, De Jure Maris) 36, 37, it is said: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or though the marks be defaced, yet, if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject does not lose his property; and accordingly it was held by Cooke and Foster, though the inundation continued forty years. . . . But, if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time become part of the sea, and within the admiral jurisdiction while it so continues." In *Morris v. Brooks*, an unreported case arising in 1815 in Delaware

[25 Alb. L. J. 91], quoted in *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206, Judge Wilson said: "Though the surface of the lower part of that island [Little Tinicum] was destroyed by the force of the winds and waves, and it was consequently overflowed by the water of the river, yet the owner did not lose the propriety of the remaining soil covered by the water; if it was regained either by natural or artificial means, it continued to belong to the original proprietor. He might embank it and thereby again exclude the waters if circumstances permitted." And in *Mulry v. Norton*, 100 N. Y. 426, 53 Am. Rep. 206, it is said: "When portions of the main land have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea. It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners. . . . Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship." Angell, *Tide Waters*, 77-80. "Where considerable quantities of soil are, by a sudden action of the water, taken from the land of one, this is called 'avulsion'; but the ownership is not lost, though the surface earth is thus transported elsewhere, and it may be reclaimed, and the ownership reasserted." Angell, *Watercourses*, § 60; 3 Washb. Real Prop. 453; *Gale v. Kinzie*, 80 Ill. 132.

Under the authorities, and according to all reasonable deductions from legal principles, we must hold that the title to these lands submerged by the action of Lake Michigan was not lost, and that by their subsequent reclamation the city has completely reasserted its title thereto, as such title stood at the time of the dedication of the respective plats thereof. The trust impressed upon them was that they should forever remain free from buildings, and it cannot be said that while they were submerged they were subject to be built upon. We do not see that the submergence and subsequent reclamation altered or destroyed the trust upon and for which they were held. As the city had, as we have seen, the fee in this park, impressed with the trust declared by the dedicators, the legislation of 1861 and 1863 added nothing to its trust, and can only be looked upon as confirmatory of the same. Section 64 of the act of 1861 identical with § 48 of the act of 1863 (both acts being acts relative to the charter of the city of Chicago), provided that no encroachments should be made upon the land or water west of the railroad right of way by any railroad company, nor allowed thereon by the city council; that any property owner on Michigan avenue should have the right to enjoin any such attempted encroachments, and recover damages therefor; and it recited that "the state of Illinois, by its canal commissioners, having de-

clared that the public grounds east of said lots should forever remain open and vacant, neither the common council of the city of Chicago, nor any other authority, shall ever have the power to permit encroachments thereon, without the assent of all the persons owning lots or land on said street or avenue." No new trust was created by these statutes. They merely ordained as law what was already the law in reference to Lake park. A point is made by counsel for plaintiff in error on the use of the word "encroachment;" it being contended that buildings would not be an encroachment, as that word is defined by Webster. Wood, *Nuisance*, 2d ed. § 77, says: "A purpresture is any encroachment upon real property, or rights and easements incident thereto, belonging to the public, by an inclosure or erection thereon, which, if made upon the property of an individual, would be a trespass." In 1869 the legislature passed the act known as the "Lake Front Act." By § 1 of this act the general assembly purported to grant to the city of Chicago, in fee, with full power and authority to sell and convey in such manner and upon such terms as the council might by ordinance provide, all right, title, and interest of the state of Illinois in and to so much of fractional § 15 as is situated east of Michigan avenue, and north of Park row, and south of the south line of Monroe street, and west of the railroad right of way (being a strip 400 feet in width, including said avenue, along the shore of Lake Michigan, and partially submerged by the waters of the lake); reserving, however, the 90 foot avenue from the right to sell. By § 4 all right and title of the state of Illinois in and to the lands, submerged, or otherwise lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan avenue and the railroad right of way, were granted in fee to the Illinois Central Railroad Company, the Chicago, Burlington, & Quincy Railroad Company, and the Michigan Central Railroad Company, for the erection thereon of a passenger depot, and for other railroad business. Section 5 required these railroad companies, in consideration of this grant, to pay the city of Chicago \$800,000, to be paid in quarterly installments. By section 6 the city council was authorized to quitclaim and release to said companies all the city's claim and interest in this tract which it might have by virtue of any expenditures and improvements thereon or otherwise; and, in case it neglected or refused to do so within four months after the passage of the act, then the companies should be discharged from paying the unpaid balance to the city. By §§ 2 and 5, all these moneys arising from the sale of Lake park were to be placed in a park fund of the city of Chicago, to be equitably distributed between the three divisions of the city. Section 8 confirmed to the Illinois Central Railroad Company certain rights to the lands east of Lake park covered by its railroad tracks, and granted to it in fee all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of its tracks and breakwater, for the distance of 1 mile, and between the south line of the south pier extended eastwardly and a line extended east-

ward from the south line of lot 21, south of and near its roundhouse and machine shops, on the payment of the same percentage of the gross receipts from its use as it was bound to pay to the state, by its charter, on its gross receipts, which tract of submerged land so granted exceeded 1,000 acres. This act was passed, over the governor's veto, April 16, 1869. About July 1, 1869, the three railroad companies tendered to Walter Kimball, then city controller, the first instalment, of \$200,000, which he refused to accept in his official capacity, but gave his individual receipt therefor, and reported the fact to the city council. The matter was referred to the judiciary committee, which on December 20, 1869, reported back to the council, reciting the several dedications above described, together with the facts regarding the washing away of the shore, and the attempts made to prevent the same, and the expenditure of money therefor, and that the city had been for years engaged in reclaiming that part of the land so dedicated, and had succeeded in reclaiming all that portion north of Monroe street; that, so far as the citizens of Chicago and the owners of the property fronting said public grounds are concerned, the city stands in the position of a trustee; that it would be a most flagrant and unjustifiable breach of trust upon the part of the city to sell the property, or in any manner to consent that this land shall be appropriated to other than public uses,—and recommended the passage of a resolution declaring that the city will not receive any money from the railroad companies under the said act of the general assembly until forced to do so by the courts. The resolution was subsequently passed, and the money was afterwards returned to the railroad companies, at their request.

It is plain that the city repudiated the privilege granted it by the legislature, and never accepted the act as binding on it. It may be said, in passing, that the Supreme Court of the United States, in *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, denied the right of the legislature to make this extensive grant of the submerged lands in the harbor of Chicago, and held the grant to the railroad company to be ineffective, with certain exceptions. As we have already seen, all the rights in regard to Lake park had long previously been fixed by the acts of dedication by the original owners, the acceptance of the city, and the acquiescence and acts of the public and abutting property owners. It was beyond the power of the legislature to change the legal result of these acts, as it would be an impairment of vested rights, which are protected by the Constitution. In *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540, 543, this court said: "A dedication must always be construed with reference to the object with which it was made.

... The power of the legislature to repeal the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the

public. The donation was made for a certain specific and defined purpose. . . . It must be preserved, or the land must revert to the original proprietors." The court cite, as fully sustaining the view it has taken, *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Le Clercq v. Gallipolis*, 7 Ohio, pt. 1, p. 217, 28 Am. Dec. 641; *Carter v. Chicago*, 57 Ill. 283; *Price v. Thompson*, 48 Mo. 361; *Warren v. Lyons City*, 22 Iowa, 351. In *Princeville v. Auten*, 77 Ill. 325, it is said: "Had this intention [that a certain square should forever remain an open space] been expressed on the plat, or even in the contemporaneous certificates it is clear, on principle and authority, the village trustees could not lawfully appropriate it to any other public use. It would have been an abuse of the trust reposed in them, that the courts would not hesitate to control, that the property might be preserved for the uses intended by the donors." It is only where the dedication of the property as public ground is an unrestricted dedication to public use that the city or legislature may designate the uses to which it shall be put. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25. As the legislature was powerless to take away any vested rights that abutting property holders had in Lake park, it is unnecessary to discuss the effect of the repeal of the act of 1869 by the legislature in 1873. The same authorities and course of reasoning also negative the proposition put forth by plaintiff in error, that where the restrictions placed on the use of real property have become useless by the change of the character of the surrounding property and neighborhood, they may be disregarded. It is assumed by plaintiff in error that these open spaces were dedicated for a park, to remain free from buildings, because Michigan avenue was then a residence street, and that because of the gradual disappearance of residences from the upper end of this street, and their replacement by business houses, therefore the open space, clear of buildings, was not needed any more. That this reasoning is fallacious need hardly be demonstrated. It is a matter of common knowledge that nearly all of our larger cities have open squares in the business portions of the city, and that these open squares are deemed and considered of great advantage, not only to the public generally, but especially to the abutting property owners. In this case it is a vested right attaching to the abutting property by virtue of the original dedications. The cases cited in support of the position of plaintiff in error are not applicable to the facts of this case. They were cases relating to the restrictive covenants in deeds, where the original owner had devised a scheme for improving the neighborhood by controlling the erection of buildings in a particular way. They have no relevancy to the case of an open park. No change in the use of the buildings abutting on a park could make the park any less a park, or deprive the abutting owners of their vested rights.

But there is a strip of land within said park, as claimed by complainants, lying along fractional section 10, which cannot be said to have been reclaimed by the city after having been submerged by the lake after its dedication, in

1839. Neither was this strip formed by the slow and imperceptible process of accretion, but it is made or filled land, and is 237 feet wide at the north line of Randolph street, and about 200 feet wide at the center of Madison street, as stated above. And the question remains whether or not this strip is held by the city subject to the restrictions placed upon that part of Ft. Dearborn addition adjoining it. If this strip had been formed by gradual accretion caused by the action of the waters, it would have become a part of the shore lands. In *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476, this court held that "all accretions to a public landing must necessarily attach to and form a part of it, otherwise we should have the novel spectacle, of a public landing separated from the water." In *Lombard v. Kinzie*, 73 Ill. 446, the question arose whether the widow of a riparian owner was entitled to dower in the accretions to land which had accreted after the husband had parted with the land, and it was there held that she was entitled to dower in such accretions; that when formed such accretions become subject, as an incident to the fee, to the same conditions, rights, and burdens as the principal to which it is an incident. In *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91, it was held that the lessee of a property fronting upon a river is entitled to hold accretions as a part and parcel of the property leased. In *Chicago Dock & Canal Co. v. Kinzie*, 93 Ill. 415, the lot in question was bounded on the east by Lake Michigan, and this court said (p. 429): "To ascertain its eastern boundary, it would be necessary to ascertain where was the line between the land and the lake; and, since the accretions became a part of the land to which they were attached, it would necessarily follow that that line would follow the receding lake to the east. The accretions do not pass as appurtenant to water lot 36, but as a part of that lot." But the strip in question is filled land, and not formed by accretions. It is admitted that the title to this strip is also in the city, but such admission does not cover the question whether the city owns it in trust, as public ground, or as a part of said public park, or holds absolute title thereto in its own right, with the right to use or dispose of the property as it may see proper. Counsel for plaintiff in error says in his argument that it does not appear from the record how the city acquired title to the submerged lands north of Monroe street, which include this strip, but claims that, between the city and the state, that question has been adjudicated. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018. The question here, however, is one between these abutting property owners and the city; and if the strip last mentioned is subject to the same trust as the remainder of said park, or that part of it which became submerged after its dedication, and was thereafter reclaimed, then, so far as this case is concerned, it must be regarded as a part of said public park, and the right of the city to authorize the construction of buildings upon it must be denied, if such right is denied as to the rest of the park, whatever the rights of the state might appear to be in a case where that question might be at issue. These open lands fronting on Lake

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Michigan, as we have seen, had been dedicated as public ground, to be kept free from buildings; and both the city and the state, by their respective legislative bodies, had declared them to be a public park, to be kept open and vacant, and free from encroachments. These lands declared to be a public park extended to the waters of Lake Michigan, and the title thereto carried with it riparian rights incident to its location upon the banks of the lake. These riparian rights were property rights which the city of Chicago held in trust in the same manner that it held title to these public grounds; and whether, under any circumstances, it could, by obtaining title to the lands under the shoal waters adjacent to the park, and by filling in, destroy such riparian rights, and hold the title to such filled lands free from such trust, it is not necessary here to decide, for we are satisfied from the evidence in the case showing the acts and declarations of the city authorities in dealing with these lands that the abutting property owners had the right to assume, and rest in the belief, that the city was not acting in antagonism to its trust, and with the purpose of destroying such riparian rights which attached to the public grounds, and of thereby acquiring an independent title to itself, but was, as such trustee, maintaining and preserving the property rights which it held in trust, and was improving said park, and extending its boundaries into shallow waters of the lake. The city was a trustee, and, besides, it had the power, by its charter, to lay out, establish, open, extend, and improve parks and public grounds; and so far as it made any addition, if it did make any, to Lake park, by filling in said strip of submerged lands, it must, upon the record before us, be presumed that it was acting under its charter powers, in the preservation of the trust imposed upon it by the dedication, and its acceptance thereof, of these public grounds, and we are of the opinion that the city is estopped from claiming title to the same free from such trust. We have been referred to *Ruge v. Apalachicola Oyster Canning & F. Co.* 25 Fla. 656, and other cases, as announcing a different doctrine. But the facts in those cases were different from those disclosed by this record, and we cannot see that the reasoning employed, if adopted, would, on a record of this character, lead to a different conclusion.

The next point of plaintiff in error is that defendants in error have no standing in a court of equity to obtain the relief sought by their bill. In *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540, we said: "A court of equity has the right to enforce the execution of the plainly declared trust, either upon the application of the owners of lots abutting upon the square, or upon the application of the city, the trustee."

The square is valuable property, intended for the use of the public, and appurtenant to the estates of the abutting lotowners." See also cases cited above, in connection with that case. In *Princeton v. Auten*, 77 Ill. 825, the village trustees were enjoined from putting a town hall on the public square, at the suit of Auten and others, and this court affirmed the decree. In *Earl v. Chicago*, 136 Ill. 277, where there was a cross petition for

an injunction, the court said, "Where there is a special trust in favor of an adjoining property holder, or a special injury, a bill or suit may be maintained by an individual in respect to a public street or highway;" and the decree granting the injunction was affirmed. In *Maywood Co. v. Maywood*, 118 Ill. 61, it was contended that there was a misjoinder of complainants. The court said: "Small and Hubbard, as residents of the village, have a common interest with each other, and with the village itself, in preventing any obstruction to the use of the public square for the purposes of a park. . . . They are therefore properly joined with the village, as complainants." In *United States v. Illinois C. R. Co.* 154 U. S. 225, 38 L. ed. 971, the Supreme Court of the United States, in speaking of that part of Lake park dedicated by the Secretary of War, said: "The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated, and the public in general. The owners of the abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated." Defendants in error are the owners of the south 43 feet of lot 8, and all of lots 4 and 5, in block 15 of Ft. Dearborn addition, and have a frontage on Lake park of 189 feet. They are clearly abutting owners, and as such have a right to maintain this action. Nor does it make any difference that Lake park was dedicated by two different owners at different times. The canal commissioners dedicated that part in fractional section 15 first, and, in selling the abutting lots, held out to purchasers the fact that such space should be clear of buildings, as an inducement. The Secretary of War, who dedicated the remainder of the park in fractional section 10 three years later, it is evident, did this in order to make one continuous open space, and expressly certified that such space should remain clear from buildings; thus following and continuing the practice of the canal commissioners. Besides, this open space has always been treated by the city and the public as one park.

But it is further urged against the contentions of defendants in error that they are estopped by consenting to repeated violations of the injunction, and of their rights in the park, and that, by discriminating in favor of certain violators, they have waived their right to restrain others committing similar violations. The proceedings and decrees in quite a number of suits were introduced in evidence, showing that since the lake front act of 1869 there has been a great deal of litigation in the state and Federal courts over the use of the park. The first was a suit in the Federal court to prevent the railroads from taking possession of that part of the park north of Madison street, under the act of 1869, instituted by one Starkweather against the Illinois Central Railroad Company, and afterwards consolidated with a similar suit by the United States against the same company, brought on behalf of the abutting property owners in fractional section 15.

by the United States district attorney, in which the injunction, as prayed for, was granted in both cases. In the summer of 1871 the first structure of any kind was built upon Lake park, the ground between Randolph and Madison streets having been fenced in and used as a ball ground; and again, between 1877 and 1884, the same ground was fenced up and used by the Chicago Baseball Club. But in the latter year a bill was filed in the Federal court, on behalf of the abutting property owners of Ft. Dearborn addition, by the United States, against the club of that city, to enjoin the maintenance of fences, buildings, etc., and compel their removal. The injunction was granted against the club and the city, absolutely prohibiting the maintenance of any building or structure on that part of the park described in the bill, and the baseball club removed their structures, in compliance with the order. In 1882 the property owners procured a suit to be started in the United States circuit court to enjoin the Baltimore & Ohio Railroad Company from laying tracks in Lake park, which is still pending. In March, 1883, the property owners procured one Stafford to file a bill in the circuit court of Cook county against the city, the Trades and Labor Assembly, and a number of other corporations, railroad companies, etc., to enjoin them from occupying and encumbering with buildings or otherwise any part of Lake park, and the injunction was granted, enjoining the erection of any building on fractional section 15; and in May, 1883, another injunction writ was issued against the city to the same effect. In 1883 a suit was begun in the state court by the attorney general against the Illinois Central Railroad Company and the city of Chicago, which was afterwards removed to the Federal court, to determine the title and rights of the several parties to the lands lying east of Michigan avenue, to which bill the city of Chicago filed a cross bill; and in which suit a decree was entered September 24, 1888, finding, among other things, that the city had title in fee to Lake park, which decree was afterwards (December 5, 1892) affirmed by the Supreme Court of the United States, 83 Fed. Rep. 730, 146 U. S. 387, 36 L. ed. 1018. The city has also at various times assumed the right to grant permission to erect structures on Lake park, or to use the same for various purposes. The first was April 23, 1873, when it authorized the erection of what was termed the "Exposition Building" between Monroe and Van Buren streets, on Lake park; but such building was not to remain longer than May 1, 1877. The time was afterwards extended. In 1889 W. T. Leland, an abutting property owner, procured an injunction from the circuit court of Cook county restraining the city and the Exposition Association from erecting any structure on that part of the park in section 15. The city then, on December 29, 1890, ordered the removal of all buildings from the park, except the two armories, and finally, on February 9, 1891, ordered the removal of the Exposition Building within the ninety days, and it was torn down. On March 30, 1891, an ordinance was passed giving the right of the World's Columbian Exposition to construct and maintain the building known as the "Art Institute" on the lake front, the title of the building to vest in the

city, but the right to use and occupy the same to vest in the Art Institute as long as it should comply with the terms and conditions in the ordinance, which required free admission to the public on Wednesdays, Saturdays, and Sundays, with the right to charge admission at other times, though professors and teachers in the public schools and other institutions of learning in Chicago should be admitted free at all times. It was then sought to have the above injunction in the *Leland Case* modified to permit the erection of this building, and, such modification having been assented to in writing by all the property owners, it was accordingly modified, notwithstanding the objection of Mrs. Sarah A. Daggett, whose husband had signed her assent to the proposed modification. In pursuance of the permission thus granted, the Art Institute Building was subsequently erected, with a frontage of about 300 feet. In 1892 permission was given to erect a frame wigwam for the accommodation of the Democratic National Convention on the lake front, which was accordingly erected, and afterwards torn down, as required by the city. In the same year the use of the lake front north of Madison street for the construction of a temporary postoffice was tendered to the United States, and a temporary postoffice building erected in pursuance of such resolution, the same to be removed as soon as a permanent postoffice is built. In 1881 the city granted permission to Battery D to occupy 125 feet of Lake park north of Monroe street for an armory building, and also permission to the 1st regiment of cavalry to erect a similar building just north of the former. Both buildings were erected, of 125 feet front, one story high, extending nearly back to the railroad. In 1886 the city council granted a place of burial to the family of the late Gen. John

A. Logan in Lake park, on the recommendation of the corporation counsel that such use would not be inconsistent with its use as a park. During all this time there were numerous orders and resolutions of the city council directing the removal of tracks, platforms, express buildings, sheds, and other obstructions, nearly all of which have been removed from time to time. The defendants in error acquired the property they own on Michigan avenue in 1887 and 1889, and the original bill in this cause was filed by them in 1890. That the abutting property owners have been diligently striving to protect their rights in the park cannot be gainsaid by anyone familiar with the litigation that has been carried on in relation thereto, and with the repeated enunciations of the courts enforcing their rights. That they have quietly assented to repeated violations of these rights is not borne out by the facts in the case. Whether the city had the power to authorize the erection of the temporary buildings mentioned, it is not necessary here to inquire, but we cannot agree with counsel for plaintiff in error that the defendants in error have waived all their rights in the premises, because they may have chosen to waive some of them. The only permanent building, perhaps, that is excepted from the injunction is the Art Institute, and all the property owners gave their consent to its erection. It cannot be said that the erection of the Art Institute has so impaired the benefits to be derived from Lake park that thereby the whole easement is gone. The defendants in error paid \$40,000 more for their property because of its location on the park, and would be seriously damaged by the erection of large and high permanent buildings, such as the city hall building and others.

The decree is affirmed.

WYOMING SUPREME COURT.

Re Estate of George L. BEARD, Deceased.

(.....Wyo.....)

The assets of an insolvent stockholder in an insolvent national bank, whether living or dead, are not, as against his other creditors, subject to a preferential lien for the payment of his liability, under U. S. Rev. Stat. §5132, for the debts of the bank for an amount equal to the par value of his stock.

(September 27, 1897.)

QUESTIONS reserved by the District Court for Laramie County for the opinion of the Supreme Court which arose upon an application by Joel Ware Foster, receiver of the Cheyenne National Bank, for preferential payment out of assets of the estate of George L. Beard, deceased. *Preference disallowed.*

The facts are stated in the opinion.

Messrs. Burke & Fowler and Edmund J. Churchill for receiver of Cheyenne National Bank.

Messrs. Clark & Breckons for administrator of George L. Beard.

Mr. John W. Lacey for creditors of George L. Beard's estate.

Conaway, Ch. J., delivered the opinion of the court:

The intestate left an estate insufficient to pay his debts in full. He was a stockholder in the Cheyenne National Bank, an insolvent corporation, now in the hands of Joel Ware Foster as receiver. Intestate was liable, under the laws of the United States upon the subject of banking, for the debts of the corporation to an amount equal to the par value of his stock in the corporation. This liability survives against his estate. The amount is fixed by the judgment and decree of the United States circuit court for the district of Wyoming at \$6,139.93, and this amount is not in dispute. But Foster, as receiver of the Cheyenne National Bank, claims that this liability constitutes a preferred claim against the estate. He filed his motion in the district court for Laramie county—a court of probate jurisdiction, and having jurisdiction of this estate—that the administrator pay to him this claim in full, without regard to the assets

NOTE.—The above case is the first to decide the question of the right of a preferential lien to secure liability of a stockholder in a national bank.
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and other liabilities of the estate, "for the reason," as stated in the motion, "that said claim aforesaid is a trust fund, and no part of the general assets of said estate." In the brief filed on behalf of the receiver, this proposition is stated in somewhat different language. It is claimed that the statute establishing the stockholder's liability "creates from his estate a trust fund for the payment of the debts of the bank," and, further, that the decree of the United States circuit court was based upon the ground that the statutory liability of the stockholder "created and carved from his assets a trust fund for the payment of the debts of the bank, and that, therefore, the assets of the decedent, to the amount of this guaranty or fund, constituted in fact no part of the general assets of the decedent's estate, but are trust funds, dedicated to the payment of this liability."

Upon the hearing of this cause in the district court, upon the motion of the receiver for preference in payment, that court found that important and difficult questions arose in the cause, and upon its own motion, and with consent of all parties, reserved and sent to this court for decision such questions. They are three in number: (1) Does the statutory liability of a stockholder of a national bank to pay towards its debts a sum equal to the face value of his stock create from his assets a trust fund for the payment of the debts of the bank? (2) Is the liability created by the statute mentioned in the last question entitled to preferential payment out of the funds of the insolvent debtor? (3) Where a stockholder of a national bank dies subsequent to the insolvency of the bank, but before any assessment is made on his stock on account of such insolvency, and after his death an assessment equal to the full value of his stock is made upon the administrator of his estate, and where his estate is insolvent, should such assessment be given a preference over the claims of general creditors?

It is not questioned that the entire assets of the intestate are held by the administrator in trust for the payment of the debts of the intestate. But this, of itself, does not give to any particular debt preference in payment over any other debt. The claim urged on behalf of the receiver is that the liability of intestate upon his bank stock is entitled to preference. Under U. S. Rev. Stat. § 5152, the administrator is not personally liable on account of this stock, but the estate and funds of intestate in his hands are liable in like manner, and to the same extent, as the intestate would be if living. It is not questioned that the principles involved are the same as if the liability of intestate had been for unpaid subscription upon his capital stock. One authority states the "trust fund" doctrine in such cases as follows: "It is a favorite doctrine of the American courts that the capital stock, and other property, of a corporation is to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders of the corporation." Thompson, *Liability of Stockholders*, § 10. It is apparent that the doctrine must have a much more extensive application than this to sustain the claim of the receiver in the case at bar. In a note to the section quoted, the learned author says: "I have not found a similar statement

of doctrine in any English book of reports. The idea appears to have been first formulated by the fertile brain of Mr. Justice Story in *Wood v. Dummer*, 3 Mason, 308 (decided in 1824)." But the case of *Wood v. Dummer* has been extensively followed by both Federal and state courts, and the doctrine of that case is perhaps now too firmly established in America to be denied. The case was a bill in equity brought by some of the creditors against some of the stockholders of the Hallowell & Augusta Bank, and sustained on the ground of the impossibility of bringing into the suit all the parties interested. There was a recovery against the stockholders, the trust fund doctrine being announced, as it appears, for the first time. No question of priority of payment arose. A good statement of the result of the cases upon this branch of the law of the liability of stockholders is given in 23 Am. & Eng. Enc. Law, at page 855, in these words: "The liability of members of a corporation is founded on statute. But in the modern stock corporation, where membership is usually acquired by entering into the contract of subscription, each member may be said to assume the obligation to pay to the company the full amount named in his contract, i. e., he agrees to pay the corporation only, and the satisfaction of its claims, in any manner acceptable to it, discharges him from further liability. But the American courts of equity have evolved the doctrine that by the act of subscription one becomes liable for the full amount thereof to corporate creditors as well as to the corporation; that all who deal with the latter have a right to rely upon the total amount subscribed as a security for their claims,—in a word, and in the language of the courts themselves, that unpaid subscriptions are a 'trust fund' for the payment of creditors. While in its origin this doctrine is distinctively American, and does not obtain in England, yet by statute, a limited application of similar principles is there allowed. The more recent applications of the doctrine have been subjected to considerable criticism in this country." This statement of the law is sustained by numerous citation of cases, and is followed by a discussion of the applications of the doctrine; but nothing appears to indicate that it has ever been applied to give to the stockholder's liability for unpaid subscriptions for stock a preference in payment over other debts of the stockholder. Neither have counsel cited a case in which such application of the trust fund doctrine has been made. Neither has such a case fallen otherwise under our observation.

In the case of *Thompson v. Reno Sav. Bank*, 19 Nev. 242, it was held that it was not necessary to present to the executor or administrator of a deceased stockholder a claim for unpaid subscription to the capital stock of the bank before bringing an action thereon, although the statute provided that no holder of any claim against the estate of a decedent should maintain an action, unless such presentation had first been made. The following reason is given in the opinion of the court: "The stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons, upon the theory that the decedent held money equal to the amount of his unpaid subscription,

in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased person. The deceased stockholders were trustees, and not debtors, of the bank's creditors."

The doctrine of this case fully sustains the contention of the receiver. If the administrator has taken possession of any money or property that did not belong to the intestate, and did belong either to the bank or its creditors, he should deliver such money or property to the receiver, who represents both the bank and its creditors. But no trust fund in money and no trust property ever passed into the hands of intestate from any source. The trust is purely constructive; the fund is purely constructive. It may have no existence in fact. The stockholder may have neither property nor money, but his debt to the corporation for unpaid subscription for stock is held to be a trust fund. The corporation, according to the American doctrine, may not release the debt to the prejudice of its creditors without payment in full. If the corporation does release the stockholder without full payment, the creditors of the corporation may resort to the stockholder for payment to the extent of the stockholder's liability for unpaid subscriptions. To this extent the cases go, and some seem to go further; but I do not find any case that goes to the extent of charging the property of a stockholder with a trust or lien on account of his unpaid subscriptions for stock.

The doctrine of the Nevada case, however, would lead to that result. It was a suit in equity by a judgment creditor of an insolvent corporation to subject unpaid subscriptions for stock to the payment of his debt. Two of the defendants were representatives of deceased stockholders. Of the conclusion that the statute requiring claims to be presented to the executors or administrators of deceased persons before suit did not apply in that case, one commentator says: "It is believed that this conclusion cannot be upheld upon principle. The rule which allows a trust fund to be followed from hand to hand, and recovered, is believed to apply only in cases where the fund is earmarked or separated from the remainder of the estate of the trustee in such a manner that it can be identified." 3 *Thomp. Corp.* § 8328. And this suggests the question which must arise in every case under the doctrine of the Nevada court, what portion of the property of the stockholder constitutes the trust fund, which is properly no part of his estate? Does the trust attach to all of his property? Does anyone purchasing his property with knowledge of his indebtedness to a corporation for unpaid subscription for stock take the property subject to the trust? No court has answered these questions directly, because no court has made the application of the trust-fund doctrine urged on behalf of the receiver in the case at bar; and, on the other hand, it must be said that no court has ruled directly against this application of the doctrine. It seems that none of the courts have been called upon to rule directly upon the exact question presented here. The application of the trust-fund doctrine claimed here is evidently a new application of that doctrine.

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The case of *Peters v. Bain*, 183 U. S. 670, 33 L. ed. 696, cited by counsel, has, however, a direct bearing upon the question under consideration. Bain & Bro. were directors and stockholders to a large amount in the Exchange National Bank of Norfolk. The bank was insolvent; Bain & Bro. were insolvent. They made an assignment of all of their property for the benefit of their creditors. Peters, receiver of the Exchange National Bank of Norfolk, brought the action by bill in equity to set aside the assignment, and subject the assigned property to the payment of debts due the bank. The liability of the Bains on account of their stock is considered, beginning at page 691, 183 U. S., and page 704, 33 L. ed. (opinion of Chief Justice Fuller). The validity of the deed of assignment and the trust-fund doctrine are disposed of in the following language: "Counsel contends that the deed was in contravention of §§ 5151 and 5284 of the Revised Statutes of the United States, which provide that the shareholders of every national banking association shall be held individually responsible for its debts to the extent of the amount of their stock, and additional thereto, and that the controller may enforce that individual liability. It is insisted that the capital stock is a trust fund of which the directors are the trustees, and that the creditors have a lien upon it in equity; that this applies to the liability upon the stock of a national bank; and that no general assignment of his property for the payment of his debts can lawfully be made by a shareholder, certainly not when he is a director. Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo*, in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. *Washburn v. Green* (*Richardson v. Green*), 188 U. S. 80, 44, 33 L. ed. 516, 522. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of any other debt due to the corporation. The shareholder cannot transfer his shares when the corporation is failing, or manipulate a release therefrom, for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the shareholder is responsible in respect thereof to an equal additional amount. There was, however, no attempt here to avoid this liability, and the fact of its existence did not operate to fetter these assignors in the otherwise lawful disposition of their property for the benefit of their creditors." This needs no comment. It appears to leave no room for the application of the trust fund doctrine to the extent of giving to the receiver or to the creditors of an insolvent corporation preference in payment from the estate of an insolvent stockholder as against the general creditors of such stockholder, whether he be living or dead. The trust, evidently, can have no greater effect on the property in the hands of an administrator than in the hands of the assignee.

Of the three questions submitted, the first is answered "Yes" to the extent indicated in this opinion. The second and third are answered in the negative.

Potter and Corn, JJ., concur.

OREGON SUPREME COURT.

Malinda F. McLENNAN, *Appt.*,

v.

Charles McLENNAN, *Resp't.*

(.....Or.....)

A marriage contracted in another state by a resident of Oregon who has been divorced in that state by a decree from which there is yet time to take an appeal is absolutely void under 1 Hill's Anno. Laws, § 508, providing that a divorce decree shall terminate the marriage, "except that neither party shall be capable of contracting marriage with a third person" until the expiration of the period allowed for an appeal.

(November 8, 1897.)

APP^{EAL} by plaintiff from a judgment of the Circuit Court for Multnomah County in favor of defendant in an action brought to obtain a decree to declare void a marriage which had been contracted in alleged contravention to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Mr. S. R. Harrington, for appellant:

A decree of divorce does not absolutely terminate the marriage relation, nor entirely free the parties from its obligation and liabilities until the expiration of the time allowed in which to take an appeal. A marriage before the expiration of six months from the rendition of the decree is absolutely void.

Conn v. Conn, 2 Kan. App. 419; *Wilhite v. Wilhite*, 41 Kan. 154; *Re Smith*, 4 Wash. 702, 17 L. R. A. 578; 1 Bishop, Mar. Div. & Sep. § 486; 2 Bishop, Mar. Div. & Sep. § 1616; Nelson, Divorce & Separation, §§ 185, 568, 582a; *Thompson v. Thompson*, 114 Mass. 566; *Cook v. Cook*, 144 Mass. 185; *Pratt v. Pratt*, 157 Mass. 608, 21 L. R. A. 97.

A decree of divorce fixes the status of the parties—their "legal position in regard to the rest of the community"—and that status cannot be confined to the state in which the decree is rendered, but goes with the parties to any state or country to which they may temporarily or permanently remove.

Nelson, Divorce & Separation, §§ 27 *et seq.*

Messrs. Charles F. Lord and Thad. S. Potter, for the State:

The decree of divorce terminates the marriage relation.

Hill's Code, § 508.

The disqualification for marriage imposed by § 508, Hill's Code, upon the parties to a suit for divorce, has no extraterritorial effect.

Van Voorhis v. Brintnall, 84 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 605, 43 Am. Rep. 189; *Com. v. Lane*, 113 Mass. 458, 16 Am. Rep. 509; *West Cambridge v. Lexington*, 1 Pick. 506, 11 Am. Dec. 281; *Putnam v. Putnam*, 8 Pick. 438; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 181.

NOTE.—As to the effect of a right of appeal from divorce decree on the right to remarry, see *Re Smith* (Wash.) 17 L. R. A. 578, and *note*.

As to the effect of statutes prohibiting remarriage after divorce, see *Hernandez's Succession* (La.) 24 L. R. A. 331, and *note*; also *Ovitt v. Smith* (Vt.) 35 L. R. A. 223, and *Crawford v. State* (Miss.) 35 L. R. A. 224.

Bean, J., delivered the opinion of the court:

On September 8, 1889, the plaintiff was divorced by the circuit court of Multnomah county, from her husband, and in twenty two days thereafter, while still a resident of and domiciled in this state, was married in Vancouver, Washington, to the present defendant, who was at the time also a resident and domiciled here. The plaintiff, being advised that the latter marriage was premature and unlawful, brought this suit to declare it void; which being decided adversely to her, she brings the cause here by appeal. The sole question presented on the appeal is as to the validity of the Vancouver marriage, and its determination depends upon the construction of § 503 of our statute (1 Hill's Anno. Laws), and its effect upon marriages solemnized in a neighboring state. By this section it is provided that "a decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such a marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this Code to take such appeal." It is clear that a marriage in this state in violation of this section would be null and void, because, by its provisions, the parties are incapable of entering into such a relation within the time specified, for the reason that the decree does not to that extent terminate the former marriage. The statute in effect declares that such marriage shall, for that purpose, continue during the time in which an appeal may be taken from the decree, or, in case of an appeal, during the pendency thereof. Until the expiration of such time, the status of the parties, so far as the right to remarry is concerned, remains the same as if no decree had been rendered. For all other purposes the decree is full and complete, but, on grounds of public policy, the legislature has provided that pending an appeal from such decree, if one be taken, and, if not, during the time in which it may be taken, the parties shall be incapable of contracting marriage with a third person, and under this provision of the law, neither of them has any more right to do so than if the decree had not been given. During that time the decree is suspended or inoperative to that extent, and both parties, without regard to their guilt, are utterly powerless to make a valid contract of marriage with a third person. It will be observed that the statute declares that neither party to the decree shall be capable of contracting marriage with a third person during the time such decree is subject to review by an appellate tribunal, and not merely that it shall not be lawful for them to do so. It goes directly to their ability or capacity to contract, and there is a distinction made in the books between the

marriage of divorced parties declared by law incapable of remarrying and a marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is absolutely void, and in the other it is often held to be valid, although the party may be punished criminally for violating the prohibitory statute. This distinction is very clearly pointed out by Judge Clark in *Conn v. Conn*, 2 Kan. App. 419. The obvious purpose and object of the statute is to enable either party aggrieved by a decree of divorce to have the same reviewed in an appellate court, and to that end it is provided that pending such right neither party shall be capable of doing an act which would render a reversal nugatory. A construction of the statute which would permit a marriage within the time limited would be, not only contrary to its plain wording and evident intent, but would produce, in case of a reversal of the decree, the anomalous result of one person having two legal husbands or wives, as the case may be, at the same time, and polygamy be thus sanctioned by law. It was to prevent the confusion and uncertainty resulting from such a condition of affairs that the statute was enacted, and it must be given force and effect.

The supreme court of the state of Kansas had occasion, in *Willite v. Willite*, 41 Kan. 154, to construe this statute; and it was there held that a marriage contracted in that state within six months after one of the parties had been divorced from her former husband by a decree of one of the courts of the state was absolutely null and void. The opinion of Mr. Justice Johnston in that case contains a very lucid and satisfactory discussion of this question. The same construction has been given to a similar statute in the state of Washington by the supreme court of that state, in *Re Smith*, 4 Wash. 702, 17 L. R. A. 573. Indeed, it is not seriously contended that a marriage contracted in this state within the prohibited time would be valid; but the contention is that, as the marriage in question was solemnized in the state of Washington, the plaintiff was freed from the restraint imposed upon her by the decree of divorce. The general rule is unquestioned that a marriage between persons *sui juris*, valid where solemnized, is valid everywhere; but this plaintiff, having been previously married, and her former husband being alive, could not contract a second valid marriage anywhere unless the incapacity arising from her previous marriage had been at the time effectively and completely removed by a decree of divorce, and this was not the case at the time of the solemnization of the marriage between plaintiff and defendant, be-

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cause the statute under which the decree was obtained provided that the divorce did not completely sever the tie of marriage, so as to enable either to become a party to a new one, until the lapse of a specified time after the decree, and her marriage was contracted in violation of this statute. This provision of the law is an integral part of the decree, by which alone both of the parties to a divorce proceeding can be relieved from the incapacity to marry, and the marriage by a person divorced in this state, and domiciled here, in violation of its provisions, is a mere nullity when called in question in the courts of the state, although such marriage may have been contracted in another state. 1 Nelson, Divorce & Separation, § 135; 1 Bishop, Mar. & Div. § 436; *Warter v. Warter*, L. R. 15 Prob. Div. 152; *Chichester v. Mure*, 8 Swab. & T. 223. The rule announced in the cases of *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509, and *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, and other cases cited of similar import, is relied upon by the defense. The doctrine of these cases is that a statute prohibiting a marriage of the guilty party in a divorce proceeding, during the lifetime of the other, or except under certain conditions, does not render void the marriage of such person out of the jurisdiction of the state in which the decree was obtained. Upon this question there is some conflict in the authorities (*Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703; 5 Am. & Eng. Enc. Law, p. 841); but the obvious distinction between the question presented in the cases referred to and in the case at bar is that there the incapacity to remarry attached only to the guilty party. The decree of divorce absolutely terminated the marriage relation between the parties as effectually as if it had been dissolved by death. The innocent party was perfectly free to remarry at any time, and the restraint upon the other was imposed as a punishment, and was therefore penal in its nature, and, as such, held inoperative out of the jurisdiction where it was inflicted. The provision of our statute is not imposed as a punishment, nor is it penal in its character, but it implies to the innocent as well as the guilty. It goes to the capacity of either party to remarry within the prescribed time, and therefore the cases cited and the doctrine contended for have no application to the question in hand.

We are clear, therefore, that the plaintiff's marriage, having been contracted before the expiration of the time allowed by law in which to appeal from a decree of divorce, is absolutely void, and the decree of the court below must be reversed; and it is so ordered.

RÉSUMÉ OF THE DÉCISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with October 1, 1897, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

International law.

A very unusual question of international law is presented in a Federal case, which denies a private right of action by a citizen of the United States against a military commander of revolutionary forces in Venezuela for assault and false imprisonment, at least since the United States has recognized the revolutionary government. (C. C. App. 2d C.) 403.

Equality.

A statute prohibiting citizens from other counties from fishing in the waters of two specified counties without a license, but not prohibiting citizens of those counties from fishing in other counties, is held to violate the constitutional provision for equal protection of the laws. (S. C.) 561.

A statute requiring a license for peddling is held to make an arbitrary distinction constituting partial class legislation when it exempts farmers, nurserymen, mechanics, manufacturers, and butchers who sell their own manufactures or products. (Minn.) 677.

Taking or impairing private property.

The Ohio act adopting the Torrens system of land registration is held unconstitutional as depriving adverse claimants of title without due process of law, attempting to take property for uses not public, and also as attempting to confer judicial power on the county recorder. (Ohio) 519.

A statute authorizing administration on the estate of a person who has left home and has not been heard from in seven years is held to be unconstitutional, since the administration of the estate of a living person deprives him of property without due process of law. (R. I.) 294.

A statute limiting the liability of a railroad company for fires to the difference between the amount of loss and the insurance on the property is held not to deprive the insurer of the equal protection of the laws, nor to impair the obligation of their pre existing contracts. (Me.) 152.

The constitutionality of an ordinance fixing water rates is discussed at much length in a

case holding it invalid because it did not produce just compensation to the owner of the water plant. In this case it gave a net income of about 8½ per cent. (Cal.) 460.

The right of a city to take water for its inhabitants from a great pond belonging to the state is held to be within the power of the legislature to grant without any compensation to those who want the power for mill purposes. (Me.) 188.

Police power; as to nuisances.

A statute requiring all railroad and transportation companies to turn over to storage companies or public warehousemen all property not called for within twenty days after notice to the consignee is held unconstitutional and void because not a proper exercise of the police power. (Minn.) 672.

A statute authorizing a board of aldermen to order any privy vault to be filled up and destroyed is sustained as constitutional although it does not provide for any notice to the owner of the premises before making and enforcing the order. (R. I.) 305.

The business of a scavenger, or the removal of night soil, is held to be within the control of a city having power to make all ordinances for the protection of health. (Minn.) 675.

An ordinance making it unlawful to keep any hog within the corporate limits of a town is held to be not subject to attack for unreasonableness, where the statutes give power to define nuisances and to regulate and control the keeping of animals. (S. C.) 326.

The attempt of a municipal corporation by ordinance to declare that any partially destroyed building which is permitted to remain in that condition after notice to remove, repair, or rebuild it, shall constitute a nuisance, is held to be void on the ground that a municipality cannot declare that to be a nuisance which in fact is not, although it has authority to declare what shall constitute a nuisance. (Ind.) 161.

Jurisdiction.

Jurisdiction of a state court to direct as to the payment of wages by a receiver for operating a railroad within the state is held not to

be prevented by the fact that the employees in the course of their services crossed the state boundary and incidentally performed some services in another state, where the receiver-ship was first created. (Conn.) 804.

Judges.

The constitutional power of the governor to appoint judges of an inferior court is protected against a statute which attempts to deprive him thereof by changing the name of the court and providing for the election of the judge. (N. J.) 878.

Officers.

The eligibility of a woman to be a county clerk in Missouri is sustained under a constitutional provision which requires an officer to be a "citizen of the United States" and a resident of the state "one year next preceding his election." The use of the masculine pronoun in that provision in the statutes is held not to exclude women, since there are express constitutional provisions limiting eligibility to men in respect to some other offices, and the word "male," which formerly was found in the statutes respecting county clerks, has been dropped. (Mo.) 208.

Enacting statutes.

The constitutional provision as to the enactment of bills by aye and nay vote and after three several readings, etc., are held mandatory, and the journals of both houses must affirmatively show compliance with the constitutional provisions. (Id.) 74.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

An employee who has learned trade secrets from his employer under an agreement, express or implied, that he will not make use of them for his own benefit, or communicate them to strangers, is held subject to injunction against breaking such agreement. (Mich.) 200.

The rule that one person cannot be compelled to enter into business relations with another is applied to the refusal of undertakers to furnish materials or render services at a funeral for a person who has refused or failed to pay for similar services in the past. (Ky.) 505.

The illegality of a transfer of stock to the president of a company for use in corrupting public officers is held not to prevent the owner from recovering it when it has not been used for the illegal purpose but has been converted by the president to his own use, since the right of action does not depend upon the illegal contract. (Cal.) 176.

Breach of contract.

In case of the refusal of a vendee in an executory contract to stand by his agreement, it is held that the other party, having an option to deliver between two subsequent dates, if he wishes to have the damages fixed on any day before the last day for performance, must give notice of such intention, although his offer to perform is waived by the other party's repudiation of the agreement. His mere executory contract to sell the same property to another person before the time for delivery is held not to constitute a breach of the contract on his

Tolls.

Tolls for the use of a road by persons riding bicycles are held not to be authorized by a statute providing for the payment of tolls for carriages or vehicles drawn by animals, also for a horse and rider or led horse. (Mich.) 198.

Voters.

Ability to read the Constitution of the state, which is required of a voter by the Wyoming Constitution, is held to mean the Constitution in the English language, and not in a translation. (Wyo.) 778.

Streets.

The caving of an excavation under a street, negligently made for an underground railroad, is held not to make the city liable. (Va.) 834.

A charter authorizing a street-railroad company to use any power which the mayor and city council may sanction, or which any other company is authorized to use, is held to give the right to use the trolley system without the sanction of the mayor and council, when other companies have been authorized by statute to use it. (Md.) 509.

The liability of a city to an action for delay in providing a fund by assessment to pay for a street improvement is denied,—at least so long as there can be any remedy by enforcing the plan of assessments. (Wash.) 259.

Lighting city.

The right of a municipality to own an electric-light plant to furnish lights to its citizens as well as for public uses is sustained in Michigan. (Mich.) 157.

part, even if an actual sale of it would be. (N. D.) 760

Innkeepers.

The right of an innholder who has no license to recover for board and lodging at his inn is denied under a statute which prohibits the keeping of an inn without a license. (Me.) 148.

Lease.

An assignment of a lease with covenant against encumbrances, except the agreements of the lessee, is held not to import a personal liability of the assignee to perform them. (Ill.) 624.

Negotiable paper.

Payments indorsed on the back of a note before its transfer by the payee are held not to destroy its negotiability. (Pa.) 823.

The addition of the word "trustee" to the name of an indorser on a note is held not to affect his liability, and the same is held as to the addition of that word to the name of the payee. (Tenn.) 837.

A statute requiring the words "peddler's note" to be written across every note given for an article sold by a peddler or itinerant person is held valid as applied to the sale of a patent right. (Ky.) 508.

The drawer of a draft which is lost in the mails during transmission from the payee to a correspondent at the place where the payee is located is held to be discharged by the failure to present the draft or discover its loss for

nearly six months, although the payee had means of knowledge of the loss in a report from the correspondent. It is also held that a duplicate draft given to enable the payee to collect from the drawee did not constitute a new contract or a promise to pay, or a waiver of a defense on the original contract. (N. D.) 848.

Carriers.

A railroad employee working on a bridge is held to become a passenger when he rides home on a train after his work for the day is done, under a contract giving him the right to free transportation. (Pa.) 876.

The ejection from a train of a woman who has paid fare for herself, but refuses to pay for a child in her custody, is held lawful on condition that her fare is returned or tendered to her, less the amount of fare for herself and the child for the distance already traveled. (Ohio) 140.

A contract by an express company with a railroad company, exempting the latter from all liability for injuries to a messenger who authorizes the contract, is held binding on him, since the railroad in this matter is acting as a private carrier. (Ind.) 938.

Delivery of goods to a consignee without his production of the bill of lading is held sufficient to relieve the carrier, where it had no notice that the bill had been forwarded with a draft attached for collection. (Ark.) 358.

An exemption of "accidents to boilers and machinery" in a bill of lading is held insufficient to exempt a railroad company from liability for injuries caused by the breaking of the axle of a car, as this is not "machinery" within the meaning of that phrase. (U. C. App. 6th C.) 271.

Insurance.

Certificates in mutual aid societies are held not to constitute insurance within the meaning of a question in an application blank of an insurance company as to "existing insurance." (C. C. App. 6th C.) 83.

An assignable interest of a person to whom an endowment certificate in a benefit society is payable on the death of the assured within the endowment period does not exist during that period, and while the assured is living, if the

latter has a right to change the beneficiary. (Iowa) 128.

Statements by an applicant for insurance which the terms of the policy warrant to be strictly true and agree to be a part of the contract are to be deemed warranties, and not mere representations. (R. I.) 297.

A contract by which a railroad employee is given his election to take benefits from a relief fund or to sue his employer for damages, but making an acceptance of the benefit operate to release his employer, is not contrary to public policy. (Ill.) 750.

A variety of important questions respecting the settlement of an insolvent insurance company are decided in a Maryland case. Among them is the decision that insurance of a carrier against liability for injury to passengers is not against public policy. (Md.) 97.

The construction of the provision as to total disability to transact any and every kind of business pertaining to one's occupation is made by holding that trivial acts do not constitute transacting of business if one is unable to transact it substantially or to some material extent. (Minn.) 587.

Another case holds that the fact that one went to his office every day, where he carried on the business of loaning money on personal security, did not show that he was not totally disabled, if he did no work or business at the office during the time for which he claimed indemnity. (Mich.) 529.

A reinsurer in case of the insolvency of a prior insurer is held liable for the whole amount of loss to which it had indemnified the other insurer, and not merely for such part thereof as the insolvent company actually paid. (N. H.) 514.

A mortgage, although in the form of an absolute deed, is held not to constitute any change in the title, interest, or possession of the property of the insured within the policy providing that it shall be void in case of such change. (Ohio) 562.

Change of title by deed from mortgagor to mortgagee pending an application for insurance is held not fatal to the insurance after the policy is delivered, if the application states the existence of the mortgage and the pendency of foreclosure proceedings. (Wash.) 397.

III. CORPORATIONS AND ASSOCIATIONS.

A receiver of a corporation because of dissensions between the two persons who constitute its officers and are equal owners of its entire stock is denied, especially when their dissensions relate chiefly to the management of another corporation some of the shares of which are owned by the former. (Iowa) 122. See also *infra*, V.

Duration; reversion of property.

A conveyance to a corporation which has an existence for a limited period is held not to be limited to the life of the corporation, or to give the grantor a resulting trust which will take effect when the corporation ceases to exist. (N. C.) 240.

Abuse of franchise.

A plumbers' supply association organized under a provision for charitable, educational, 88 I. R. A.

and social companies, which assumes to notify its members of the failure of a dealer to pay any of them, and to prevent them from giving any credit thereafter to the delinquent, is held to be officiously interfering with matters outside its proper business, and subject to attack by an information in the nature of a quo warranto. (Mass.) 194.

Nonuser of franchise.

The forfeiture of the franchise, and also of the road, of a street-railway company is enforced under a clause of the ordinance granting the franchise, to the effect that it should be forfeited for failure to operate the road for one year. (Minn.) 541.

The forfeiture of the franchise of a street-railway company granted by ordinance is held to be made by nonuser of the tracks for sev-

eral years, although the city may have agreed that nonuser should not constitute a forfeiture, and the ouster of the company from the franchise is held to be properly made in quo warranto proceedings by the state on relation of the city. (Mo.) 218.

Lease of franchise.

A constitutional provision against the lease of any franchise so as to relieve it or the property held under it from the liability of the lessor or lessee is construed to make a leased railroad liable to the enforcement of a judgment against the lessee for injuries to an employee, but not to make the lessor, by a fiction, the employer of such person. (Cal.) 71.

Lien for stockholder's liability.

The assets of an insolvent stockholder in an insolvent national bank are held not to be subject to any preferential lien for the payment of the stockholder's liability. (Wyo.) 860.

Preference to employees.

A person employed by a mowing machine company to sell machines, as well as to set them up and unpack and repack them when necessary, is held to be an employee, within the meaning of a statute giving a preference to claims of employees, operators, and laborers of corporations. (N. Y.) 102.

Stock.

The right of a married woman to hold stock in a national bank of another state is held to depend on the law of her domicile. (Md.) 119.

One holding stock as an attorney or trustee of an infant without anything to show that fact on the books of the corporation is held liable as a stockholder. *Id.*

Increase of stock.

The increase of the capital stock of a corporation by an amendment of its by-laws is held valid, where the Constitution of the company provides that the amount of capital may be fixed by the by-laws. (C. C. App. 6th C.) 616.

A contract between proposed shareholders of a corporation which has not yet come into existence, to the effect that they will not transfer their shares without giving the company an option to purchase them, is held to be ineffectual in favor of the corporation, and not to be ratified by its mere issue of stock to such persons. (R. I.) 299.

Bonus stock.

Corporate stock issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security is held valid as against existing creditors of the company. (Mich.) 490.

Charities.

An incorporated institution for the blind largely supported by state appropriations is held to be a charitable institution so far as it supports indigent pupils, and therefore subject

to that extent to the visitation and rules of the board of charities, although as to paying pupils it may be only an educational institution. (N. Y.) 591.

In a case which reviews the authorities quite extensively, it is held that a bequest to an incorporated charitable institution in excess of the amount which general laws permit such corporations to take is merely voidable, and can be avoided only by the state itself, and not by the relatives of the deceased. (Me.) 339.

Foreign corporations.

A contract of an unauthorized foreign corporation is held valid in a Rhode Island case under statutes which do not expressly declare it void. (R. I.) 545.

The right of a foreign corporation to purchase or solicit wool by an agent is upheld as a transaction in interstate commerce, although the corporation had not complied with the conditions imposed by a statute on the right to do business in the state. (Mont.) 367.

The court refuses to interfere with the internal management of a foreign electric light company at the suit of a resident stockholder, although the tangible property of the company consisting of conduits in the streets, is within the state. (Pa.) 638.

Loan association.

Notice of withdrawals given before the appointment of a receiver of a loan association are held to give no priority after insolvency where the by-laws provide that not more than 80 per cent of the receipts of the loan fund should be applied on withdrawals. (Iowa) 188.

Seceding members—name taken.

The members who withdrew from the Knights of Pythias and formed a new order because the old order would not permit them to have the ritual in the German language are held entitled to take for the new organization the name "Improved Order, Knights of Pythias." (Mich.) 658.

Limited partnership.

For the purpose of an action against a Pennsylvania limited partnership in Massachusetts, it is held that it is to be regarded as an association or partnership, and can be sued in its company name. (Mass.) 791.

The formation of a limited partnership is held not to make the members liable as general partners merely for technical irregularities. (Mich.) 798.

Payment of subscriptions to the capital stock of a limited partnership is held sufficiently made by promissory note, where that was immediately turned into money. (Mich.) 794.

Religious society.

The call of a Presbyterian society to a pastor is held, under the rules of that church, to be ineffective until formally sanctioned by the presbytery, and the refusal thereof to be fatal to the contract. (Okla.) 687.

IV. DOMESTIC RELATIONS.

The rule that the welfare of the child is the determining consideration in awarding its custody is applied to a contest between a guardian appointed where the child has actually

resided for several years and a guardian appointed in another state on the father's application at his technical domicile. (Conn.) 471.

The provision in a statute that divorce ter-

minates marriage, except that neither party shall be capable of contracting marriage with a third person until the time for an appeal has expired, renders a marriage within that time, though contracted in another state, utterly void. (Or.) 863.

The common-law right of a husband to a right of action for the loss of consortium through an injury to his wife caused by negligence is not taken away by the Massachusetts statutes giving married women the control of their time and actions. (Mass.) 631.

The right of a married woman abandoned by her husband to an action in her own name without joining him against one who caused the abandonment is sustained, where the statutes give her the right to contract and also to set up as a counterclaim when sued for tort any damages arising out of the same transaction. (N. C.) 242.

A diamond shirt stud worn by a husband is held to be a family expense within the meaning of a statute charging such expenses upon the property of both husband and wife or either of them. (Iowa) 847.

The liability of a wife to support her husband out of her separate estate in the exceptional case provided for by the California statute is held to be enforceable by an order of court in an equity proceeding because of the want of an adequate remedy at law. (Cal.) 175.

For improvements made by a husband's earnings on his wife's land it is held that she is liable to his creditors up to the amount of the enhancement of the value of her property thereby, and that the husband cannot be charged with any rent for the use of the premises by the family,—at least in the absence of any agreement therefor. (Me.) 190.

V. FIDUCIARIES.

The attempt of a receiver to enforce the individual liability of stockholders for debts of

the corporation is denied in the absence of a statute authorizing it. (Illn.) 413.
See also *supra*, III.

VI. TORTS; NEGLIGENCE; INJURIES.

The actual use of force is held not to be necessary to constitute intimidation by strikers who make a display of force. (Pa.) 833.

An action against a hospital for an unauthorized autopsy on the body of a child is held maintainable by the father who placed the child there for treatment. (Mass.) 413.

Negligence.

For damages done by drifting logs which had broken from a raft in a violent storm without fault of the owner, and had been left floating until a later violent storm arose, it is held that the owner is not liable, although he has not definitely abandoned them, if he is proceeding to recover them as fast as he can without unreasonable expense. (La.) 134.

A bystander injured by the bolting of a vicious horse from a race track is denied a right of action where no negligence on the part of the fair association is shown, and the owner of the horse is not shown to have known that he was vicious, while the bystander negligently remained where he had been warned against standing. (N. C.) 156.

As to premises.

A defective railing on a platform of a grain elevator is held not to make the owner liable to a person who is injured by its fall while he is leaning against it, as this is putting it to a use for which it is not intended. (Mich.) 665.

A landlord is held not to be liable for injury to a person delivering goods to a tenant by falling into an elevator well which was dangerously defective because of a large opening between the elevator and the well, where the tenant had covenanted to repair and the landlord was not in possession or control of the elevator. (R. I.) 716.

An excavation on railroad premises, so near a path to a station platform as to be dangerous, is held to be insufficient to make the railroad company liable for the death of a child who
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falls into it while playing along the path. (Tex.) 573.

Injured passengers.

It is held to be negligence, as a matter of law, to jump from an electric street car running 4 or 5 miles an hour. (Pa.) 786.

A passenger on a railway train stopped by tanks of burning oil upon the track is not allowed to recover against the carrier for injuries caused by an explosion of the oil when he had unnecessarily exposed himself by going too close to it. (Wis.) 419.

Injury to a passenger on an excursion boat by the careless discharge of a loaded gun in the hands of another passenger is held to make the carrier liable if it failed to exercise reasonable care after there was reason to expect or anticipate danger. (Tenn.) 427.

The authority of a brakeman on a freight train to eject a passenger so as to make the master liable for his acts in so doing is held not to be implied from rules prohibiting such trains to carry passengers, and requiring the brakeman to know the rules, where it is also provided that such brakemen are subject to the orders of the conductors. (Mich.) 666.

Others injured by cars.

The negligence of a boy in standing so near a passing train as to be drawn under it by a current of air is held to be a question for the jury, and not of law for the court. (Mo.) 633.

Operating a dummy line of cars in a street at slow rate with occasional stops is held not to be negligence so as to create a liability for injury to a child which gets on the car and falls or is thrown off, although precautions were not taken to keep children from getting on. (Ala.) 458.

The rule that persons crossing a railroad must look and listen is held applicable to those operating an electric street car at a crossing, but the failure of the railroad company to give

the statutory signals is held to preclude an action by it against the electric company for damages resulting from a collision. (N. J.) 516.

The rule that one must stop, look, and listen before attempting to cross a railway track is held applicable to an electric railway in a street, by the supreme court of Louisiana. (La.) 708.

Running a tank car along an electric street railway with black coats hanging and waving from it so as to frighten horses is held to make

the street-railway company liable unless reasonable care to prevent such result is exercised, and this is held to be a question for the jury. (N. J.) 236.

The fact that a statute requiring signals at railroad crossings does not apply to farm crossings is held not to exempt the railroad company from liability to give signals, when required in the exercise of reasonable care, at peculiarly dangerous farm crossings, when a train is running at great speed. (Minn.) 302.

VII. PROPERTY RIGHTS; WILLS; LIENS.

A remarkable case as to the effect of a consent decree in partition giving one party a life estate only with remainder at her death to children then living or issue of such as may be dead holds that the remainder is contingent, and the fee during such contingency is not in abeyance but continues to abide in the life tenant, and upon her death without children or their issue surviving becomes absolute again, subject to disposal by her will. (Tenn.) 679.

Expectancy.

A written instrument to transfer a share of a mere expectancy is held not to be valid, where there was no consideration or any controversy or dispute to be settled thereby. (Pa.) 378.

Coal.

Adverse possession of the surface of land is held not to affect the title to underlying coal. (Pa.) 826.

Oil.

A life tenant who is also a tenant in common of the reversion is held liable to account for oil which he extracts from the land under a supposed right to do so, believing himself to be the sole owner. (W. Va.) 694.

Fixtures.

A striking case of the removal of fixtures from a mortgaged building is one in which what is called the standing finish, including window and door sashes, jambs and trimmings, wainscoting, baseboards, mantel piece, and doors were removed in default of payment, in accordance with a contract between the contractor and the mortgagor to the effect that the title should remain in the contractor until payment was made. (Wash.) 267.

Easement to use elevator.

The right to use an elevator to convey goods from a sidewalk to a basement or *vice versa* is held not to be appurtenant to a lease of the basement, where such use was not originally intended to accompany the use of the basement, and the connection between them was through another room which was not a common passageway. (Mass.) 149.

Waters; riparian rights.

Although a city may have wrongfully taken considerable part of the waters of a stream to the damage of a riparian owner he cannot require the sewage into which the waters have gone to be returned to the stream above his mill, but the disposal thereof must be left to the control of the city. (Conn.) 474.

A riparian proprietor upon navigable water is held not to be entitled to any compensation 88 L. R. A.

for cutting off his access to the water by municipal improvement of the water front for the benefit of navigation, as his riparian rights are subordinate to navigation. (N. Y.) 606.

A diversion of water from a stream to non-riparian lands by one to whom the riparian owner has assumed to grant such right is held unlawful as against a lower riparian proprietor. (Cal.) 181.

The submergence of lands dedicated for a public park with the express condition that no buildings shall be erected thereon does not free it from the restrictions on the subsequent reclamation of the lands. (Ill.) 849.

The right to go in boats and hunt wild fowl on a marsh surrounding an island in a river where the water is 10 or 12 inches deep, but where the land is at other times dry and covered with rushes, is denied to those who do not get the consent of the owner of the land, as such water is not navigable. (Mich.) 205.

Deed.

An attempt by the grantor to prevent the passing of title by a deed to his natural son which he had delivered to a deputy clerk with instructions to have it proved by the subscribing witness and registered, which was not done at the time because of the clerk's absence, was held ineffectual, although he obtained the deed again before it was actually proved, and destroyed it, and the grantee knew nothing of the delivery or the recall of the deed. (N. C.) 238.

Railroad fence.

Inclosed lands through which a railroad right of way must be fenced are held to be those which have such line of obstacle of any sort between them and other land as to set them off as private property, although the fence is not at all times maintained as a lawful fence which will prevent cattle from passing through at any point. (Va.) 570.

Trust for charity.

A devise in trust for a local branch of the Salvation Army is held invalid for want of an ascertained beneficiary unless the society becomes incorporated. (Minn.) 669.

A bequest in trust for a chapel is held to have failed altogether, and not to be, under the *cy pres* doctrine, applicable to general parish purposes when the purpose of the testatrix fails because the people have become too few and too poor to support the chapel. (Mass.) 629.

Liens.

The fact that the materials in a building were furnished under a contract made outside the state is held insufficient to prevent a lien

therefor under a statute providing for a lien in favor of any person who has furnished materials for a building in the state. (N. Y.) 410.

The sale of a narrow strip from the front of property for the sole purpose of avoiding a street improvement assessment for which the city has made a contract, but before the lien of the assessment attaches, is held void as against such assessment. (Iowa) 480.

Judgment; priority.

A mortgage for an antecedent consideration filed the same day and a little before the entry of a judgment is held to have no priority, but to stand on a footing of equality with the judgment. (Wash.) 257.

The statutory provision that a judgment shall be a lien from the first day of the term is

held to give it priority over a mortgage made during the term and before the judgment. (Neb.) 243.

Will.

Proof of a lost will by declarations of the testator is held insufficient, and testimony of a witness as to such contents, if based entirely on the reading of the will to him by the testator, amounts only to evidence of such declarations. (Neb.) 433.

A will executed jointly by husband and wife, although it cannot be probated as their joint will while one of them is living, is held entitled to probate as the will of the husband during the wife's life, subject to be again probated as her will upon her subsequent death. (N. C.) 339.

VIII. CIVIL REMEDIES.

Comity.

The right to maintain an action in a Federal court between citizens of different states for negligence occurring in Mexico is sustained against objections growing out of the dissimilarity between the laws of Mexico and of the state in which the action is brought. (C. C. App. 5th C.) 387.

Transitory action.

An action by a mortgagor for wrongful sale of the premises by the mortgagee under a power in the mortgage when there had been no default is held to be transitory, and to entitle him to full damages if he elects to affirm the sale, even if the sale is void and he might redeem the premises. (Mass.) 145.

Action for mistake in telegram.

A banker cashing a draft on the faith of a telegram is held to have no right of action against the telegraph company for a mistake in the amount where the message was not sent to him and the banker owed him no duty. (C. C. App. 8th C.) 634.

Process.

Service on the insurance commissioner of process against a foreign insurance company is held to give no jurisdiction where he has not been appointed by the company as required by statute, although it was doing business in the state, if these facts appear on plaintiff's own showing and the company has not appeared to contest the jurisdiction, and is not shown to have received any notice, either actual or constructive. (R. I.) 546.

Service on a nonresident joint stock association engaged in the business of a common carrier is held to be properly made upon a local agent where it appears that there is no officer or superior agent in the state. (Minn.) 225.

An attorney while going to his own county from the supreme court is held exempt from service of process. (Mich.) 663.

Injunction.

An injunction against the diversion of water from a mill dam is allowed notwithstanding the fact that the injury from the diversion would be trivial compared with that which may be suffered by those who are restrained from making it. (Mich.) 355.

Mandatory injunction.

A mandatory injunction to compel the spe-

cific performance of a railroad lease by requiring the operation of the road by the lessee is granted against the contention that the lease was too indefinite to be enforced, and that it was a continuing contract requiring the exercise of skill and supervision. (Ky.) 800.

Mandamus.

Mandamus to compel a township trustee to meet with others who have met and because they could not get a quorum have adjourned from day to day can be granted when the law requires the trustees to meet at that time to appoint a county superintendent. (Ind.) 839.

Payment into court.

Taking from the court money paid in as full payment is held to amount to a discharge of the obligation, although the plaintiff takes it protesting that more is due, if the defendant does not waive the condition on which he paid it into court, and no rule of court is made modifying the conditions. (Tenn.) 549.

Mortgagee's liability in receivership.

A novel question in the law of receiverships is that of the liability of a railroad mortgagee who obtains the appointment of a receiver on foreclosure for the wages of the receiver's employees when the trust fund is insufficient to pay them. The court holds that there is no such liability unless it is imposed by the court as a condition of appointing or continuing the receiver. (Or.) 424.

Property subject to creditors.

A perpetual scholarship in a college, granted in consideration of a donation thereto and entitling the donor to keep one pupil in the college free of charge, is held not to be such property as can be taken by his creditors. (Tenn.) 753.

Time.

Including Sunday preceding a term of court which begins on Monday in the computation of the twenty days for which an action must be filed in order to be triable at the term is held correct,—especially where this is in accordance with the long practice of the court, since nothing is to be done on that day. (Ga.) 749.

Damages.

The right to recover damages for fright or nervous shock is denied in an action for negligence, even if physical injuries result there-

from, if these result solely from the mental disturbance. (Mass.) 512.

The owner of land left in a cul de sac by vacating another portion of the street on which it abuts is held to be within a statute giving damages for injuries to land caused by vacating a street. (Pa.) 375.

Presumption.

A presumption of negligence from the escape of electricity from a street railway, causing shock to a horse in the street, is held to be a proper application of the maxim *Res ipsa loquitur*. (N. J.) 637.

Opinions of witnesses.

On a question of sanity or insanity, nonexperts are held competent to testify, where they show sufficient reasons for the foundation of their opinions. (Ga.) 721.

Unanimous decision.

A unanimous decision to appeal, from which leave is necessary, is held to be made when one of the judges is absent, but the remaining four, who constitute a quorum, all agree. (N. Y.) 615.

IX. CRIMINAL LAW AND PRACTICE.

Jurisdiction.

A statute attempting to give police courts jurisdiction of offenses where the fine does not exceed \$200 and the term of imprisonment does not exceed one year is held unconstitutional because it denies the right to a jury except on appeal, and also the right to an information before prosecution. (N. H.) 228.

Fraudulent banking.

A banker who fails to repudiate the act of his son in receiving a deposit after the insolvency of the bank is known, and who does not return the money but makes an assignment, including that money among the assets, within four days, is held guilty of receiving the deposit in violation of statute. (Iowa) 485.

Betting.

Putting up a sum of money as a forfeit on an agreement to put up within a certain time a larger sum equal to that which the other party has put up is held not to constitute a bet. (Tex.) 719.

Sending money to another state to be wagered on a horse race in a third state is held punishable by the state from which it is sent, although such wagers were lawful in the state where the wager was made. (Va.) 640.

Insane convict.

The right of a convict to have a jury trial on an issue of insanity which is alleged to have supervened after conviction is denied, and is 88 L. R. A.

held not to be necessary to due process of law. (Ga.) 577.

Contempt.

Newspaper articles charging a judge, who is a candidate for re-election, with corruption and partiality in actions already ended, are held to be beyond the power of the judge to punish as a criminal contempt, and an affidavit alleging their truth, filed in response to an order to show cause, does not constitute a contempt if the original publication did not. (Wis.) 554.

Pardon.

The forfeiture of a bail bond is held to be unaffected by a subsequent pardon. (Ky.) 808.

Extradition.

The waiver of requisition papers by a fugitive, and his submission to arrest upon a warrant, are held to be a voluntary return into the jurisdiction which authorizes his prosecution for any other crime than that named in the warrant. (Kan.) 756.

The right of the governor to revoke his warrant for the surrender of a fugitive from justice at any time before his removal from the state is sustained, and the power of the court to inquire into the cause of such revocation is denied. (Minn.) 224.

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10. A material finding in favor of plaintiff cannot be stricken from the record and a judgment rendered for defendant, where there is any evidence to support it. *Conroy v. Chicago, St. P. M. & O. R. Co.* (Wis.) 419

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1. The assets of an insolvent stockholder in an insolvent national bank, whether living or dead, are not, as against his other creditors, subject to a preferential lien by virtue of the trust-fund doctrine applicable to the assets of insolvent corporations, for the payment of his liability, under U. S. Rev. Stat. § 5152, for the debts of the bank for an amount equal to the par value of his stock. *Re Beard's Estate* (Wyo.) 860

2. A banker who fails to repudiate the act of his son in receiving a deposit contrary to his instructions, an hour or two before the bank finally closed and when its insolvency was known, and who fails to return the money, but within four days after its receipt includes it in a general assignment for the benefit of creditors, is guilty of accepting and receiving the deposit knowing himself to be insolvent, in violation of the Iowa statute. *State v. Eifart* (Iowa) 485

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1. The Supreme Lodge, Knights of Pythias, which becomes incorporated after the words "Knights of Pythias" have been used by the order as an existing voluntary society, cannot claim any greater right to that name than the order of which it is the head. *Supreme Lodge, K. of P. v. Improved Order, K. of P.* (Mich.) 658

2. The name "Improved Order, Knights of Pythias," can be lawfully taken as the name of a new order formed by members who withdraw from the Knights of Pythias chiefly because the old order refuses to permit them to have the ritual printed in the German language. *Id.*

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Tolls for the use of a road by persons riding bicycles cannot be charged under How. Stat. (Mich.) § 3582, allowing a charge of 2 cents per mile for "any vehicle or carriage drawn by two animals" and 1 cent per mile for every vehicle or carriage "drawn by one animal," as well as for "every horse and rider or led horse." *Murfin v. Detroit & E. Plank Road Co.* (Mich.) 198

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BILLS AND NOTES. See also CHECKS.

1. Payments indorsed on the back of a note before its transfer by the payee do not destroy its negotiability. *Farmers' Bank v. Shippey* (Pa.) 823

2. A note is not subjected to equities in the hands of a holder for value by the fact that it is payable to a person, "trustee," if inquiry would have disclosed the fact that the word was merely descriptive, and that the note was made to him for the purpose of enabling him to turn it over in consummation of a subscription to the stock of a syndicate, which was accomplished by his indorsement and transfer. *Tradesmen's Nat. Bank v. Looney* (Tenn.) 887

3. The liability of the indorser of a note is not affected by the addition of the word "trustee" to his name. *Id.*

4. The drawer of a draft which is lost in course of transmission through the mails from the payee to his correspondent in another city where the drawee is located is relieved from liability, where the payee fails to present the draft or to discover the loss for nearly six months, although the fact of the loss appeared by report from the correspondent showing that the draft had never been received. *Bank of Gilby v. Farnsworth* (N. D.) 843

5. A duplicate draft given by the drawer of one which has been lost does not, as a matter of law, import a promise to pay the draft or waive a defense to liability thereon, where it

was done to accommodate the payee and enable him to collect the money from the drawee. *Id.*

6. A drawer's promise to pay a draft, or his recognition of liability thereon, with full knowledge of the facts releasing him from liability, is a waiver of his right to insist that he has been released by failure to take the necessary steps to charge him. *Id.*

7. Notice to the indorsee that an indorser has no interest in the transaction will not relieve the indorser from liability on the note. *Tradesmen's Nat. Bank v. Looney* (Tenn.) 887

8. The liability of the maker of a note to an indorsee is not affected by a compromise of a suit by the indorsee against the indorser by which the latter is permitted to substitute securities in lieu of his liability as indorser, under the express agreement that the liability of the maker shall not be affected, and that when any money is collected from the maker it shall be applied to release the securities so deposited. *Id.*

9. A purchase for value in due course of trade, of a note, is made by a bank which discounts it and applies the proceeds to the payment of a prior note due by the indorser and an overdraft in a bank in which the indorser is interested. *Id.*

10. Enforcement of a note given as a subscription to the stock of a syndicate organized to purchase the property of a corporation, and which is used to pay for such property, cannot be defeated for fraudulent overvaluation of the property purchased, if the parties making the representation were representatives of the syndicate, and not of the vendor corporation. *Id.*

11. The rights of the owner of a patent under laws of the United States are not infringed by a state statute applicable to the sale of patent rights requiring the words "peddler's note" to be written across the face of all notes executed for articles sold by a peddler or itinerant person. *Union Nat. Bank v. Brown* (Ky.) 508

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BOUNDARIES. See also WATERS, 7.

1. The title to lands described in a deed as bounded by a navigable river where the tide ebbs and flows ends at high-water mark. *Sage v. New York* (N. Y.) 606

2. Meadows, pastures, and marshes below high-water mark did not pass as appurtenant to the grant by Governor Nichols October 11, 1667, to the village of New Harlem, of lands bounded on one side by the Harlem river, together with all the soils, creeks, quarries, woods, meadows, pastures, marshes, waters, and other profits, commodities, emoluments, and hereditaments belonging to the lands "within the said bounds and limits set forth." *Sage v. New York* (N. Y.) 206

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BUILDING AND LOAN ASSOCIATIONS.

Notice of withdrawal before the appointment of a receiver of a building and savings association does not give priority to a shareholder of an insolvent association under by-laws providing for the payment of withdrawals "according to the priority of notice," but also providing that no more shall be paid in any month than 30 per cent of the cash receipts of the loan fund during that month, as these by-laws contemplate a going concern. *Rabbitt v. Wilcozen* (Iowa) 183

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BUILDINGS. See also MUNICIPAL CORPORATIONS, 4; DEDICATION; INJUNCTION, 1.

1. A restriction against the erection of buildings upon land dedicated as a park is not removed by the change of the use of the buildings abutting thereon from residence to business purposes. *Chicago v. Ward* (Ill.) 849

2. The submergence of lands dedicated as a public park with the express condition that no buildings shall be erected thereon, as the result of heavy storms, and the subsequent reclamation by the city of such land, does not destroy the restrictions. *Id.*

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Buildings; as nuisances, see NUISANCES.

BY-LAWS. See CORPORATIONS, 8, 9.

CARRIERS. See also MASTER AND SERVANT, 1; TRIAL, 13.

Of passengers.

1. A railroad employee engaged in working upon a bridge is a passenger while riding on a railroad train to his home after his day's work is done, where his contract entitles him to free transportation and he is not under any obligation to ride, or engaged in any service for the company while so riding. *McNulty v. Pennsylvania R. Co.* (Pa.) 376

2. The relation of carrier and passenger exists between a railroad company and a passenger on a train which is temporarily stopped by a burning tank of oil on the track, during which time passengers on the train are taken to a place some distance from the tank, while 38 L. R. A.

waiting for a train to receive them on the other side of the obstruction. *Conroy v. Chicago, St. P. M. & O. R. Co.* (Wis.) 419

3. A person taking passage on a railroad with a child in his charge of sufficient age to require payment of fare becomes liable for the payment of the child's fare, and upon refusal to pay the same both may be ejected from the train at the next station. *Lake Shore & M. S. R. Co. v. Orndorff* (Ohio) 140

4. In ejecting a person who has paid fare or presented a ticket, taken up, for failure to pay the fare of a child in his charge, the conductor must first return or offer to return the unused value of such ticket or fare over and above the fares of both for the distance already traveled; but if the ticket is such that a stop-over may be had thereon the conductor may tender a stop-over check instead of money. *Id.*

5. A railroad company cannot enforce a contract between a messenger and an express company, that the railroad company will not be held liable for accidental injuries to the messenger, of the making of which the railroad company has no knowledge. *Louisville, N. A. & O. R. Co. v. Keefer* (Ind.) 93

6. A contract by an express company authorized by a messenger in its employ, that, in consideration that the express company be permitted to do business on a railroad, the railroad company will be exempted from all liability for injuries to the messenger, is binding on the messenger, since the railroad company in making it acts, not as a public, but as a private, carrier. *Id.*

7. The lawfulness of the act of a passenger on an excursion boat in using his gun with a loaded shell will not excuse the owners of the boat from liability for an injury resulting in such passenger's negligence or lack of caution, provided his action is such as to excite apprehension in a reasonably prudent person. *West Memphis Packet Co. v. White* (Tenn.) 427

8. The owner of a steamboat is required to exercise the utmost vigilance and diligence in protecting its passengers from injuries by the negligent and careless use of a loaded gun exhibited by another passenger where under all the circumstances such owner or his officers and agents might reasonably expect or anticipate the injury. *Id.*

9. A railway company is required to exercise only ordinary care and prudence towards a passenger who is temporarily prevented from continuing his journey by a burning tank of oil on the track, while he is waiting for a train to come from the other side of the tank to receive him. *Conroy v. Chicago, St. P. M. & O. R. Co.* (Wis.) 419

10. A railroad company is not required to restrain by physical force a passenger on a railway train which is temporarily stopped by a burning tank of oil on the track, from unnecessarily exposing himself to danger from an explosion of the tank by approaching too close to it. *Id.*

11. A burning tank of oil on a railroad track, the flames from which ascend several feet into the air, is sufficient notice of the danger of an explosion to a passenger on a train

temporarily stopped by the fire, to render unnecessary any caution to him from the company not to approach too near the tank. *Id.*

12. A passenger on a railway train which is stopped for some time by tanks of burning oil upon the track, who from motives of curiosity and pleasure leaves a place fixed as a temporary station at a safe distance from the burning oil, and goes within 85 feet of the same and remains there for several minutes, is guilty of such contributory negligence as will prevent recovery for injuries caused by an explosion of a tank by which burning oil is thrown upon him. *Id.*

13. Jumping from an electric car moving at the rate of from 4 to 5 miles an hour is contributory negligence as matter of law. *Jagger v. People's Street R. Co. (Pa.)* 786

Of goods.

14. Exemptions in favor of a common carrier in bills of lading are to be strictly construed against the carrier, and any doubt or ambiguity therein is to be resolved in favor of the shipper. *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. (C. C. App. 6th C.)* 271

15. General and comprehensive words of exemption following an enumeration of particular dangers or risks in a bill of lading are to be construed to embrace only particular occurrences *ejusdem generis* with those enumerated, unless there is a clear intent to the contrary. *Id.*

16. Those devices and parts of a car which have no physical operation and connection with the locomotive, except by means of the cars of the train and the couplers between them, such as the axles of the car, are not within the term "machinery" in the phrase "accidents to boilers and machinery," as used in the exemption clause in a bill of lading, evidently intended to apply either to water or rail transportation. *Id.*

17. A railroad company is not liable for delivery to the consignee, to whom goods are billed, without notice to it that the bill of lading has been forwarded to a bank with a draft attached for collection, although the bill of lading is not produced. *Nebraska Meat Mills v. St. Louis N. W. R. Co. (Ark.)* 358

18. The right of a carrier to deliver to the consignee is not affected by the Arkansas statute declaring bills of lading negotiable, and that any person to whom the same are transferred shall be held the owner so far as to give validity to any pledge, lien, or transfer upon the faith thereof, and that no property specified therein shall be delivered except on the surrender and cancelation of the bill of lading,—except in cases where the bill of lading has been transferred. *Id.*

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CHARITIES. See also CORPORATIONS, 2.

1. An institution which is educational to some extent may be also a charitable institution within the meaning and intent of the Constitution and statutes respecting charitable institutions. *People, New York Inst. for the Blind, v. Fitch (N. Y.)* 591

2. The fact that an institution is subject to the visitation of the superintendent of public instruction is not conclusive against regarding it as a charitable institution subject to the visitation of a board of charities. *Id.*

3. An incorporated institution for the blind, which has been supported and its property purchased and maintained mainly by appropriations from the state, although it may be only an educational institution so far as it educates paying pupils, is to be regarded, so far as it clothes, educates, and maintains indigent pupils at public expense or by donations from individuals, as a charitable institution subject to the visitation and the rules of the board of charities, under N. Y. Laws 1895, chap. 771, and also to the restriction under N. Y. Const. art. 8, § 14, against payments by municipalities for any inmate not received and retained pursuant to rules established by the state board of charities. *Id.*

4. A devise of property to be used in aiding the cause of home and foreign missions, made to an incorporated church which is authorized to acquire property for such purposes, is not a devise in trust for which there must be an ascertained beneficiary, but is an

absolute gift to the church. *Lans v. Eaton* (Minn.) 669

5. Incorporation within a reasonable time may make a local branch of the Salvation Army competent to become the beneficiary of a charitable trust by virtue of Minn. Gen. Stat. § 8048, providing that on the incorporation of a religious society any estate devised in trust for it shall vest in the corporation as fully as if it had been legally incorporated from the date of its religious organization. *Id.*

6. An unincorporated, voluntary association constituting a branch of the Salvation Army cannot be the beneficiary of a trust under Minn. Gen. Stat. 1894, chap. 43, requiring the beneficiary to be certain, or capable of being rendered certain. *Id.*

7. A bequest in trust to purchase a lot and build a chapel to be used forever for public worship under the auspices of the Roman Catholic church is for a public charitable use. *Teale v. Bishop of Derry* (Mass.) 629

8. The failure of the purpose of the testatrix in a bequest for the building of a chapel in her native place, which results because the people there are diminishing in number and are too poor to support the chapel, will not justify a diversion of the fund by the *cy pres* doctrine to the repair of a neighboring parish church, or for a parish house, or the enlargement of a parish graveyard or otherwise for the general benefit of the parish, but the bequest must be held to have failed. *Id.*

NOTES AND BRIEFS.

See also CORPORATIONS.

Charities; what institutions are charitable. 591

Bequest for; what are; doctrine of *cy pres*. 629

Distinction between trust and absolute gift for; gift to church or religious organization. 670

CHECKS.

Delay in presenting a check for payment does not release the drawer unless some loss has resulted to him from the delay. *Merritt v. Gate City Nat. Bank* (Ga.) 749

CLERKS. See also OFFICERS; VOTERS AND ELECTIONS, 2.

NOTES AND BRIEFS.

Clerks; right of women to be. 218

COAL. See ADVERSE POSSESSION.

COMMERCE.

The purchase and solicitation of wool by an agent of a foreign corporation, for shipment to other states wherein the principal business of the corporation is done, is a business directly pertaining to interstate commerce, which the foreign corporation is entitled to engage in without complying with the state statute imposing conditions upon its right to do business in the state. *Macnaughtan v. McGirl* (Mont.) 867

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NOTES AND BRIEFS.

Commerce; unlawful burden on. 673

COMMISSIONER.

NOTES AND BRIEFS.

Commissioner; of sewers, right of woman to be. 211

COMMON LAW.

The common law is simply the "right reason of the thing" in matters as to which there is no statutory enactment. *Wilson v. Leury* (N. C.) 240

COMMON SCHOOLS. See SCHOOLS.

COMMUNITY. See EVIDENCE, 7.

COMPULSORY SERVICE.

1. An action for damages cannot be maintained against members of an undertakers' association for refusal to furnish materials or render services at a funeral for one who has refused or failed to pay for such services previously rendered by some member of the association. *Brewster v. O. Miller's Sons* (Ky.) 503

2. One has the right to decline to enter into a business undertaking with another person, and any number of persons can enter into an agreement by which they can decline to assume business relations with or enter into any contract with one or more persons. *Id.*

CONFLICT OF LAWS. See also RECEIVERS, 4.

1. A statute providing that an association or partnership can be sued in its company name has no extraterritorial force or effect. *Edwards v. Warren Linoline & G.* (Mass.) 791

2. A transfer of stock in a national bank of another state, made in Maryland to a married woman, who is competent by the law of that state to be a stockholder, is valid irrespective of the law of the state in which the bank is situated. *Kerr v. Urie* (Md.) 119

3. A marriage contracted in another state by a resident of Oregon, who has been divorced in that state by a decree from which there is yet time to take an appeal, is absolutely void under 1 Hill's (Or.) Ann. Laws, § 503, providing that a divorce decree shall terminate the marriage "except that neither party shall be capable of contracting marriage with a third person" until the expiration of the period allowed for an appeal. *McLennan v. McLennan* (Or.) 863

4. That a contract for materials to be delivered "at and for" a building in New York was made and payable in another state does not prevent the materialman from obtaining a lien therefor, under N. Y. Laws 1885, chap. 342, providing that "any person" may have a lien who has furnished any materials which have been used in the erection of any building within the state. *Campbell v. Coon* (N. Y.) 410

Action for negligence.

5. The laws of Mexico defining negligence, and the civil rights resulting therefrom, are not too vague and indefinite to be administered by courts in this country. *Every v. Mexican C. R. Co.* (C. C. App. 5th C.) 387

6. Dissimilarity between the law of Mexico, where the cause of action for negligence arose, and the law of Texas, in which an action is brought therefor, will not preclude the maintenance of the action, where the dissimilarity relates chiefly to matters of procedure, and does not involve any conflict with the settled public policy of Texas. *Id.*

7. The provision of the law of Mexico giving extraordinary indemnity for negligence considering the social position of the party injured does not constitute any reason why a court in this country should not entertain an action for negligence occurring in Mexico, when it is not asked to give such extraordinary indemnity. *Id.*

8. The fact that negligence may constitute a crime in Mexico does not make a civil action in this country for the negligence amount to the enforcement of a penal law of Mexico, when the civil liability does not depend, under Mexican law, upon the criminal prosecution. *Id.*

9. The requirement of an endeavor to procure an agreement and a compromise, which is found in the Mexican Code, art. 313, relates merely to procedure, and failure to comply therewith does not prevent an action in this country for negligence occurring in Mexico. *Id.*

10. The right, under the law of Mexico, to recover additional damages in a new suit, when they accrue after the first judgment for injuries caused by negligence, is a matter of remedy only, and does not prevent a court in the United States from enforcing a liability for negligence occurring in Mexico. *Id.*

NOTES AND BRIEFS.

See also **LIENS.**

Conflict of laws; as to actions for negligence. 392

Law of comity. 791

CONSPIRACY. See also **COMPULSORY SERVICE, 2; CORPORATIONS, 3.**

1. It is not unlawful for the undertakers of a community to associate themselves together, and agree to refuse to render service in their business to one who has refused or failed to pay a bill due to some member of the association for similar services previously rendered. *Brewster v. C. Miller's Sons* (Ky.) 505

2. The display of force by strikers, though none is actually used, is intimidation and as much unlawful as violence itself. *O'Neil v. Behanna* (Pa.) 382

3. All who participate personally in the unlawful conduct of strikers, or in such combination as makes them liable for the acts of the others done in pursuance of the common purpose, are liable for the damages done in the execution of such purpose. *Id.*

4. Strikers who induce newly employed men to break their contracts by meeting them

and following them in considerable numbers as the new men enter the town, and calling them "scabs" and "blacklegs," sometimes surrounding them and endeavoring to pull them away, —are liable to the employer for any damages he may suffer in consequence. *Id.*

NOTES AND BRIEFS.

Conspiracy; against trader. 505

CONSTITUTIONAL LAW. See also **MUNICIPAL CORPORATIONS, 5.**

1. The New York Constitution of 1777, being adopted before the Constitution of the United States had been adopted, is a result of all the legislative power that the people of the state could exert untrammelled by any higher law. *Sage v. New York* (N. Y.) 606

2. Debates of a constitutional convention, although they may, for some purposes, but in a limited degree, be consulted in interpreting a doubtful phrase or provision of the Constitution, are as a rule deemed an unsafe guide. *Rasmussen v. Baker* (Wyo.) 773

3. The act of Congress admitting Utah as a state by accepting and ratifying the state Constitution invested all its provisions with all authority conferred by any act of Congress, even if the power given to provide for the transfer of causes pending in the territorial courts to the state and Federal courts was an invalid delegation of the power of Congress. *McCornick v. Western U. Teleg. Co.* (C. C. App. 8th C.) 684

Delegation of power.

4. An attempt to confer judicial authority on the county recorder in violation of Ohio Const. art. 4, § 1, is made by Ohio act April 27, 1896, for the registration of land titles, by giving him authority to determine the fact that a mortgage has been discharged or that a lien has become inoperative, and to enter those facts on the records, and also to correct memorials made or issued by mistake if the rights of bona fide purchasers or lien holders have not intervened. *State, Monnett, v. Guilbert* (Ohio) 519

5. Legislative powers are not delegated to the judiciary by Minn. Gen. Stat. 1894, § 5979, providing that the court or judge allowing a writ of mandamus shall direct the manner of serving the same. *State, Railroad & W. Co., v. Adams Exp. Co.* (Minn.) 225

6. The provision of the Minnesota Constitution forbidding the delegation of the legislative powers to the judiciary is not violated by the provision of Minn. Gen. Stat. 1894, § 399, that the courts may direct the manner in which notice may be given to a common carrier of a hearing of an accusation that it refuses or neglects to obey any lawful order of the railroad and warehouse commission. *Id.*

7. The power given by the act of Congress to the constitutional convention of Utah to provide for the transfer of actions pending in the territorial courts to the state or Federal courts is not an invalid delegation of the power of Congress, as Congress has power to create local legislative bodies and invest them with legislative powers. *McCornick v. Western U. Teleg. Co.* (C. C. App. 8th C.) 684

Equality.

8. A statute forbidding the citizens of any other county from fishing in the waters of two specified counties without a license, without anything to forbid the citizens of those counties from fishing in other counties without a license, violates the constitutional guaranty of the equal protection of the laws. *State v. Higgins* (S. C.) 561

9. The exemption from a statute to license and regulate hawkers and peddlers, manufacturers, mechanics, nurserymen, farmers, and butchers, who sell their own manufactures or the products of their own nurseries or farms, makes an arbitrary distinction between the peddling by those persons and by a purchaser from them, and is therefore in violation of Minn. Const. art. 4, §§ 33, 34, prohibiting partial class legislation. *State, Luria, v. Wagener* (Minn.) 677

10. An insurance company is not denied the equal protection of the laws by a statute which in effect limits the liability of a railroad company for fires to the difference between the amount of loss and the amount of insurance on the property destroyed, thus depriving the insurer of the benefit of subrogation. *Leavitt v. Canadian P. R. Co.* (Me.) 152

Due process of law.

11. A statute authorizing administration upon the estate of a person who has left home and not been heard from for seven years is unconstitutional, since the administration upon the estate of a living person deprives him of property contrary to the law of the land or without due process of law. *Carr v. Brown* (R. I.) 294

12. The remedy by due course of law guaranteed by § 16 of the Ohio Bill of Rights extends to all the adversary rights of persons in property, and requires, before judicially determining such right, that jurisdiction of the person shall be obtained by process issued and served, although substituted or constructive service may be provided by the legislature when actual service is impracticable. *State, Monnett, v. Guilbert* (Ohio) 519

13. The determination against adverse claimants of real estate under Ohio act April 27, 1896, for the registration of land titles, made without any issuance and service of summons upon them, and without any notice except by one published in a newspaper "To whom it may concern," is in violation of the constitutional guaranty of due course of law. *Id.*

14. The refusal by a judge of the superior court at the time when judgment is to be entered or after it has been entered in a capital case, to allow or order a judicial investigation concerning the mental condition of the accused, either with or without the aid of a jury, is not a denial of due process of law, as the provisions of Ga. Pen. Code, § 1047, relating to inquisitions in such matters, are sufficiently comprehensive to cover all cases of alleged insanity beginning after the rendition of the verdict. *Baughn v. State* (Ga.) 577

15. The provision of Minn. Gen. Laws 1894, § 399, authorizing the courts to direct the manner in which service shall be made on 88 L. R. A.

the agents or servants of a common carrier of a notice of a hearing of an accusation that it refuses or neglects to obey a lawful order of the railroad and warehouse commission, is not objectionable as an attempt to obtain jurisdiction over the carrier without due process of law. *State, Railroad & W. Com., v. Adams Exp. Co.* (Minn.) 225

16. Notice to the owner or occupant of premises before the passage of an ordinance by a board of aldermen, under authority of statute, requiring a privy vault to be filled up and destroyed, is not necessary to constitute due process of law, since his day in court can be had when sued for a penalty under the ordinance, or by bringing an action for damages if the authorities fill up and destroy the vault. *Harrington v. Providence* (R. I.) 305

Police regulation.

17. A statute requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignees fail to call for or receive within twenty days after notice of its arrival (Minn. Gen. Laws 1895, chap. 149, § 11), is unconstitutional and void, not being a lawful exercise of the police power of the state. *State v. Chicago, M. & St. P. E. Co.* (Minn.) 672

18. A city ordinance providing that no persons shall establish or conduct any steam shoddy machine or steam carpet-beating machine within 100 feet of any church, school-house, or dwelling-house, is valid under Cal. Const. art. 11, § 11, providing that any city may make or enforce within its limits all such "police regulations as are not in conflict with general laws." *Ex parte Lacey* (Cal.) 640

NOTES AND BRIEFS.

Constitutional law; rule of construction.	774
Due process of law; what constitutes.	519
Privileges and immunities of citizens; due process of law; equal protection of laws; police power.	673
Equal protection of laws.	675
Equal privileges.	677

CONTEMPT.

1. Newspaper articles charging a judge who is a candidate for re-election with corruption and partiality in actions already past and ended, but not referring to any pending litigation, cannot be punished as a criminal contempt, although they are distributed to officers of the court and to persons summoned as jurors therein, as well as generally circulated. *State, Ashbaugh, v. Eau Claire Cir. Ct.* (Wis.) 554

2. An affidavit alleging the truth of newspaper statements filed in response to an order to show cause why the affiant should not be punished for a contempt because of such publication, cannot be itself held to constitute a contempt when the original publication did not. *Id.*

3. The obligation of a wife to pay money for the support of her husband under an order of court in a case within Cal. Civ. Code, § 176,

is not a debt within the provisions of the Constitution against imprisonment for debt. *Livingston v. Los Angeles County Super. Ct.* (Cal.) 175

NOTES AND BRIEFS.

Contempt; by newspaper publication; power to punish; affidavit justifying. 554

CONTINUANCE AND ADJOURNMENT.

1. An application for the continuance of a criminal case for the absence of witnesses, which complies strictly with all the requirements of Ga. Pen. Code, § 962, should be granted or the trial postponed until the attendance of such witnesses can be had, where it appears that their evidence is material on the controlling issue in the case, and also that defendant cannot as fully and satisfactorily make such proof by any other witnesses. *Ryder v. State* (Ga.) 721

2. A continuance of a trial for murder, in which the defense of insanity is set up, should be granted for the absence of witnesses by whom defendant expects to prove his insanity, where they have been acquainted with him all his life, and one of them is a physician who is familiar with the nature of the disease which is claimed to have caused the insanity; and others are defendant's brothers, although there are other witnesses, including near relatives, by whom many of the facts could be proved, and although the absent witnesses had not actually seen defendant for some time before the homicide. *Id.*

CONTRACTS. See also DAMAGES, 1, 2; INNKEEPERS; MORTGAGE, 4.

Validity.

1. A contract of a foreign corporation, if not contrary to public policy, is not invalid because the corporation has not complied with R. I. Gen. Laws, chap. 253, §§ 36-41, requiring it to appoint a resident of the state as its attorney but not declaring that such contract shall be void, while another statute expressly provides that in case of a foreign insurance company the contract shall be valid. *Garratt Ford Co. v. Vermont Mfg. Co.* (R. I.) 545

2. The illegality of a transfer of stock to the president of a corporation for the purpose of having it used to corrupt government officials for the benefit of the corporation will not prevent the owner from recovering the stock by action, if it has not been used for the illegal purpose, but has been taken by the transferee for his own use. *Wassermann v. Sloss* (Cal.) 176

3. An abandonment of effort to obtain a codicil to a will cannot constitute a valuable consideration for the assignment of an expected interest in the estate, as it is against public policy to recognize such importunity as the legitimate basis of a contract right. *Re Lennig's Estate* (Pa.) 878

4. Public policy does not require the avoidance of a contract by an employee not to disclose secrets which must necessarily be imparted to him by his employer to enable him

to do his work. *O. & W. Thum Co. v. Tloczynski* (Mich.) 200

5. Insurance of a carrier of passengers against liability for injuries to them is not contrary to public policy. *Boston & A. R. Co. v. Mercantile Trust & D. Co.* (Md.) 87

6. A contract by a railroad employee which gives him his election, after an injury, to take the benefits of a relief fund to which he as well as the railroad company has contributed, or to sue for damages in a court of law, and providing that his acceptance of such benefits will release the employer from liability, —is not contrary to public policy. *Eckman v. Chicago, B. & Q. R. Co.* (Ill.) 750

Performance; breach.

7. An architect's certificate that a building has been actually completed, provided for in the building contract, need not be obtained by one who furnished materials to the contractor, where the latter abandons the work and the owner finishes the same in accordance with a provision of the contract. *Campbell v. Coon* (N. Y.) 410

8. The repudiation of a contract before the time for performance arrives does not constitute a breach thereof, but the only effect is to dispense with an offer by the other party to perform, if such repudiation is not withdrawn before the stipulated time for performance. *Stanford v. Magill* (N. D.) 760

9. The mere making of a second executory contract to sell property which the vendor had already agreed to sell is not of itself a breach of the prior agreement, as it does not incapacitate him from carrying it out. *Id.*

10. The vendor in a contract to sell property of a certain description, no particular articles being agreed upon, can, before the day of delivery, after an *ex parte* selection of the property which he intends to deliver, sell that property to another without breach of his agreement, as the law requires only that he deliver property of the prescribed description when delivery is due. *Id.*

11. A party having an option to deliver property under a contract at any time between certain dates, if he intends to treat the time of performance as having arrived and therefore to hold a repudiation of the agreement by the vendee before the last day of performance has arrived as a breach thereof, must give notice to the vendee of his exercise of his option for an earlier delivery; but he need not offer to perform, as that is waived by the vendee's refusal to perform. *Id.*

Impairing obligation.

12. The vested rights of owners abutting upon a public park dedicated with the restriction that no buildings shall be erected upon it, fixed by the acts of dedication, the acceptance of the city, and the acquiescence of the public and abutting owners, cannot be changed by the legislature granting the city the right to convey such land for railroad purposes, as such action would be an unconstitutional impairment of such rights. *Chicago v. Ward* (Ill.) 849

13. The obligation of a contract of fire insurance made at a time when a railroad company was by statute liable for fires communi-

cated by its engines is not impaired by a subsequent amendment of the statute restricting the liability of the railroad company in effect to the difference between the loss and the amount of insurance on the property, as the parties to that contract cannot limit the right of the legislature to change the statutory liability. *Leavitt v. Canadian P. R. Co. (Me.)* 152

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COPY. See DEFINITIONS.

CORPORATIONS. See also **BANKS**, 1; **BENEVOLENT SOCIETIES**; **COMMERCE**; **CONFLICT OF LAWS**, 2; **CONTRACTS**, 1, 2; **COURTS**, 6, 9-11; **EVIDENCE**, 8; **JUDGMENT**, 4; **PLEADING**, 4; **RECEIVERS**; **STATUTES**, 6; **WRIT AND PROCESS**, 8.

1. A water company entering upon the business of furnishing a public water supply under a constitution giving a tribunal the right to fix water rates is bound to submit to the conditions thereby imposed. *San Diego Water Co. v. San Diego (Cal.)* 460

2. A bequest to an incorporated charitable institution, of property in excess of the amount which such corporations are allowed by general statute to take and hold, if it is not prohibited by the statute of wills or by the charter of the corporation or by the law which authorized its organization, and there is no penalty for taking in excess of the limitation, is not void, but merely voidable, and can be avoided by the state alone. *Farrington v. Putnam (Me.)* 389

3. The private rights or interests of a dealer in plumbers' supplies are injured or put in hazard by proceedings of an incorporated plumbers' supply association which is not engaged in the trade and with which he has no dealings nor any relation by which its legitimate interests are affected by the question whether he shall have credit in the market, when it officiously and without right assumes to notify sellers of such goods that he has not paid his accounts, and to debar a considerable number of dealers from selling to him upon credit. *Hartnett v. Plumbers' Supply Assn. (Mass.)* 194

4. Proceedings to compel persons to pay demands of members of a plumbers' association by threatening to expose their alleged delinquencies and inform certain dealers that they owed overdue accounts, and thereby prevent them from obtaining credit in the business which they are carrying on, are not germane to the purpose declared by a plumbers' supply association "of promoting pleasant relations among its members," or "of establishing and maintaining a place for social meetings," or of "discussing, arbitrating, and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business." *Id.*

Stock and stockholders.

5. A contract to offer stock to the corporation at the lowest price at which the holder is willing to sell, before offering it to any other purchaser, is not binding in favor of the corporation when it was made by proposed stockholders before the corporation was in existence as a legal entity. *Ireland v. Globe Milling & R. Co. (R. I.)* 299

6. A corporation cannot enforce a contract between proposed incorporators to the effect that they will not transfer their stock without giving the option of purchase to the corporation; but the remedy, if any, for breach of the contract, would be a personal one against the offending stockholder. *Id.*

7. The mere issue of certificates of stock by a corporation does not amount to a ratification by it of a contract made before it came into existence between the proposed incorporators to the effect that they would not transfer their shares without giving the company an option to purchase them. *Id.*

8. A resolution of the members of a corporation for the increase of its capital stock is a sufficient by-law for that purpose. *Peck v. Elliott (C. C. App. 6th C.)* 616

9. An increase of the capital of a corporation by an amendment of a by-law is valid when by the constitution of the corporation it is given power to fix the amount of capital by by-law. *Id.*

10. The rule against an implied power of a corporation to increase the amount of its capital when that is definitely fixed by the charter or statutory articles of incorporation has no application where the power to determine upon the capital to be engaged is made one of the matters for internal regulation by by-law. *Id.*

11. A transfer of a patent right to a corporation in partial payment of a subscription to stock as a mere device for evading a condition that the stock must be taken at par, followed by a retransfer to the subscriber at a nominal consideration, is insufficient to relieve him from liability to pay for the stock at its par value. *Id.*

12. A mortgage by a corporation to secure money advanced to it in good faith cannot be reduced in favor of liens of subsequent creditors, because, at the time of, and as an inducement to, the advance, the mortgagees received stock of the corporation as a bonus. *Dummer v. Smedley (Mich.)* 490

13. Existing creditors of a corporation cannot impeach a transaction by which the corporate stock is increased and issued as a bonus to third persons to induce them to advance money to the corporation on mortgage security, so as to avoid the mortgage and treat the advance as a payment for stock. *Id.*

14. One who holds stock as the self-appointed attorney or trustee of an infant, without anything on the books of the corporation to show that the holder is not the actual and beneficial owner, is liable as a stockholder. *Kerr v. Urie (Md.)* 119

15. The failure of a corporation to pay a tax required on the increase of its capital stock

cannot be set up by a subscriber to such stock as a defense against his liability, when he has become president of the corporation by virtue of that stock alone. *Peck v. Elliott* (C. C. App. 6th C.) 618

16. A proceeding under the statute for an execution for unpaid subscriptions to corporate stock cannot be maintained after the appointment of a receiver for the purpose of collecting the assets of the corporation. *Rouse. H. & Co. v. Detroit Cycle Co.* (Mich.) 794

17. A receiver appointed in an action for the sequestration of the assets of an insolvent corporation, under the provisions of Minn. Gen. Stat. 1894, chap. 76, has no authority, except in cases where it is otherwise provided by statute, to enforce the individual liability of the stockholders for the debts of the corporation. *Minneapolis Baseball Co. v. City Bank* (Minn.) 415

Dissolution; disposition of property.

18. A court of equity cannot dissolve or wind up the affairs and sequester the property of a corporation without express statutory authority. *Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 122

19. The exercise by a private corporation of franchises or privileges not conferred by law may be a serious usurpation and encroachment which, when it injures or puts in hazard the private rights of any person, will justify the exercise by the court of the powers given by Mass. Pub. Stat. chap. 186, §§ 17-25, on an information in the nature of a quo warranto. *Hartnett v. Plumbers' Supply Assn.* (Mass.) 194

20. A conveyance in fee to a corporation which has a limited existence is not limited to the life of the corporation, and does not give the grantor a resulting trust which will take effect when the corporation ceases to exist. *Wilson v. Leary* (N. C.) 240

21. A person employed at a salary of \$100 per month by a mowing machine company to go from place to place and fix and set up machines and unpack and repack them when necessary, as well as to sell or solicit sales, is an employee within the meaning of N. Y. Laws 1885, chap. 876, giving a preference to claims of wages of "employees, operatives, and laborers" of corporations. *Palmer v. Van Santvoord* (N. Y.) 402

22. A preference of claims of clerks, servants, and employees of an insolvent corporation, does not extend to a trust fund devoted to a special purpose, as in case of a deposit for the benefit of policy holders of an insurance company. *Boston & A. R. Co. v. Mercantile Trust & D. Co.* (Md.) 97

23. An insurance adjuster, or a person rendering services of a higher degree than a clerk, is not included among the "clerks, servants, and employees" of an insurance company, to whom the statutes give a preference in distribution of the company's assets when it is insolvent. *Id.*

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Foreign; right to do business. 869

Power of equity over foreign company. 639

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CORPSE.

An action against a hospital for an autopsy performed upon the dead body of a child without the consent of the father, who was the natural guardian, and who intrusted the child to the hospital for treatment, does not fail on the ground that there is no right of property in a dead body. *Burney v. Children's Hospital* (Mass.) 413

NOTES AND BRIEFS.

Corpse; action for mutilation of. 418

COSTS AND FEES. See also INSURANCE, 81.

Attorney's fees cannot be allowed to unsuccessful proponents of a will in the contest proceedings, but any allowance therefor must be made out of the estate in the course of administration. *Clark v. Turner* (Neb.) 433

COTENANTS. See also ACCOUNT, 2; ESTOPPEL, 6.

It is waste in a tenant in common to take petroleum oil from the land for which he is liable to his cotenants to the extent of their right in the land. *Williamson v. Jones* (W. Va.) 694

COUNTIES.

The statutory provisions naming the time for trustees to convene in order to appoint a county superintendent are directory only, and the failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day. *Wampler v. State, Alexander* (Ind.) 829

COURTS. See also CONSTITUTIONAL LAW, 5, 6, 15; CONTEMPT, 1; CRIMINAL LAW, 2; STATUTES, 8.

1. A statute which attempts to deprive the governor of his constitutional power to appoint judges of an inferior court, by changing the

name of the court and requiring the judge to be elected, without changing its jurisdiction or functions, is void. *Johnson v. State* (N. J. Err. & App.) 373

2. When four of the five judges composing a court are declared by the Constitution to be a quorum, their agreement in a decision, the other being absent, makes the decision unanimous within the meaning of a statute requiring leave to appeal from unanimous decisions. *Harroun v. Brush Electric Light Co.* (N. Y.) 615

3. The question of international comity is controlled and decided by international law and custom, and the decisions of local courts thereon are not controlling in the courts of the United States. *Evey v. Mexican C. R. Co.* (C. C. App. 5th C.) 887

4. The fact that an action might be brought in Mexico for injuries received there by a railroad employee who lives in Texas, since the defendant owns and operates a railroad in Mexico, does not constitute a reason why he should not sue in Texas,—at least when the defendant railway company is incorporated in the United States and its road extends into Texas. *Id.*

5. A transitory action for a personal tort, accruing in Mexico, is within the jurisdiction of a circuit court of the United States, where one party is a citizen and resident of Texas and the other a citizen of Massachusetts. *Id.*

See also **CONFLICT OF LAWS.**

6. The fixing of rates by legislative power or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given is reviewable by the courts,—at least to the extent of ascertaining whether such rates will furnish some reward for the property used and services furnished. *San Diego Water Co. v. San Diego* (Cal.) 460

7. A review by the court of the action of the common council in fixing water rates is not limited to a determination of the question on the same evidence that was produced before the council, where the hearing before the council was conducted without notice to the water company or the rate payers, and without any right on their part to intervene effectually. *Id.*

8. An ordinance cannot be held invalid because it is unreasonable, when the power to pass ordinances on the subject is conferred by a constitutional statute. [Affirmed by divided court.] *Darlington v. Ward* (S. C.) 326

9. A court will not interfere with the internal management of a foreign corporation at the suit of a resident stockholder, by setting aside unwise and useless contracts which depreciate and destroy the value of the stock, although the visible, tangible property of the corporation, consisting of conduits in streets for electric lighting, is within the state. *Madden v. Penn Electric Light Co.* (Pa.) 638

10. The legal character of the liability of a stockholder does not prevent its enforcement by receivers in a proceeding which is wholly ancillary to the original receivership suit in equity. *Peck v. Elliott* (C. C. App. 6th C.) 616

11. A proceeding by receivers of a corpora-

tion to enforce the liability of a stockholder is ancillary to the receivership suit, and the jurisdiction thereof depends upon the jurisdiction in the original case. *Id.*

12. A decision which misconceives and wrongly declares the law, whether it is an ancient or a recent one, is subject to be overruled. *Wilson v. Leary* (N. C.) 240

NOTES AND BRIEFS.

See also **CONFLICT OF LAWS.**

Courts; vesting judicial power in recorder of land titles. 519

COVENANT. See **LANDLORD AND TENANT**, 3.

COVERTURE. See **HUSBAND AND WIFE**, **CREDIT.**

NOTES AND BRIEFS.

Illegal combination to prevent. 194

CRIMINAL LAW. See also **BANKS**, 2; **CONSTITUTIONAL LAW**, 14; **CONTINUANCE AND ADJOURNMENT**, 1.

1. The constitutional right to an accusation by information before being put on trial for a misdemeanor stands on the same ground, under N. H. Const. art. 87, as the right to indictment before being put on trial for felony. *State v. Gerry* (N. H.) 228

2. The attempt to give police courts concurrent jurisdiction with the supreme court in any criminal case where the fine does not exceed \$200 and the term of imprisonment does not exceed one year, although the offenses thus punishable were not within the jurisdiction of a justice of the peace in 1784, renders N. H. Laws 1895, chap. 117, unconstitutional, because it impairs the constitutional right of trial by jury, and of a presentment or indictment before prosecution in cases in which such rights existed when the state Constitution was adopted. *Id.*

NOTES AND BRIEFS.

Criminal law; insanity after the commission of a criminal act:—(I.) Effect; generally; (II.) question when and how raised; (III.) test of insanity which will prevent trial; (IV.) determination as to submission of issue: (a) doubts as to sanity; (b) evidence to establish doubt; (c) discretion of the court as to; (V.) disposition of the issue: (a) how tried; generally; (b) procedure on trial; (VI.) effect of the determination; (VII.) insanity after verdict; (VIII.) insanity after judgment; (IX.) appeals; (X.) effect of recovery. 577

CURTESY.

An estate by curtesy cannot attach to a mere life estate. *Bigley v. Watson* (Tenn.) 679

DAMAGES. See also **FRIGHT.**

1. An abortive attempt to sell property as prescribed by N. D. Rev. Code, § 4833, in order to fix the amount of liability of a vendee who has broken his contract, will not preclude the recovery of the damages prescribed by § 4988, subd. 2, and § 5009. *Stanford v. Magill* (N. D.) 766

3. The measure of damages for a vendee's breach of an executory contract of purchase, when the property has not been resold as prescribed by N. D. Rev. Code, § 4888, is, under § 4988, subd. 2, the excess, if any, of the amount due from the buyer under the contract over the value to the seller, together with the excess, if any, of the expenses of marketing the property over those which would have been incurred in delivering it to the purchaser; while under § 5009 the value to the seller is deemed to be the price which he could have obtained in the market nearest the place where it should have been accepted by the buyer, and at such time after the breach as would have sufficed, with reasonable diligence, for the seller to effect a resale. *Id.*

3. A verdict for \$3,500 for an injury to a laborer who is shot in the finger and through his thumb, and whose right arm is perforated with shot from the shoulder to his hand, many of which are never extracted, and whose right leg also receives several shot by which his capacity for lifting is permanently affected, is not excessive. *West Memphis Packet Co. v. White* (Tenn.) 487

4. A mortgagor may elect to recover full damages on account of the unlawful sale of the land under a power of sale in the mortgage when there was no default, and thus ratify the title of a purchaser who has bought the land for value in good faith, although he might, instead, repudiate the sale and redeem the premises. *Rogers v. Barnes* (Mass.) 145

DEAD ANIMALS.

NOTES AND BRIEFS.

Municipal regulation as to nuisance of. 830

DEBTOR AND CREDITOR. See also HUSBAND AND WIFE, 4-6.

NOTES AND BRIEFS.

Debtor and creditor; gift to wife of husband's earnings. 190

DEDICATION.

Leaving land unsubdivided upon a plat with an express dedication as public ground not to be occupied by buildings of any description, or marking it as a street and holding it out as open ground, no buildings, to purchasers, is equivalent to a dedication for public use, and creates a restriction against the erection of buildings thereon. *Chicago v. Ward* (Ill.) 849

DEEDS. See also WATERS, 1.

The delivery of a deed to his natural child by the grantor to the deputy clerk of the court, with instructions to have it proved by the subscribing witness before the clerk who was then absent from the office, and to have it duly registered, is complete and passes title, and cannot be defeated by the grantor's subsequently changing his mind and recalling the deed and destroying it before it had been proved, although the grantee knew nothing of the deed or of its recall. *Robbins v. Rascoe* (N. C.) 288

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DEFINITIONS. See also CORPORATIONS, 21.

A copy of an instrument is a reproduction or imitation of it, and a translation is not a copy. *Rasmussen v. Baker* (Wyo.) 778

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 5-7.

DEPUTY.

NOTES AND BRIEFS.

Right of woman to be. 310

DISEASE.

NOTES AND BRIEFS.

Municipal regulation of, as nuisance. 321

DIVORCE. See CONFLICT OF LAWS, 3.

DOMICIL. See also INFANTS, 1.

NOTES AND BRIEFS.

Domicil; of infant. 472

DRAINS AND SEWERS.

A riparian owner has no right to have the 'sewage of a city turned into the stream above his mill, instead of being diverted elsewhere, although from one third to one half of the stream has been taken by the city without right and has entered the sewerage system; but the disposal of the sewage is under the control of the city, and the remedy of the riparian owner for wrongfully taking the water is by action for damages or by injunction. *Fisk v. Hartford* (Conn.) 474

NOTES AND BRIEFS.

Drains; municipal regulation of, as nuisances. 819

DUE PROCESS. See CONSTITUTIONAL LAW, 11-16.

DUMMY RAILWAY. See NEGLIGENCE, 6; PLEADING, 3.

DUTIES.

NOTES AND BRIEFS.

State imposts on imports. 678

EASEMENTS.

1. The rightful use for mill purposes of water from a great public pond belonging to the state has no element of adverseness in it, and can never ripen into a prescriptive title. *Auburn v. Union Water Power Co.* (Me.) 188

2. The right to use an elevator for hoisting goods from a basement room up to the sidewalk, or lowering them from the sidewalk to the basement, cannot be implied as incidental or appurtenant to the estate in the basement room, where the elevator was not originally intended for use by occupants of that room, and suitable means of ingress and egress were furnished by steps and doors from the basement to the street, while there was at no time any access to the elevator directly from

the basement, and only through another room by a way which was not a common passage-way. *Cummings v. Perry* (Mass.) 149

NOTES AND BRIEFS.

Easement; by implication. 149

ELECTRICAL USES AND APPLIANCES. See also EVIDENCE, 11, 19.

NOTES AND BRIEFS.

Electricity; as a nuisance under municipal control. 306

ELECTRIC LIGHT.; See MUNICIPAL CORPORATIONS, 1, 2.

ELECTRIC RAILWAYS. See CARRIES 18, NOTES AND BRIEFS; RAILROADS, 18-16; STREET RAILWAYS, 5-7.

ELEVATORS. See also EASEMENTS, 2; NEGLIGENCE, 3.

A lessor who is not in possession or control of an elevator well in a leased building which the tenant has covenanted to keep in repair is not liable for the death of a person who falls therein while delivering goods to the tenant on the latter's invitation, although there was a dangerous defect consisting of a large opening between the elevator and the outer wall. *Henson v. Beckwith* (R. I.) 716

EMINENT DOMAIN. See also WATERS, 17.

1. An appropriation of water and a water plant to public use by the state, for which just compensation must be made, is in effect made by Cal. Const. art. 14, § 1, which subjects to the control of the state every public water supply. *San Diego Water Co. v. San Diego* (Cal.) 460

(Per Van Fleet, Henshaw, and McFarland, JJ.)

2. Assessments or charges for the creation of an assurance fund, under Ohio act April 27, 1896, made upon the issuance of certificates of title, when made on real estate in the hands of an assignee for creditors, constitute an unconstitutional taking of property without the consent of the owners and without compensation for uses that are not public, since the fund is for the benefit of persons whose lands have been wrongfully taken from them. *State, Monnett, v. Guilbert* (Ohio) 519

NOTES AND BRIEFS.

Eminent domain; railway as additional burden on street; injury to riparian owners. 608

Provision as to property damaged; compensation for vacating street. 285

EQUITY. See also HUSBAND AND WIFE, 2.

Compensation for damages may be allowed in equity to avoid multiplicity of suits, where remainderman, reversioner, or tenant in common sues to enjoin waste. *Williamson v. Jones* (W. Va.) 694

NOTES AND BRIEFS.

Equity; enforcement of constructive trust. 497

ESTOPPEL. See also CORPORATIONS, 15.

1. Consent of owners abutting upon a park dedicated under restrictions against the erection of buildings, to the erection of one or more buildings upon such park, will not estop them from bringing suit to enjoin the erection of other buildings. *Chicago v. Ward* (Ill.) 849

2. A city acting as trustee of a public park bounded upon a lake by filling in submerged land adjacent thereto as a part of the park is estopped from claiming title to the same free from the park trust, and from restrictions thereof against the erection of buildings upon the park. *Id.*

3. A city is not estopped from enforcing the forfeiture of a street-railway franchise for nonuser, merely because of its interference with the street railway company's rights in some respects, unless that was such as to justify or excuse the nonoperation of the road. *State, Kansas City, v. East Fifth Street R. Co.* (Mo.) 218

4. An infant of years of discretion by intentional fraudulent conduct will be barred, under the doctrine of estoppel *in pais*, from asserting title either to real or personal property against one misled thereby. *Williams v. Jones* (W. Va.) 694

5. A married woman cannot, even by fraudulent conduct, be barred under the principle of estoppel *in pais*, from asserting her title to land, though separate estate; but it is different as to her personal estate, under statutes giving her the right to contract as if single. *Id.*

6. The mere silence of cotenants when a tenant in common who is also the owner of a life estate in the land proceeds to take petroleum from the land will not estop them from asserting their title against him. *Id.*

7. A parol ratification by a mortgagor of a void sale under a power in the mortgage is sufficient to confirm the title of a bona fide purchaser who has bought the land in reliance upon the records, which showed an apparently good title. *Rogers v. Barnes* (Mass.) 144

NOTES AND BRIEFS.

Estoppel; doctrine of. 376

By laches. 694

EVIDENCE. See also WITNESSES.

Judicial notice.

1. Judicial knowledge is taken of the fact that at the elections in several years persons who could read the Constitution of the state only in a translation were allowed to vote. *Rasmussen v. Baker* (Wyo.) 773

2. The court knows judicially the proper biennial year in which the law requires trustees of each county in the state to meet and elect officers. *Wampler v. State, Alexander* (Ind.) 829

3. It is common knowledge that the condition in which privy vaults shall be kept, when allowed to exist, their construction, their locality, and the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation. *Harrington v. Providence* (R. I.) 305

4. The expenditure by a city of vast sums of money in perfecting its water and sewer systems is a matter of common knowledge.

Id.

Presumptions and burden of proof.

5. Defendant on trial for murder, who relies on the defense of insanity, must show affirmatively by a preponderance of the evidence introduced at the trial that he was insane when he committed the homicide. *Ryder v. State* (Ga.) 721

6. A wife who turns remittances from her husband into a business which she carries on in partnership with a third person, and out of which both families are supported, has the burden of proving, as against the husband's creditors, that their rights have not been injured thereby, and that an equivalent sum was properly and actually consumed by the husband's family. *Trefethen v. Lynam* (Me.) 190

7. The presumption is that a judgment obtained against a husband, and which is claimed to be a lien upon community property, was for a community debt, if there is no proof on the subject. *Goetsinger v. Rosenfeld* (Wash.) 257

8. It will be presumed that the law requiring payment of a tax on the increase of the capital stock of a corporation has been complied with, when the stock has been increased and there is no evidence that the tax has not been paid. *Peck v. Elliott* (C. C. App. 6th C.) 616

9. The burden is on the insurer to show materiality of a concealment by an applicant for life insurance, as well as fraudulent intent, for the purpose of avoiding the policy. *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 83

10. The burden of proving the truth of answers by an applicant for life insurance, which are by the contract made warranties, rests upon the one seeking to recover on the policy, although the burden may be lifted as to matters which only affect the right of action, by the presumption in favor of honesty and against fraud until something appears to rebut it. *Sweeney v. Metropolitan L. Ins. Co.* (R. I.) 297

11. The escape of electricity from a street railway, to the injury of a horse being driven on a public street, is presumptive proof of negligence in the operation of the railway. *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.) 637

Oral as to writing.

12. Oral evidence that a duplicate draft was given to accommodate the payee in order to enable him to collect the money from the drawee does not contradict or vary the terms of a written contract between the parties, because the contract was made by the original draft and the duplicate adds nothing thereto. *Bank of Gilby v. Farnsworth* (N. D.) 843

Opinions.

13. Testimony of nonexperts as to the appearance of footprints in the sand near the scene of a crime, and prints made in sand by boots worn by the prisoner, is admissible upon the question of his connection with the crime. *Johnson v. State* (N. J. Err. & App.) 873

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14. Testimony of expert witnesses as to the value of the property of a water company is not admissible, at least in favor of the company, as against the better evidence of its own books on the subject. *San Diego Water Co. v. San Diego* (Cal.) 460

15. An insurance expert will not be permitted to state whether or not a misrepresented or concealed fact in an application for a life policy would be regarded among insurance companies generally as material. *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 83

16. An insurance expert cannot be permitted to give his opinion that certain undisclosed facts increased the risk of a life policy, but he may state the usage of insurance companies as to rejecting risks when made aware of such facts. *Id.*

Res gestae.

17. Words spoken by a driver in the effort to control a runaway horse are admissible in evidence as a part of the *res gestae*, in an action for damages resulting from the frightening of the horse. *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.) 637

Relevancy.

18. Evidence legal for some purposes cannot be excluded because a jury may erroneously use it for another purpose. *Id.*

19. Evidence of previous experience of a driver in the case of electric shock to a horse is competent to account for his words and conduct in endeavoring to control a horse which had received a shock, but not to prove the fact of the shock. *Id.*

20. Evidence of the effect of air upon mail sacks thrown from running trains is inadmissible on the question of the effect upon a boy weighing 65 pounds standing near a passing train. *Graney v. St. Louis, I. M. & S. R. Co.* (Mo.) 633

21. Upon the question of intent in omitting existing policies from the answer to a question in an application as to the amount of other insurance, evidence of similar omissions by the applicant in answer to similar questions by other companies is relevant and competent. *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 83

Weight and sufficiency.

22. The contents of a lost will cannot be proved solely by the declarations of the testator. *Clark v. Turner* (Neb.) 433

23. Testimony as to the contents of a lost will by a witness who has never inspected it but has derived knowledge only from the testator's reading it to him is in effect only testimony as to the testator's declarations, and is not sufficient to prove the contents of the lost will. *Id.*

24. A variance between an averment that plaintiff was an employee of a railroad company, and proof that he was employed by its lessee and injured through the lessor's negligent construction of its road, is immaterial. *Lee v. Southern P. R. Co.* (Cal.) 71

25. It is the duty of the jury on a trial for murder in which the defense of insanity is set up, to consider the evidence on such defense

in connection with the other evidence in the case, although it does not appear from the preponderance of such evidence that defendant was insane at the time of the homicide, and the jury must then, in view of all the evidence, determine whether or not a reasonable doubt of defendant's guilt exists in their minds. *Ryder v. State* (Ga.) 721

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Judicial notice of negro population. 373
 Presumption from failure to offer. 695
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 Non-expert opinions as to sanity or insanity:—(I.) The general rule as to admissibility: (a) when admissible; (b) grounds of admissibility; (II.) exceptions: (a) states adopting different rules; (b) privilege of witness; (III.) what constitutes opinion evidence; (IV.) who may give; (V.) acquaintance necessary: (a) general rules; (b) application in particular cases; (1) in criminal proceedings; (2) in civil actions; (VI.) facts and reasons as a basis for an opinion: (a) general rules as to statement of; (b) effect of failure to state; (c) what facts may be stated; (d) what facts warrant an opinion; (VII.) scope: (a) confinement to conclusions from facts stated; (b) comparisons and conclusions from observation; (c) conclusions of law and fact; (d) as to particular statements: (1) in criminal proceedings; (2) in civil cases; (VIII.) time to which opinion relates; (IX.) cross-examination, rebuttal, and impeachment; (X.) weight: (a) generally; (b) as affected by character, capacity, and opportunity; (c) as affected by the facts and reasons stated; (d) as compared with expert and other evidence; (e) a question for the jury. 721

Res gesta.

To establish lost or destroyed wills:—(I.) Presumption as to revocation of missing will: (a) generally; (b) burden of proof; (c) rebutting presumption; (d) declarations; (e) where there is more than one will; (II.) proof of execution: (a) generally; (b) declarations; (c) witness; (III.) evidence of the contents; (a) sufficiency: (1) in general; (2) wills torn in pieces; (3) proof by copy; (4) number of witnesses; (5) proving part of the contents; (b) declarations; (c) loss after probating or filing for record. 433

EXCAVATION. See HIGHWAYS, 2; NEGLIGENCE, 4, 5.

EXECUTION. See CORPORATIONS, 16.

EXECUTORS AND ADMINISTRATORS. See also CONSTITUTIONAL LAW, 11.

NOTES AND BRIEFS.

Executors; administration on estate of living persons. 294

EXPECTANCY. See also CONTRACTS, 3.

A written agreement to transfer a share of a mere expectancy cannot be sustained as a gift and is not valid when it is entirely one-sided without any consideration, and is not made in settlement of any controversy or dispute. *Re Lennig's Estate* (Pa.) 578

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Expectancy; transfer of; consideration for. 373

EXPERTS. See EVIDENCE, NOTES AND BRIEFS.

EXPLOSION. See also CARRIERS, 10-12.

NOTES AND BRIEFS.

Explosives; municipal regulation of, as a nuisance. 306

EXPRESS COMPANIES. See CARRIERS, 5, 6.

EXTRADITION.

1. The governor of a state has the right to revoke his warrant for the surrender of an alleged fugitive from justice, at any time before he is taken out of the state. *State, Nisbett, v. Toole* (Minn.) 224

2. A person held for interstate extradition must be discharged on habeas corpus if it appears that the governor's warrant for his surrender has been revoked; and the ground of such revocation cannot be inquired into by the court. *Id.*

3. A fugitive from justice, who waives the necessity of requisition papers, and submits to an arrest upon a warrant and to be brought back into the state from which he has fled, is deemed to come back voluntarily into the jurisdiction, and may, on arrival there, be prosecuted for another offense than that described in the warrant and to respond to which he agreed to return. *State v. McNaspy* (Kan.) 756

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For what person extradited may be prosecuted. 756

FAIR. See HORSE RACE.

FAMILY EXPENSE. See HUSBAND AND WIFE, 3.

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Municipal regulation of nuisance of. 314

FISH COMMISSIONER.

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Right of woman to be. 211

FISHERIES. See also CONSTITUTIONAL LAW, 8; STATUTES, 7.

Fish are to be classed as game within the meaning of a constitutional provision against special laws to provide for the protection of game. *State v. Higgins* (S. C.) 561

FIXTURES.

Standing finish, consisting of window and door sashes, jambs, trimmings, wainscoting, baseboards, mantel piece without the tiling, and doors, including glass and hardware, when placed in a mortgaged building under a contract with the mortgagor by which the contractor retains title until he is paid, do not become a part of the real estate so as to defeat the contractor's right to remove them, when they are attached to the building by screws only and can be removed without injury to the building. *German Sav. & L. Soc. v. Weber* (Wash.) 267

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Fixtures; what are; right to remove. 268

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FORFEITURE. See BETTING; STREET RAILWAYS, 2, 3.

FORGERY. See also INDICTMENT, 2.

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Forgery; ratification of. 485

FRANCHISES. See also STREET RAILWAYS, 3.

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Franchise; public control of. 218

FRAUD. See also BILLS AND NOTES, 10.

NOTES AND BRIEFS.

Fraud; remedy of creditors against fraudulent transaction. 496

FRIGHT.

No recovery for fright, terror, alarm, anxiety, or distress of mind, even if these result in physical injury, can be had in an action for negligence where there are no physical injuries except those caused solely by the mental disturbance. *Spade v. Lynn & B. R. Co.* (Mass.) 512

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Fright; right of action for damage from. 512

GAME LAWS. See FISHERIES.

GIFT. See EXPECTANCY.

GOVERNOR. See COURTS, 1; EXTRADITION, 1.

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Right of women to serve on. 214

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HABEAS CORPUS. See also EXTRADITION, 2.

Only defects of a jurisdictional character, which render the proceedings not merely erroneous, but absolutely void, can be considered on habeas corpus. *State, Moriarity, v. McMahon* (Minn.) 675

HEALTH.

NOTES AND BRIEFS.

Municipal regulation of nuisances relating to. 811

Right of woman to be member of board of. 211

HIGHWAYS. See also PUBLIC IMPROVEMENTS, 2; WATERS, 8.

1. Taking a bond from a railroad company which is about to lay tracks in its streets, to save the city from the results of possible negligence of the company, will not increase the liability of the city in case of such negligence. *Terry v. Richmond* (Va.) 884

2. The caving of an excavation under a street, through the negligence of the railroad company making it, does not make a city liable for injuries to adjacent buildings, if the company had authority from the state to lay its tracks within the city, and the city had legally granted its permission. *Id.*

3. Permission to lay tracks under a street is within the power given to a city council to determine and designate the route and grade of any railroad to be laid in the city. *Id.*

4. Owners of property abutting on that portion of a street which is not vacated, but which is left in a cul de sac by vacating another part of the street, if the market value of the property is lessened thereby, are entitled to damages under Pa. act April 21, 1858, § 6, giving the owner of land injured by the vacation of a street the same right to damages as if it was injured by the opening or widening of a street. *Re Melon Street* (Pa.) 275

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Highways; liability of persons creating defects in. 834

Vacation of; remedy of landowner. 285

HOGS. See ANIMALS, NOTES AND BRIEFS; MUNICIPAL CORPORATIONS, 5.

HOMICIDE. See TRIAL, 15, 16.

HORSE RACE.

1. The owners of a horse not known to be vicious or dangerous are not liable to a bystander injured by his bolting the track during a race in which he was entered, while he was in charge of a good and expert rider. *Hallyburton v. Burke County Fair Assn.* (N. C.) 156

2. A fair association is not liable for injuries to one who is injured by the bolting of a horse from a track where a race is being held, if it has provided a suitable grand stand from which the race could be viewed, and has erected a railing composed of 2 x 4 timber nailed to posts 3½ or 4 feet high, between the

of warranty of answers in an application for insurance, no misrepresentation made in good faith shall defeat the policy unless it is material to the risk, the mere fact of warranty in form will not render every statement of fact material, but the question of materiality is subject to judicial investigation. *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 88

9. False answers in an application for insurance, knowingly made for the purpose of misleading the company, although not material, will avoid the policy under a statute providing that such answers innocently made shall have no effect on the policy. *Id.*

10. A representation is made in bad faith, within the meaning of a statute providing that it shall not avoid the policy unless made in bad faith, only when it is made with actual intent to mislead, not when it is made through forgetfulness and inadvertence. *Id.*

11. Materiality of a concealment of other insurance, upon a life risk, cannot be presumed from the fact that such concealment was made by the applicant in applications to other companies. *Id.*

12. Concealment by an applicant for life insurance, of embezzlements by him which are not inquired about by the insurer, will not, unless fraudulent, avoid the policy, although the fact of embezzlement may be material to the risk. *Id.*

13. A warranty in an application for life insurance, that no circumstance or information has been withheld touching applicant's past or present state of health and habits of life with which the insurer ought to be acquainted, does not cover a habit of embezzlement as to which the application contains no inquiry. *Id.*

14. A question as to occupation, in an application for life insurance, does not call for information as to the fact of the applicant being an habitual embezzler. *Id.*

15. Mere temporary ailments or affections, not of a serious or dangerous character, which pass away and are likely to be forgotten because they leave no trace in the constitution, are not to be regarded as diseases within the meaning of a life insurance policy. *Id.*

16. Omitting a part of the insurance carried, from an answer to a question in an application as to policies in other companies, with directions to state companies and amount, will render the answer false. *Id.*

17. An application for a policy of insurance in Minnesota, on property located in Washington, which is delivered by the company on a certain day in the latter state, will be held to have been before a transfer of the property, which took place two days before the policy was delivered, for the purpose of determining the truthfulness of a statement as to the title to the property. *Pioneer Sav. & L. Co. v. Providence Washington Ins. Co.* (Wash.) 897

18. A conveyance from the mortgagor to mortgagee prior to the date of the fire, which is not accepted until after that date, will not avoid a policy of insurance on the property for change of title, since the mortgagor may keep

his mortgage alive and prevent its merging in the title if it is to his interest to do so. *Id.*

19. Change of title by deed from mortgagor to mortgagee in the interval between the application by the mortgagee for insurance on the property and delivery of the policy will not render the insurance void for false description of the property as belonging to the mortgagor. If the facts of the existence of the mortgage and the pendency of foreclosure proceedings are stated in the application. *Id.*

20. A violation of the ordinary stipulation in a mortgage clause on an insurance policy, that the mortgagee will notify the insurer of a change of title to the property, is not a ground for forfeiture of the policy, but is merely a breach of contract for which an action for damages will lie if the insurer is injured. *Id.*

21. Additional insurance taken without the consent of the prior insurer increases the risk as matter of law, so that the provision of Ohio Rev. Stat. § 8643, as to the liability on a policy in the absence of any change increasing the risk without the consent of the insurers, does not apply. *Sun Fire Office v. Clark* (Ohio) 562

22. A mortgage, although in the form of an absolute deed, does not make any change in the title, interest, or possession of the property of the insured within the meaning of a provision in a policy that it shall be void in case of such change. *Id.*

Total disability.

23. Total disability within the meaning of an accident policy does not mean absolute physical inability to transact any kind of business pertaining to one's occupation, but it is sufficient if his injuries are such that common care and prudence require him to desist from transacting any such business in order to effect a cure. *Lobbill v. Laboring Men's Mut. Aid Assn.* (Minn.) 537

24. Ability to perform occasionally some trivial or unimportant act connected with some kind of business pertaining to one's occupation will not render his disability partial instead of total, provided that he is unable to transact substantially, to any material extent, any kind of business pertaining to his occupation. *Id.*

25. Inability to transact some kinds or branches of business pertaining to one's occupation as a merchant will not constitute total disability to transact "any and every kind of business pertaining to the occupation," if he is able to transact some other kinds or branches of business pertaining thereto. *Id.*

26. The fact that a merchant goes to his store several times a week when he is down town to see his physician and get shaved, and sits down for a brief time, but takes no part in the business except to hand out a small article to a customer and take change for it on one or two occasions, does not show that he is not wholly disabled from transacting any and every kind of business pertaining to his occupation. *Id.*

27. The fact that a man goes to his office every day for a short time without doing any work or business there does not show that he is not wholly disabled from prosecuting any

and every kind of business pertaining to his occupation, where his business consists in making loans on personal security. *Turner v. Fidelity & C. Co. (Mich.)* 529

Waiver of provision.

28. A letter from an insurer to a claimant asking that the matter be allowed to rest until the adjuster of the company can see the claimant or his attorney constitutes a waiver of a provision in the policy limiting the time for furnishing proofs of death and beginning an action on the policy. *Id.*

Delay of action.

29. Delaying action for insurance for more than one year and a half after a letter from the insurer asking that the matter may rest until an adjuster calls is not fatal, although nothing more is heard about the adjuster and the delay continued for nearly a year after the limitation of the time for action, which was waived by the letter, had expired. *Id.*

Subrogation.

30. The right of recovery against the person causing the loss, which is reserved to the insurer by a clause in a policy, depends upon the law existing at the time of the fire. *Leavitt v. Canadian P. R. Co. (Me.)* 152

Insolvency of insurer.

31. A special fund for the benefit of policyholders of an insolvent insurance company cannot be charged with any portion of the costs and commissions incurred in administering the general fund, which is totally distinct. *Boston & A. R. Co. v. Mercantile Trust & D. Co. (Md.)* 97

32. The importance of distributing assets of an insolvent insurance company at an early date prevents postponing the settlement to await the determination of every contingency on which its policy engagements are suspended; and the court may fix a reasonable time within which claims must be filed in order to participate, although this may result in a misfortune to those whose claims are cut off. *Id.*

33. Policy-holders of an insolvent insurance company have the right to participate with all other creditors in the general fund of the company's assets after they have exhausted a special fund which is held in trust for them alone. *Id.*

34. A surrender of a trust fund by a state treasurer under order of court, when he held it for the benefit of the policy-holders of an insurance company, does not affect their rights therein. *Id.*

35. A deposit with a state treasurer of securities as a guaranty for the payment of policies of an insurance company, whether made as a statutory requirement or voluntarily, and whether held by him in his official or in his individual capacity, creates a trust for the benefit of such policy-holders in case of the insolvency of the company, to the exclusion of other claims except a paramount claim for taxes. *Id.*

36. A loss or injury insured against, which takes place before the insolvency of the insurance company, but the amount of which is not ascertained or paid until after the insolvency,

entitles the policy-holder to prove for a sum equal to his loss or damage plus the return premium, if any. *Id.*

37. Losses which happen after the insolvency of an insurance company are not provable against the funds in the hands of a receiver of the company, although the value of destroyed policies may be proved. *Id.*

38. On the breach of the contract of an insurance policy by insolvency of the company the policy holder has a claim for the value of the destroyed policy, amounting to the unearned or return premium, against the assets of the company. *Id.*

Reinsurance.

39. A reinsurer may be required to pay the amount of the loss which it is liable for, directly to the insured or the party ultimately entitled to the money when the prior insurer which it has indemnified has become insolvent. *Hunt v. New Hampshire Fire Underwriters' Assn. (N. H.)* 514

40. The liability of a reinsurer is not lessened by the insolvency of an intermediate insurer which has become unable to pay the loss, but the reinsurer's liability is for the entire amount of the loss against which they agreed to indemnify the prior insurer. *Id.*

NOTES AND BRIEFS.

Is a benefit association an insurance company?—(I.) Where the question is as to "other insurance;" (II.) where the construction of the certificate is in question; (III.) where compliance with state insurance law is required before doing business; (IV.) where the question is in regard to jurisdiction; (V.) under statutes exempting benevolent societies; (VI.) where the question is not discussed; (VII.) some definitions; (VIII.) summary. 38

Insurable interest of assignee. 129

Warranties in application. 48

Estoppel of insurer by act of agent; insurable interest of mortgagee; materiality of representations; change of ownership. 897

Mortgage as affecting change of title or interest in insured property:—Insurable interests; alienation; assignment; title or ownership; change of interest; sale, alienation, conveyance, transfer, or change of title; sale or otherwise; alienation in whole or in part; alteration in ownership or termination of interest; specific provision against encumbrance; other conditions; mutual companies; absolute conveyance. 562

What constitutes total disability of insured:—(I.) Ability to do some small act; (II.) inability to do anything; (III.) ability to attend to part of the business; (IV.) ability to do work in other occupation; (V.) disability of particular members: (a) eyes; (b) hands; (c) feet; (VI.) lunacy; (VII.) sickness; (VIII.) old age; (IX.) death; (X.) "immediately" construed; (XI.) "per week" construed; (XII.) other matters; (XIII.) summary. 529

Liability of reinsurer. 514

Distribution of assets of insolvent insurance company:—(I.) Who is to distribute: (a) as between different territorial jurisdictions; (b) as between courts and officers; (II.) valuation and

adjustment of claims: (a) date when claims become fixed; (b) finding value of immature policies; (c) general rules; (d) presentation of claims; (III.) priorities: (a) in general; (b) among policy-holders; (c) set-off; (d) claims entitled to preference; (IV.) special funds: (a) in general; (b) reinsurance; (c) stockholder's liability; (V.) contract rights; (VI.) surplus assets. 97

INTEREST.

Interest cannot be allowed on a claim for taxes, or any other claim against an insolvent insurance company, when the failure to pay it was merely the result of insolvency. *Boston & A. R. Co. v. Mercantile Trust & D. Co. (Md.)* 97

INTERNATIONAL LAW. See also ACTION OR SUIT, 8; COURTS, 8.

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International law; as to action against foreign government or its officers; recognition of foreign power. 405

JOINT WILL. See WILLS.

JUDGES. See also COURTS, 1.

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Judges; right of women to be. 209

JUDGMENT. See also MORTGAGE, 2.

1. Judgment *non obstante veredicto* cannot be given for either party where the special verdict is inconsistent and contradictory, until the conflicting portions of it are set aside. *Conroy v. Chicago, St. P. M. & O. R. Co. (Wis.)* 419

2. The rule that a decree which is not confined to the matters presented in the pleadings is subject to avoidance does not apply to a consent decree when the court has jurisdiction of the parties and of the subject-matter. *Bigley v. Watson (Tenn.)* 679

3. The disability of coverture of a party to a consent decree who does not avoid it in her lifetime will not prevent the decree from being binding on those claiming under her after her death. *Id.*

4. A decree awarding a mandamus requiring a trial judge to take evidence and award an execution for unpaid subscriptions to the capital stock of a corporation, as required by statute, in a proceeding to which the stockholders are not parties, is not *res judicata* upon the question of the right to enforce payment of the subscriptions, so as to prevent the stockholders, after being made parties to the proceeding, from showing that a receiver has been appointed who is entitled to collect all the assets of the corporation. *Rouse, H. & Co. v. Detroit Cycle Co. (Mich.)* 794

5. A judgment is a lien from the first day of the term, superior to a mortgage made before the judgment was rendered, under Neb. Code Civ. Proc. § 477, declaring that the debtor's lands shall be bound for the satisfaction of a judgment, unless it was confessed, from the 88 L. R. A.

first day of the term at which it was rendered. *Norfolk State Bank v. Murphy (Neb.)* 243

NOTES AND BRIEFS.

Priority of judgment over conveyance made after beginning of term:—(I.) English rule; (II.) American comments on English rule; (III.) states in which the judgment relates back; (IV.) general American rule; (V.) judgment with stay of execution; (VI.) special cases. 243

JUDICIAL NOTICE. See EVIDENCE, 1-4.

JUDICIAL SALE. See also MORTGAGE, 7.

A purchaser at a judicial sale is conclusively held to have notice of all facts touching the rights of others in the property sold, if disclosed by the record of the case. *Williamson v. Jones (W. Va.)* 694

JURY. See also TRIAL, 1, 2.

The requirement of N. J. Rev. p. 526, that the sheriff shall file the jury list summoned for service with the county clerk, is directory merely; and failure to do so will not invalidate a trial unless it affirmatively appears that injury was done. *Johnson v. State (N. J. Err. & App.)* 373

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KNIGHTS OF PYTHIAS. See BENEVOLENT SOCIETIES.

LANDLORD AND TENANT. See also ELEVATORS.

1. A provision that an assignee of a lease takes it "subject to the agreements in the lease" does not impose a personal contractual obligation on the assignee. *Consolidated Coal Co. v. Peers (Ill.)* 624

2. The exclusion of "the agreements of the lessee" from a covenant against encumbrances in an assignment of a lease does not impose a personal liability upon the assignee to perform such agreements but leaves them *in statu quo*. *Id.*

3. A privity of estate between a lessor and an assignee of the term renders the assignee liable for breaches of any express covenants of the lease running with the land or term, if they occur while such privity continues to exist. *Id.*

NOTES AND BRIEFS.

Lessor's liability to third party for defective premises. 717

Effect of assignment of lease. 625

LANGUAGE. See VOTERS AND ELECTIONS, 1.

LAUNDRIES.

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Municipal power over, as nuisance. 651

LEASE. See RAILROADS, 1-5.

LEGISLATURE.

NOTES AND BRIEFS.

Right of women to legislative office. 210

LEVY AND SEIZURE.

A perpetual scholarship in a college, granted in consideration of a donation thereto, entitling the donor to keep one pupil in the college free of charge, is not such property as can be taken and sold for debt. *Cleveland Nat. Bank v. Morrow* (Tenn.) 758

LIBEL AND SLANDER.

Written communications stating that a dealer has not paid his accounts, and debarring other dealers from selling to him upon credit, if not justified, are libelous. *Hartnett v. Plumbers' Supply Asso.* (Mass.) 194

LICENSE. See also CONSTITUTIONAL LAW, 9; INNKEEPERS.

An ordinance requiring a license for the business of a scavenger, or the removal of night soil, is within the general grant of power to make all regulations and ordinances expedient or necessary for the preservation of health, and the suppression or prevention of disease. *State, Moriarty, v. McMahon* (Minn.) 675

NOTES AND BRIEFS.

License; power to grant. 675

LIENS. See also CONFLICT OF LAWS, 4; JUDGMENT, 5; MORTGAGE, 4; SALE.

A lien for materials furnished to the principal contractor who abandons the contract filed before the owner assumes to complete the work in accordance with a provision of the contract, attaches after the completion to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. *Campbell v. Coon* (N. Y.) 410

NOTES AND BRIEFS.

Liens; mechanic's lien under contract made or performed in another state:—Immaterial when contract is made; where title passes in other state. 410

LIFE TENANTS. See also ACCOUNTING; CURTESY; ESTOPPEL, 6.

1. Equity has power to provide for the securing of any part of real property which is going to loss during a life tenancy, if imperative need calls for it and the life tenant be not harmed thereby, or if he be compensated. *Williamson v. Jones* (W. Va.) 694

2. Things part of the land wrongfully severed by a tenant for life become personalty, but belong to the owner of the next vested estate of inheritance in reversion or remainder, not, the life tenant. *Id.*

3. A tenant for life may work open salt or oil wells or mines, even to exhaustion, without accounting, but cannot open new ones. *Id.*

4. A tenant for life who by waste has

severed from the realty things that are a part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest therein during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance. *Id.*

5. It is waste in a tenant for life to take petroleum oil from the land for which he is liable to the reversioner or remainderman in fee. *Id.*

LIMITATION OF ACTIONS. See also INSURANCE, 29.

NOTES AND BRIEFS.

Effect of laches. 856

LIVERY STABLES.

NOTES AND BRIEFS.

Municipal regulation of, as nuisance. 658

LODGE. See BENEVOLENT SOCIETIES, NOTES AND BRIEFS.

LOGS.

The owner of drifting logs which have escaped from a raft broken up by a violent storm on a lake without his fault is not under obligation to recapture and remove such of them as he can obtain only by extraordinary methods and at unreasonable expense, in order to escape liability for damages caused by them in a subsequent storm, although he has not definitely abandoned them but is proceeding to recover those which he can get without an unwarranted expenditure of money. *New Orleans & N. E. R. Co. v. McEwan* (La.) 134

LOST INSTRUMENTS. See BILLS AND NOTES, 4, 5; EVIDENCE, 22, 28.

MANDAMUS. See also CONSTITUTIONAL LAW, 5; JUDGMENT, 4; WRIT AND PROCESS, 4, 5.

1. An applicant for the writ of mandamus need not show any legal or special interest in the result, but only that he is a citizen and as such interested, in common with other citizens, in the execution of the law, when the object of the action is to enforce the performance of a public duty or right in which the people in general are interested. *Wampler v. State, Alexander* (Ind.) 829

2. The facts stated in an alternative writ of mandamus may be supplemented by those stated in the application in determining whether or not they are sufficient to withstand a demurrer. *Id.*

3. Mandamus may be invoked to force a township trustee to meet with others for the purpose of appointing a county superintendent as required by law, when they have met on a day fixed by law for that purpose, and have adjourned from day to day for want of a quorum. *Id.*

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Mandamus; pleading and practice in. 828

MANDATORY INJUNCTION. See INJUNCTION, 6.

MARRIAGE. See CONFLICT OF LAWS, 8; HUSBAND AND WIFE.

MASTER AND SERVANT. See also ACCORD AND SATISFACTION; CARRIERS, 1; CONTRACTS, 4, 6; INJUNCTION, 5; RAILROADS, 4; STREET RAILWAYS, 8.

1. Authority of a brakeman on a freight train to eject a passenger cannot be implied, so as to render the employer liable for his acts in this respect, from rules of the company providing that such trains shall not carry passengers, and also that the brakemen must familiarize themselves with the rules, but also providing that brakemen are subject at all times to the orders of the conductors. *Randall v. Chicago & G. T. R. Co.* (Mich.) 666

2. The master is responsible for injury to a third person by the negligence of a servant acting in the execution of his orders, although the act was not necessary for the proper performance of the duty to the master, or was even contrary to the master's orders. *McCann v. Consolidated Traction Co.* (N. J. Err. & App.) 286

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Scope of duty of railroad employee. 666

MASTER IN CHANCERY.

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Right of woman to be. 213

MAXIMS.

1. Damnum absque injuria. *Sage v. New York* (N. Y.) 606

2. Reddendo singula singulis. *Peck v. Elliott* (C. C. App. 6th C.) 616

3. Res ipsa loquitur. *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.) 637

4. Sic utere tuo, ut alienum non lædas. *Harrington v. Providence* (R. I.) 305

5. Where one of two parties must suffer, the loss should fall upon the one who had the best opportunity to protect himself and is most at fault. *German-American Sav. Bank v. Spokane* (Wash.) 259

MECHANIC'S LIEN. See LIEN.

MILITARY COMMANDER. See ACTION OR SUIT, 8.

MINES. See also ACCOUNTING; ADVERSE POSSESSION; COTENANTS; LIFE TENANT, 3, 4.

Petroleum oil in place is part of the land. *Williamson v. Jones* (W. Va.) 694

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Mines; rights in oil wells; life estate and tenancy in. 666

Possession of. 626

MORTGAGE. See also ACTION OR SUIT, 4; CORPORATIONS, 12; DAMAGES, 4; ESTOPPEL, 7; INSURANCE, 18-20; RECEIVERS, 5.

1. A deed absolute on its face, but shown by a separate written agreement to be a security for the performance of the personal obligation of the grantor to the grantee, is a mortgage. *Sun Fire Office v. Clark* (Ohio) 562

2. A mortgage to secure an antecedent debt, which is filed before the actual entry of a judgment which is filed soon afterward on the same afternoon, will not have priority over the judgment, but their liens will be equal. *Goetzinger v. Rosenfeld* (Wash.) 257

3. A mortgage will not be rendered invalid by the fact that all the money which it is given to secure is not paid over at its execution and it does not state that it is given for future advances, if it is given in good faith for a needed amount, and the money is paid over as fast as it can be raised by the mortgagee. *Dummer v. Smedley* (Mich.) 490

4. A lien may be given to a second mortgagee and to a receiver of a corporation, for money advanced to pay interest on the first mortgage and taxes, as against attachment creditors of the corporation. *Id.*

5. Attachments levied on the property of a mortgagor subsequently to the execution of the mortgage are properly given priority over money afterwards paid over on the security of the mortgage in accordance with the agreement under which it was executed. *Id.*

6. A mortgagee cannot sell the land under a power of sale, when there has been no default or breach of the conditions of the mortgage, so as to pass a good title, even to a bona fide purchaser for value or to any subsequent purchaser from him. *Rogers v. Barnes* (Mass.) 145

7. A mortgagor can recover the damages sustained by him from the wrongful execution of a power of sale in the mortgage when there was no default, even if the sale was an absolute nullity, if a subsequent transfer has placed the property in the hands of a purchaser for value with a title which appears perfect on the records and constitutes a cloud on the mortgagor's title. *Id.*

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Mortgage; void sale under. 146

MUNICIPAL CORPORATIONS. See also CONSTITUTIONAL LAW, 18; ESTOPPEL, 2, 8; HIGHWAYS, 1; PUBLIC IMPROVEMENTS, 1; QUO WARRANTO, 2; STREET RAILWAYS, 3.

1. Municipalities may be authorized to own electric lighting plants which shall furnish lights, not only to the municipality, but also to its citizens. *Mitchell v. Negaunee* (Mich.) 157

2. The installation of an electric-light plant may be provided for at special election under Mich. Laws 1891, act No. 186, and the provisions of the charter of the city of Negaunee. *Id.*

3. A municipal corporation may not declare that to be a nuisance which in fact is not, although it is empowered by law to declare what shall constitute a nuisance. *Keansville v. Miller* (Ind.) 161

4. An ordinance declaring that any building or structure of any kind partially destroyed

by fire, which shall be permitted to remain in such condition after notification to remove, repair, or rebuild it, shall constitute a nuisance, without making any limitations with regard to its dangerous character by reason of its weak condition or location or surroundings,—is void. *Id.*

5. An ordinance making it unlawful to keep any hog within the corporate limits of a town cannot be held void for unreasonableness under statutes giving power to define nuisances and to regulate and control the keeping of animals in the town. [Affirmed by divided court.] *Darlington v. Ward* (S. C.) 326

6. The distance of 100 feet fixed by ordinance as the nearest to a church, schoolhouse, or dwelling that a steam shoddy machine or steam carpet-beating machine shall be established, is not unreasonable. *Ex parte Lacey* (Cal.) 640

NOTES AND BRIEFS.

See also NUISANCES.

Municipal corporations; power to furnish electric lights. 157

Delegation of power of. 675

Liability for nuisance. 885

NAME. See BENEVOLENT SOCIETIES.

NEGLIGENCE. See also ELEVATORS; NEGLIGENCE, 11; HORSE RACE, 1, 3, LOGS; PLEADING, 3; TRIAL, 6-8.

1. A mere failure to guard against a certain result is not actionable negligence unless under all the circumstances it might have been reasonably foreseen by a man of ordinary intelligence and prudence. *New Orleans & N. E. R. Co. v. McEwen* (La.) 134

2. The common law imposes no duty upon the owner to use care to keep his property in such condition that persons, even children of tender years, going thereon without his invitation, may not be injured. *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 573

3. Defects in the railing of a platform connected with a grain elevator do not render the owner of the premises liable to a person who was injured by the fall of the railing while he was leaning against it, thus putting it to a use for which it was not intended. *Kinney v. Onsted* (Mich.) 665

4. The maintenance of an excavation so near a path designed for the use of persons going to and from a railroad station platform on business as to be dangerous to one straying from the same does not render the company liable for the death of a child who fell therein while playing along the path. *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 573

5. The rule imposing upon the owner the duty not to permit any dangerous excavation to remain on his land so near a street or highway as to endanger persons who may accidentally stray from the same does not apply where one approaches the excavation from another route. *Id.*

6. Operating small cars by a dummy engine in a street at a low rate of speed, with occasional stops, without precautions to prevent

children getting upon them, does not create a liability for the death of a child that got upon the cars and was thrown or fell from them. *Jefferson v. Birmingham R. & Electric Co.* (Ala.) 458

7. No recovery can be had for personal injuries by one whose own negligence contributed to the result. *Conroy v. Chicago, St. P. M. & O. R. Co.* (Wis.) 419

NOTES AND BRIEFS.

See also CARRIERS.

Negligence; what is. 186

As to excavation near path. 573

As to defects in premises. 665

NERVOUS SHOCK. See FRIGHT.

NOTARY.

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NOTICE. See also CARRIERS, 11; JUDICIAL SALE.

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Notice; imputation of. 481

NUISANCES. See also MUNICIPAL CORPORATIONS, 3, 4.

1. A formal declaration that a thing is a nuisance does not necessarily make it so, and the failure of a statute to declare it to be a nuisance does not technically keep it from being one if it is treated as such in the statute. *Harrington v. Providence* (R. I.) 305

2. Legislative power to declare certain things nuisances *per se* in the exercise of its police power extends to privy vaults in cities. *Id.*

NOTES AND BRIEFS.

Municipal power over buildings and other structures as nuisances:—(I.) Extent of power over buildings as such; (II.) limit of power: (a) in general; (b) to destroy; (III.) over the use of buildings; (IV.) wooden and frame buildings. 161

Municipal power over nuisances affecting safety, health, and personal comfort:—(I.) Nuisances relating to public safety: (a) in general; (b) electricity, steam, and explosives; (II.) nuisances relating to health: (a) in general; (b) removal of filth, etc.; (c) water-closets and privies; (d) drains and drainage; (e) persons and things infected with disease; (f) with respect to offensive and unwholesome smells; (g) water and watercourses; (h) burial of the dead; (i) dead animals; (j) the keeping of animals; (k) articles of food. 305

Municipal power over nuisances relating to trade or business:—(I.) In general; (II.) slaughter-houses; (III.) laundries; (IV.) fertilizers; (V.) livery stables; (VI.) brick and lime kilns; (VII.) stockyards; (VIII.) tallow, fat, hides, etc.; (IX.) dairies; (X.) pawn brokers, junk and second hand clothes dealers; (XI.) miscellaneous trades. 640

ODORS. See SMELLS, NOTES AND BRIEFS.

OFFICERS. See also COURTS, 1; VOTERS AND ELECTIONS, 2.

1. A woman is eligible to election as a county clerk under Mo. Const. art. 8, § 12, providing that no person shall be chosen to an office "who is not a citizen of the United States and who shall not have resided in this state one year." *State, Crow, v. Hostetter* (Mo.) 203

2. The use of the masculine pronoun in Mo. Const. art. 8, § 12, and the statutes relating to the qualifications of a county clerk (§ 1965), does not restrict the right to hold such office to males, since other provisions of the Constitution expressly provide that certain officers must be males, while an express provision that the clerk should be a male citizen, which previously existed in the statute, has been dropped. *Id.*

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Right of woman to hold office:—(I.) Distinction between the right to hold elective office and right to hold appointive office; (II.) right to hold judicial office: (a) office of judge; (b) office of justice of the peace; (c) office of arbitrator; (III.) right to hold legislative office; (IV.) right to hold administrative office: (a) when functions exercisable by deputy: generally; (b) when functions exercisable in person: (1) sheriff; (2) overseer of the poor; (3) sexton of the parish; (4) commissioner of sewers; fish commissioners, forester, etc.; (5) director of the workhouse, matron, medical superintendent of the hospital, member of the board of health, etc.; (6) superintendent of public instruction, school director, inspector, etc.; (7) pension agent, postmaster, etc.; (8) clerk of the county court; (9) master in chancery; (10) grand juror; (11) notary public; (V.) conclusion. 208

OIL. See ACCOUNTING; CARRIERS, 9-12; COVENANTS; INJUNCTION, 2; LIFE TENANT, 4, 5; MINES.

OPTION. See CORPORATIONS, 5-7.

ORDINANCE. See MUNICIPAL CORPORATIONS.

PARDON. See also BAIL AND RECOGNIZANCE.

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Pardon; effect of. 808

PARENT AND CHILD. See also INFANTS, 2-4.

PARKS. See BUILDINGS; CONTRACTS, 12; ESTOPPEL, 1, 2.

PARTNERSHIP. See also CONFLICT OF LAWS, 1.

1. A partnership association organized under the laws of Pennsylvania is regarded in Massachusetts as an association or partnership, and not as a corporation, for the purpose of bringing an action against it. *Edwards v. Warren Linoline & G. Works* (Mass.) 791

2. Subscriptions to the capital stock of a 83 L. R. A.

partnership association may be paid by the giving of a promissory note, if the note is immediately converted into money and the proceeds applied for the benefit of the corporation. *Rouse, H. & Co. v. Detroit Cycle Co.* (Mich.) 794

3. Technical noncompliance with the statute in the formation of a partnership association, and failure to comply with the statutory requirements in its subsequent management, will not render subsequent stockholders who had no knowledge of the defects and had no intent to become partners liable as such, in the absence of a statutory provision making them so, for goods furnished by one who dealt with the concern as a limited association. *Starer & A. Mfg. Co. v. Blake* (Mich.) 798

4. Omission in a single instance by the manager of a partnership association, of the word "limited" in dealing with a correspondent, will not render the members of the association liable as partners, in the absence of anything to show that any indebtedness, damage, or liability arose in consequence of that act. *Id.*

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Partnership; limited, distinguished from corporation. 791, 794, 798

Limited; payment of subscription. 795, 798

PASTOR. See RELIGIOUS SOCIETIES, 1.

PATENTS. See BILLS AND NOTES, 11; CORPORATIONS, 11.

PAYMENT. See TRIAL, 4.

PEDDLERS. See also CONSTITUTIONAL LAW, 9.

The business of a hawker or peddler is so far a legitimate and moral business that the legislature can regulate it only for the purpose of preventing it from becoming a nuisance. *State, Luria, v. Wagener* (Minn.) 677

NOTES AND BRIEFS.

Peddlers; who are; restrictions on. 677

PENSIONS.

NOTES AND BRIEFS.

Right of woman to be pension agent. 213

PERPETUITIES.

The rule against perpetuities, so far as it applies to a trust for a meeting house of a religious society, is abrogated by Minn. Gen. Stat. § 3040. *Lane v. Eaton* (Minn.) 669

PETROLEUM. See ACCOUNTING; COVENANTS; INJUNCTION, 2; LIFE TENANT, 4, 5; MINES.

PIERS. See WATERS, 5.

PIGS. See ANIMALS, NOTES AND BRIEFS.

PLATFORM. See NEGLIGENCE, 3.

PLEADING. See also JUDGMENT, 2; MAN-DAMUS, 2.

1. It is not proper to strike a plea from the files because it is insufficient in substance or form, but the remedy in such case is by demurrer. *Consolidated Coal Co. v. Peers* (Ill.) 624

2. A presumption against the pleader as to the contents of an instrument will arise when he bases a claim upon it without setting it forth *in hac verba* or making averments which definitely show its contents. *Id.*

3. An allegation that the defendant's servants recklessly and wantonly or intentionally caused a child to leave cars of a dummy line in a street while they were in motion is not sufficient to show negligence without anything to show that the conditions were not proper for the child to get off. *Jefferson v. Birmingham R. & Electric Co.* (Ala.) 458

4. A plea to an action by a corporation, alleging that it has been dissolved by a forfeiture of its charter and by misuser of its franchises, is good, against a general demurrer or mere motion to strike, as an allegation that the charter has been forfeited in the manner prescribed by law. *Merritt v. Gate City Nat. Bank* (Ga.) 749

5. An allegation that a note "is what is denominated under the laws of Kentucky a 'peddler's note'" is a mere legal conclusion, and does not sufficiently aver that the vendor of the article for which the note was given was an itinerant person. *Union Nat. Bank v. Brown* (Ky.) 508

6. An estoppel *in pais* cannot be relied upon unless pleaded. *State, Kansas City, v. East Fifth Street R. Co.* (Mo.) 218

PLUMBERS. See CORPORATIONS, 3, 4.

POND. See EASEMENTS, 1; WATERS, 11.

POOR.

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Woman as overseer of. 211

POSTOFFICE.

NOTES AND BRIEFS.

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PRINCIPAL AND AGENT.

NOTES AND BRIEFS.

Ratification of agent's act. 485

PRIVIES. See also CONSTITUTIONAL LAW, 16; NUISANCES, 2.

NOTES AND BRIEFS.

Privies; municipal regulations of. 816

PROHIBITION.

A writ of prohibition to restrain the judge from proceeding to punish a contempt in excess of his jurisdiction is an apt and proper remedy. *State, Ashbaugh, v. Eau Claire Cir. Ct.* (Wis.) 554

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PROXIMATE CAUSE.

1. Negligence may be the proximate cause of an injury which directly results therefrom, although the particular consequences were unusual and could not ordinarily have been foreseen. *Graney v. St. Louis, I. M. & S. R. Co.* (Mo.) 638

2. An act must have been the proximate cause of the damage in order to render the person who did it liable therefor. *New Orleans & N. E. R. Co. v. McEwen* (La.) 184

PUBLIC IMPROVEMENTS.

1. Delay and negligence of city officers in providing a fund for the payment of street-grade warrants by levy and special tax or assessment will not render the city liable to an action,—at least so long as the assessment plan can be enforced in any way. *German-American Sav. Bank v. Spokane* (Wash.) 259

2. The sale of a narrow strip from the front of property abutting on a street, for the sole purpose of avoiding a street-improvement assessment, after the city has entered into a contract for the improvement but before the lien of the assessment attaches, is void, so far as concerns the assessment. *Eagle Mfg. Co. v. Davenport* (Iowa) 480

3. The lien of an assessment for a street improvement attaches from the time when labor is first done or material furnished by the contractor in making the improvement after the contract is made, and not from the adoption of a resolution for doing the work or the letting of the contract therefor, under Iowa Acts 28d Gen. Assem. chap. 14, § 12, providing that the assessment shall be a lien from the "commencement of the work." *Id.*

4. Land purchased after the execution of a contract for a street improvement, with the knowledge, actual or constructive, on the part of the purchaser, that a strip of land 2 feet wide between the land purchased and the street to be improved had previously been sold by his grantor for the sole purpose of avoiding the easement, is liable for such assessment although the assessment was made for a lawful purpose. *Id.*

5. The owner of land abutting on a street for the improvement of which a contract has been entered into may lawfully sell a strip from the front of his property, of less width than the 150 feet which would otherwise be liable for the assessment, if such sale is in good faith, for legitimate purposes, and not merely a subterfuge to defeat the assessment. *Id.*

NOTES AND BRIEFS.

Public improvements; transfer of property to defeat assessments. 481

PUBLIC LANDS.

Grants of land made by the King of Great Britain, or by persons acting under his authority, before October 14, 1775, are ratified and confirmed by the New York Constitution of 1777. *Sage v. New York* (N. Y.) 606

QUO WARRANTO. See also CORPORATIONS, 19.

1. The state may oust a street-railway company from its franchise to operate a railway in streets, by quo warranto proceedings brought on relation of the city, although the franchises were derived directly from the city under ordinances passed in the exercise of charter power conferred on the city by the state, which thus made the grant through the agency of the city. *State, Kansas City, v. East Fifth Street R. Co. (Mo.)* 218

2. A city cannot contract away, or in any way abridge, the sovereign power of the state to proceed against a street-railway company by quo warranto for forfeiture of its franchises, or even to do so on the relation of the city. *Id.*

RAILROAD RELIEF ASSOCIATION. See ACCORD AND SATISFACTION; CONTRACTS, 6.**RAILROADS.** See also HIGHWAYS, 2; INJUNCTION, 6; NEGLIGENCE, 4, 6; RECEIVERS, 4, 5; SPECIFIC PERFORMANCE, 8.

1. A company which purchases all the property and rights of another railroad company, including a lease, and which takes charge of the leased road, operates it for a long time, and elects to sue and recover money due the lessee from the lessor, must be held to have assumed the obligations of the lease, and not be a mere tenant by sufferance. *Schmidt v. Louisville & N. R. Co. (Ky.)* 809

2. An abandonment of a railroad lease by a company which has acquired the lessee's property and rights is not authorized by the mere failure of the lessor to pay the money due under the lease, when the contract gives the lessee a lien therefor, and does not provide that it shall be a ground for forfeiture, although there are other conditions of forfeiture expressed. *Id.*

3. The lessor of a railroad which is leased under statutory authority without any provision exempting the lessor from liability remains liable for an injury resulting from negligent omission of a duty owing by it to the public,—such as the proper construction of its road. *Lee v. Southern P. R. Co. (Cal.)* 71

4. The lessor of a railroad is liable to an employee of its lessee who is injured by the imperfect construction and maintenance of the rails and track. *Id.*

5. The provision against leasing a franchise so as to relieve it or property held under it from the liability of the lessor, grantor, lessee, or grantee, made by Cal. Const. art. 12, § 10, does not give an employee of the lessee of a railroad a right of action against the lessor company, upon the fiction that it is his employer, but merely enables him to enforce his judgment, based on the negligence of his employer, against the property. *Id.*

6. Standing so near a passing train that there is danger of being drawn under it by a current of air is negligence, although the person does not stand near enough to be struck by the train. *Graney v. St. Louis, I. M. & S. R. Co. (Mo.)* 683

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Fences.

7. Inclosed lands within the meaning of a statute requiring a railroad to fence its right of way through inclosed lands are those surrounded by a fence, hedge, ditch, wall, or any line of obstacle interposed so as to part off and shut in the land, and set it off as private property. *Kimball v. Carter (Va.)* 570

8. The inclosure of lands need not be by continuous and lawful fence at all times sufficient to prevent stock passing through it, in order to constitute them inclosed lands within the meaning of a statute requiring a railroad right of way to be fenced through such lands. *Id.*

9. The inclosure of lands leased by a lessee from different parties is sufficient to make them inclosed lands while in his possession, within the meaning of a statute requiring a railroad through them to be fenced, if the entire track in his possession is inclosed, although separate parcels are not divided by fences. *Id.*

Crossings.

10. A farm crossing is not a "traveled road or street" within the meaning of a statute requiring the bell or whistle of a locomotive to be sounded where a railway crosses such road or street. *Czech v. Great Northern R. Co. (Minn.)* 302

11. Reasonable care may require the giving of signals at farm crossings when they are peculiarly dangerous and a train is approaching at great speed, although the statute requiring signals does not apply to such crossings. *Id.*

12. An action for negligence in running a train at a rate of speed prohibited by ordinance, over a crossing at which there does not appear to have been any gates or watchmen, is not defeated by the subsequent substitution of an ordinance which makes the same limitation except when gates and a watchman are provided. *Graney v. St. Louis, I. M. & S. R. Co. (Mo.)* 633

13. A steam railroad has the right of way over a crossing as against an electric street railway, and may run its cars at such speed as it chooses, if it exercises proper care in giving signals. *New York & G. L. R. Co. v. New Jersey Elec. R. Co. (N. J. Sup.)* 516

14. The same character or degree of care to avoid collision must be exercised by those operating an electric car along a public highway, in crossing a steam railroad, that is required from persons driving across it with ordinary vehicles, and they must look and listen for an approaching train. *Id.*

15. The failure of a railroad company to sound a whistle or ring a bell as required by statute, on a train's approach to a highway crossing will preclude, under the rule as to contributory negligence, a recovery by such company against an electric-railway company for damages resulting from a collision caused by the latter's negligence. *Id.*

16. An agreement between an electric-railway company and a railroad company, that the former shall have a derailing switch near a crossing as a precaution against collisions, and that a conductor of an electric car before it passes over the crossing shall look in both

directions and listen for the approach of a railroad train, does not excuse the railroad company from giving the statutory signals as a warning of the approach of a train. *Id.*

WATERS.

17. Railroad companies are not charged with the duty of preventing the accumulation of water on their rights of way by Tex. Rev. Stat. 1895, art. 4436, providing that in no case shall any railroad company construct a road-bed without first constructing such necessary culverts or sluices as the natural lay of the land requires for the necessary drainage thereof. *Dobbins v. Missouri, K. & T.P.R. Co.* (Tex.) 573

NOTES AND BRIEFS.

Railroad; lease of; abandonment of; specific performance of contract to operate. 810
 Liability of lessor of. 71
 Duty to signal at crossing. 803
 Collision with electric car at crossing. 517

RATES. See CORPORATIONS, 1; WATERS, 12-17.

REAL PROPERTY. See also CONSTITUTIONAL LAW, 4, 18; CORPORATIONS, 20; EMINENT DOMAIN, 2; MORTGAGE, 2.

1. A remainder will be regarded as vested, rather than contingent, if the disposition is so obviously upon the border as to be inherently doubtful between the two. *Bigley v. Watson* (Tenn.) 679

2. A remainder to the children of a woman who has an estate for life is not extinguished until her death, although she may be very old and childless, as the law does not assume that there is an impossibility of issue at any age, however great. *Id.*

3. The fee is not in abeyance while a remainder is contingent, under a consent decree in partition giving one party a life estate, with remainder at her death to her children then living or the issue of such as may be dead; but the fee abides with her during such contingency; and if the line of remaindermen is extinct at her death her title is freed from the remainder and subject to disposal by her will. *Id.*

4. The statute abrogating the rule in *Shelley's Case* (Tenn. Acts 1851-52, chap. 91, § 11) by providing that, on the termination of a life estate with remainders to heirs or heirs of the body of the life tenant, such heirs shall take as purchasers by virtue of the remainder so limited to them, gives no rights to "heirs" to whom no remainder was limited, as against devisees of one who was not only a life tenant but in whom the fee abode subject to a contingent remainder to her surviving children or issue of children, when by the extinction of the line of her descendants during her life the remainder failed and her title at the moment of her death became absolute. *Id.*

RECEIVERS. See also APPEAL AND ERROR, 1; CORPORATIONS, 16, 17; COURTS, 10, 11; INSURANCE, 87.

1. Dissensions between two persons who are equal owners of the stock of a corporation 88 L. R. A.

and are also its officers will not justify the appointment of a receiver so long as no actual wrong is committed by either of them. *Wallace v. Pierce-Wallace Pub. Co.* (Iowa) 123

2. A receiver of that part of the property of a corporation which consists of shares of stock in another corporation cannot be appointed on account of a disagreement respecting the management and control of the latter corporation, between two persons who are the officers of the former corporation and own all its stock in equal shares. *Id.*

3. A solvent corporation cannot be put into the hands of a receiver on account of a debt not reduced to judgment or secured by any lien on property of the corporation. *Id.*

4. The jurisdiction of a state court which has appointed a railroad receiver to direct him as to the wages to be paid for operating the road within that state is not defeated by the fact that the employees in operating the road crossed the state boundary and incidentally performed some service in another state, although the receivership is ancillary to a receivership in such other state. *Guarantee Trust & S. D. Co. v. Philadelphia, R. & N. E. R. Co.* (Conn.) 804

5. A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is sufficient to pay them, unless such responsibility was imposed by the court as a condition of the appointment or the continuance of the receiver in office. *Farmers' Loan & T. Co. v. Oregon P. R. Co.* (Or.) 424

6. Taxes upon the shares of stock in an insurance company, which are by statute charged to and made payable by the corporation, are a demand payable out of its assets in the hands of its receiver in case it becomes insolvent after they become due. *Boston & A. R. Co. v. Mercantile Trust & D. Co.* (Md.) 97

NOTES AND BRIEFS.

Receivers; of corporations; ground of appointment. 123
 Charging expense of, on party obtaining appointment. 424
 Jurisdiction as to property in other state 805

RECORDS. See CONSTITUTIONAL LAW, 18; EMINENT DOMAIN, 2.

RELIEF ASSOCIATIONS. See CONTRACTS, 6.

RELIGIOUS SOCIETIES. See also CHARITIES, 4, 7; PERPETUITIES.

1. A call to a pastor, made by a congregation of a Presbyterian church, fixing the amount of salary, does not become effective, under the rules and regulations of that church, until it is placed in the hands of the minister and formally sanctioned by the presbytery; and the refusal of the presbytery to place the call in his hands or to install him puts an end to the contract. *First Presby. Church v. Myers* (Okla.) 687

2. The chief governing body of a church

is the exclusive judge, within the jurisdiction prescribed by its rules and regulations, as to whether the pastoral relations shall be formed between a minister of the denomination and one of the local churches. *First Presby. Church v. Myers* (Okla.) 687

3. The decisions of church tribunals as to the terms upon which the pastoral relations shall be formed and the salary accompanying it shall be demanded, as well as in respect to doctrine and discipline, will be binding on the civil courts. *Id.*

4. Rules and regulations for church government and discipline, prescribed by the governing bodies of religious associations and churches, will be obligatory upon the members, congregations, and officers, and will be given effect by the civil courts. *Id.*

NOTES AND BRIEFS.

Religious societies; liability for salary of pastor:—Taxes, subscriptions, etc.; binding contract for services; interference with performance; abuse of contract; absence of incorporation; dissolution of pastoral relation; right to compensation; individual liability; sale of property; accord and satisfaction. 687

REMAINDER. See ACTION OR SUIT, 2; REAL PROPERTY, 1-8.

REMOVAL OF CAUSES. See CONSTITUTIONAL LAW, 7.

The provision of the Utah Constitution, under the authority given by the act of Congress for the transfer of causes pending in the territorial courts of which the Federal courts do not have exclusive jurisdiction upon motion or petition under and in accordance with the act or acts of Congress, does not require the application for removal to be made by the defendant before pleading or at any specified time before trial. *McCornick v. Western U. Telog. Co.* (C. C. App. 8th C.) 684

RESERVATION. See WATERS, 1.

RESUME.

For résumé of contents of book, see 865

RIPARIAN RIGHTS. See WATERS.

SALE. See also CONTRACTS, 11.

Sale of machinery to a corporation with notice that it is in a bad condition financially, and under a guaranty of payment by a third person, does not entitle the seller to a lien for its price. *Dummer v. Smedley* (Mich.) 490

NOTES AND BRIEFS.

Sale; remedies of parties on. 760

SALVATION ARMY. See CHARITIES, 5, 6.

SCAVENGER. See LICENSE.

SCHOLARSHIP. See LEVY AND SEIZURE.

SCHOOLS.

The constitutional provision that the 99 L. R. A

legislature shall provide for a system of free common schools wherein all the children of the state may be educated has no application to an institution wholly or partly under private control. *People, New York Inst. for the Blind v. Fitch* (N. Y.) 591

NOTES AND BRIEFS.

Schools; right of woman to be superintendent or other officer of. 213

SECRETS. See also CONTRACTS, 4; INJUNCTION, 5.

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Secrets; wrongful disclosure of; as property. 200

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On settlement of claims of insolvent insurance company. 105

SEWERS. See DRAINS AND SEWERS; EVIDENCE, 4.

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Right of woman to be. 211

SHELLEY'S CASE. See REAL PROPERTY, 4.

SHERIFF.

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Right of woman to be. 211

SLAUGHTER-HOUSES.

NOTES AND BRIEFS.

Municipal power over, as nuisances. 646

SMELLS.

NOTES AND BRIEFS.

Municipal regulation as to nuisance of. 322

SPECIFIC PERFORMANCE. See also INJUNCTION, 6.

1. A contract fair when made may be specifically performed, although it has become a hard one by force of subsequent circumstances or changing events. *Schmidt v. Louisville & N. R. Co.* (Ky.) 809

2. The mere fact that a contract having a number of years to run may turn out a losing investment affords no reason for refusing specifically to enforce it. *Id.*

3. A railroad lease is not so uncertain and indefinite that it cannot be specifically performed, where a fair construction of it will authorize such an operation of the road as the business interests of the community may require. *Id.*

NOTES AND BRIEFS.

Specific performance; of contract to operate railroad. 810

STATUTES. See also **FISHERIES.**

1. The constitutional provisions requiring three several readings, the printing of bills, and an aye and nay vote on final passage of any bill, are mandatory. *Cohn v. Kingsley* (Id.) 74

2. A court may go back of the enrolled bill to the journals of both houses of the legislature to ascertain whether or not the constitutional requirements were obeyed in the passage of the act in question. *Id.*

3. The journals of both houses of the legislature must affirmatively show that the provisions of the Constitution in regard to the passage of any law were substantially followed by the legislature in the passage of any act the validity of which is questioned. *Id.*

4. The failure of the journals of both houses of the legislature to show that any step required by the Constitution in the passage of a law was taken is conclusive evidence against the validity of the bill, that it was not taken. *Id.*

5. Neither house of the legislature can suspend the provision of the Constitution which requires three readings on separate days in each house except in case of urgency, and then there must be an aye and nay vote by two thirds of the house voting with reference to only one bill then before the house. *Id.*

6. The power to increase the capital of a corporation by by-law, which is given by Tenn. act March 23, 1875, is not repealed by Tenn. act March 27, 1883, making a different provision for an increase of stock, even if that applies to a corporation under a former act. *Peck v. Elliott* (C. C. App. 6th C.) 616

7. A special law to prevent fishing for profit by citizens of one county in the waters of another county, which is limited to certain counties, is in violation of the provision of S. C. Const. art. 3, § 34, against special laws "where a general law can be made applicable." *State v. Higgins* (S. C.) 561

8. A statute attempting to abolish several inferior courts, and to substitute one court in their place, cannot be separated so as to uphold the substituted court in place of some of them, if one is protected from destruction by the Constitution and its judge is a member of the others. *Johnson v. State* (N. J. Err. & App.) 873

9. A statute limiting the liability of a railroad company for fires to the difference between the amount of the loss and the amount of insurance upon the property applies to a pre-existing policy of insurance on which a loss occurs after the passage of the statute. *Leavitt v. Canadian P. R. Co.* (Me.) 152

NOTES AND BRIEFS.

Statute; constitutional provisions as to enactment; readings of; yea and nay vote. 75

Constitutional provisions as to title. 225

Partly bad. 873

STEAM.**NOTES AND BRIEFS.**

Municipal regulation of, as a nuisance. 805
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STORAGE. See **CONSTITUTIONAL LAW**, 17.

STREET RAILWAYS. See also **CARRIERS**, 13; **ESTOPPEL**, 3; **QUO WARRANTO**; **RAILROADS**, 18-16; **TRIAL**, 8.

1. The forfeiture of the "road" of a street-railway company under a clause in the grant of the franchise stating that the company will forfeit the road to the city in one year after it ceases to operate the road includes the rails as well as the franchise. *Tower v. Tower & S. Street R. Co.* (Minn.) 541

2. The forfeiture of the road of a street-railway company to the city in case of failure to operate it for one year, which is provided for by a condition in the ordinance granting the franchise, is not unenforceable on the ground that it is a penalty or liquidated damages which can be recovered, but it may be judicially enforced. *Id.*

3. A contract that nonuser of street railway tracks for any specified time shall not operate as a forfeiture of the franchise cannot be made by a city, either by ordinance or otherwise, since this would involve authority to grant the right of the use of streets for private purposes. *State, Kansas City, v. East Fifth Street R. Co.* (Mo.) 218

4. Entire failure to operate a street railway for three years, when the ordinance under which the franchise is exercised requires cars to run sixteen hours every day in the year, constitutes a nonuser which forfeits the franchise. *Id.*

5. A street railway company has the right to use the trolley system without the sanction of the mayor and city council, where its charter authorizes it to use "any motive power and means of traction which the mayor and city council may sanction or which shall be authorized to be made use of in the city . . . by another corporation exercising street-railway franchises thereon," and the legislature has subsequently given express authority to other companies to use the trolley system in that city. *Hooper v. Baltimore City Pass. R. Co.* (Md.) 509.

6. The rule that a pedestrian must stop, look, and listen before crossing a railroad track applies to a street railway operated by electricity. *Hoelzel v. Crescent City R. Co.* (La.) 703

7. A pedestrian who suddenly attempts to cross an electric railway in the night when a street car is approaching so near that it must be visible and its noise apparent must be held negligent, so that no recovery can be had against the railway company for his death if he is struck by the car. *Id.*

8. Negligence in running a car upon an electric street railway having a sprinkler thereon upon which waving black coats are hung, without reasonable care to prevent frightening horses, renders the street railway company liable; and it would seem to be immaterial who placed the coats in that position, if the car was operated with knowledge that they were there. *McCann v. Co.* (N. J.) 236

9. Reasonable means to prevent frightening horses and thereby injuring persons riding or driving along the street must be taken when a street railway car is propelled in such a con-

dition that a reasonably prudent man would apprehend that it would frighten horses. *McCann v. Consolidated Traction Co.* (N. J.) 236

NOTES AND BRIEFS.

See also CARRIERS.

Street railways; ousting from franchise. 218
Forfeiture of franchise of. 541
Collision at railroad crossing. 517

Negligence of person struck by street car; duty to look out for car; care in running car. 709

STRIKE. See CONSPIRACY, 2-4.

SUBROGATION.

NOTES AND BRIEFS.

Of subcontractor. 412

SUNDAY. See TIME, 2.

SYNDICATE. See BILLS AND NOTES, 10.

TAXES. See EVIDENCE, 8; INTEREST; RECEIVERS, 6.

TELEGRAPHS.

A telegraph company is not liable to a banker who cashes a draft upon the faith of a telegram from the drawee purporting to authorize the drawer to make such a draft because of a mistake in transmitting the amount for which the draft is authorized, as the company cannot be liable to a stranger to whom it has never delivered the message and to whom it owes no duty whatever merely because he has seen the telegram and acted upon it to his injury. *Mc'ornick v. Western U. Teleg. Co.* (C. C. App. 8th C.) 684

NOTES AND BRIEFS.

Telegraphs; liability for negligence; who may have right of action. 684

TENDER.

Money tendered and paid into court as the full amount due the plaintiff constitutes a full discharge if plaintiff takes it from the court, although he protests that more is due and declines to accept it as full payment, if the terms on which it was tendered are not waived by the defendant or modified by rule of court. *Jonathan Turner's Sons v. Lee Gin & M. Co.* (Tenn.) 549

NOTES AND BRIEFS.

Tender; payment of money into court; effect of accepting it. 549

TIME. See also MORTGAGE, 2.

1. The law divides the day where equity requires it. *Goetzinger v. Rosenfeldt* (Wash.) 257

2. The Sunday before a term of court which begins on Monday is not excluded from the computation of the twenty days that an action must be filed before the term in order to be triable, at least when by the long practice of the court that Sunday has been included in such twenty days, since there is nothing to be done on the last day, and the fact that it falls

on Sunday makes no difference. *Merritt v. Gate City Nat. Bank* (Ga.) 749

NOTES AND BRIEFS.

Time; rule of, as to priority of judgment. 243

Fractions of day. 257

Computation of; excluding Sunday. 749

TOLLS. See BICYCLES, NOTES AND BRIEFS.

TORRENS LAW. See CONSTITUTIONAL LAW, 4, 18; EMINENT DOMAIN, 2.

TOWN. See MANDAMUS, 3.

TRADE SECRETS. See INJUNCTION, 5.

TRESPASS.

One who anchors a boat in the shallow water of a river, at a marshy place which is not navigable, and there hunts wild fowl, is guilty of a trespass as to the owner of the soil. *Hall v. Alford* (Mich.) 205

TRIAL. See also CARRIERS, 18; CRIMINAL LAW, 2; EVIDENCE, 25; JURY.

1. A jury trial upon appeal does not answer the constitutional guaranty of a right to be tried by jury. *State v. Gerry* (N. H.) 228

2. The trial court is not bound to ask or to permit counsel to ask a juror on his voir dire any question the answer to which would tend to criminate or disgrace him. *Ryder v. State* (Ga.) 721

3. Defendant in a criminal action did not lose his right to complain of the absence of a witness, which was not in any way occasioned by him or his counsel, because such witness was present at an earlier period of the trial, and requested defendant's counsel to be allowed at that time to go on the stand and testify, and was subsequently compelled to leave the court for providential cause, as it is defendant's right to introduce his witnesses in the order in which he or his counsel may deem best. *Id.*

Questions for jury.

4. The jury must determine whether or not the giving of notes in payment of subscriptions to the capital stock of a corporation was in good faith. *Rouse, H. & Co. v. Detroit Cycle Co.* (Mich.) 794

5. The question whether or not a person is wholly disabled so as to prevent him from doing any and every kind of business pertaining to his occupation is for the jury, where the evidence shows that he went to his office every day, but was unable to do any kind of work. *Turner v. Fidelity & O. Co.* (Mich.) 529

6. Questions of dispute of matters of fact relating to negligence and contributory negligence are properly submitted to the jury. *New York & G. I. R. Co. v. New Jersey Elec. R. Co.* (N. J. Sup.) 516

7. The negligence of a boy twelve years old, in standing so near a passing train that he is drawn under it by a current of air is a question for the jury, and cannot be declared as a matter of law. *Graney v. St. Louis, I. M. & S. R. Co.* (Mo.) 633

8. The question of negligence in running a tank car on an electric street railway, with waving black coats hanging thereon in such way as to frighten horses, is a question for the jury. *McCann v. Consolidated Traction Co.* (N. J. Err. & App.) 236

9. The question as to the materiality of the omission to mention another policy in an application for life insurance, and of the fact that the applicant was an embezzler, is for the jury under a statute providing that misstatements and concealments shall not defeat the policy unless material. *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. App. 6th C.) 33

Taking case from jury.

10. A motion to exclude the evidence of plaintiff from the jury on the ground that it will not support a verdict in his favor is not proper practice in Tennessee. *West Memphis Packet Co. v. White* (Tenn.) 427

11. A variance between the evidence of a plaintiff and his principal witness is not the ground of a nonsuit. *Wassermann v. Sloss* (Cal.) 176

Instructions.

12. A charge is not erroneous because of generalization and abstractions which lead up to the statement of the law determining the rights and responsibilities of the parties on the issues of fact involved. *West Memphis Packet Co. v. White* (Tenn.) 427

13. An instruction in an action against a steamboat company for personal injuries to a passenger, that the evidence must satisfy them that the boat was being run by and in the interest of defendant at the time of the injury, sufficiently presents the theory that the excursion during which plaintiff was injured was an individual affair of a third person for which the company was not liable. *Id.*

14. An insurer is not entitled to an instruction to the jury that the failure of an applicant for insurance to mention a policy in another company, when asked about other insurance, raises the presumption that the omission was fraudulent. *Penn Mut. L. Ins. Co. v. Mechanics' Sav. & T. Co.* (C. C. App. 6th C.) 33

15. An instruction on a trial for murder, which refers to the homicide as the "act which the accused had committed," is improper where it is not distinctly admitted that the accused did commit the homicide, although many of the requests to charge practically conceded such fact. *Ryder v. State* (Ga.) 721

16. The trial court should not, on a trial for murder, in explaining the nature of expert and nonexpert testimony and the rules under which witnesses belonging to each class may give their opinions as to the sanity or insanity of defendant, charge that the testimony of expert witnesses is entitled to great weight, and add that it is the same with parties who associated with defendant, lived with him, and lived in the same community, as the probative value of the testimony of each witness should be determined by the jury. *Id.*

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Trial; right to jury in criminal case. 229

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TRUSTS. See ACTION OR SUIT, 1; BILLS AND NOTES, 2, 3; CORPORATIONS, 14; INSURANCE, 34, 35.

UNDERGROUND RAILWAY. See HIGHWAYS, 2, 3.

UNDERTAKERS. See COMPULSORY SERVICE, 1; CONSPIRACY, 1.

VENDOR AND PURCHASER. See ESTOPPEL, 7.

VOTERS AND ELECTIONS. See also BETTING.

1. A person is not "able to read the Constitution of this state" within the meaning of Wyo. Const. art 6, § 9, unless he can read it in the English language, instead of a translation. *Rasmussen v. Baker* (Wyo.) 773

2. A vacancy in office caused by the death of a county clerk within fifteen days before a general election should be filled at that election under Mo Stat. § 1964, read in connection with § 4766, as amended by Mo. Laws 1893, p. 155. *State, Crow, v. Hostetter* (Mo.) 208

NOTES AND BRIEFS.

See also BETTING.

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WARRANT. See ARREST.

WASTE. See COTENANTS; EQUITY; LIFE TENANT, 5.

WATER-CLOSETS.

NOTES AND BRIEFS.

Municipal regulations of, 316

WATERS. See also BOUNDARIES; BUILDINGS, 2; COURTS, 7; DRAINS AND SEWERS; EASEMENTS, 1. EMINENT DOMAIN, 1; JUNCTION, 3, 4; RAILROADS, 17; TRESPASS.

1. A public grant of lands bounded by tidewater is impliedly subject to those paramount uses to which the government as trustee for the public may be called upon to apply the water front for the promotion of commerce and the general welfare. *Sage v. New York* (N. Y.) 606

2. Absolute power to improve a water

front for the benefit of navigation exists in the state or its municipal grantee as a trustee for the public, free from any interference by a riparian owner, whose sole right as against such authority is the statutory right of pre-emption in case of a sale. *Sage v. New York* (N. Y.) 606

8. A riparian owner's right of ingress and egress to his water front does not include a right to compensation for an interference therewith caused by the public improvement of the water front for the benefit of navigation. *Id.*

4. The privileges or easements of riparian proprietors upon tidewater include the right of access to the navigable part of the water in front, as against all but the government as trustee for the people at large. *Id.*

5. Lands made by filling up a water front and constructing piers, in a municipal improvement of the water front for the benefit of navigation, do not constitute an accretion to the land of a riparian proprietor, but remain the property of the city for the benefit of the public as dry land, just the same as when it was land under water. *Id.*

6. The governmental power of the state to control public waters cannot be lost by mere nonuser. *Auburn v. Union Water Power Co.* (Me.) 188

7. The fee to land under the waters of a river is in the riparian owner up to the middle of the stream. *Hall v. Alford* (Mich.) 205

Diversion.

8. The improvement of highways, draining of lands, and general improvement of the country, will not justify the diversion of water from a mill without compensation and due process of law. *Stock v. Jefferson* (Mich.) 855

9. The manner in which water diverted from a stream is returned to it is immaterial to a lower riparian proprietor, if the water is returned before the stream reaches his land. *Gould v. Euton* (Cal.) 181

10. A riparian proprietor cannot confer upon another person the right to divert water from a stream to use on nonriparian lands to the injury of a lower proprietor, since the riparian owner himself has a right to divert waters to riparian lands only. *Id.*

11. The right of a city to take water for the use of its inhabitants from a great public pond belonging to the state can be granted by the legislature, without making any compensation to those who want the water for the use of mills. *Auburn v. Union Water Power Co.* (Me.) 188

Water rates.

12. The current expenses which may be allowed in determining the sufficiency of the income provided by water rates consist of the money which is reasonably and properly expended in each year in collecting and distributing the water. *San Diego Water Co. v. San Diego* (Cal.) 460

13. Expenses of litigation contesting an ordinance fixing water rates cannot be considered as part of the expenses to be allowed in determining the sufficiency of the income produced by the rates. *Id.*

14. The investment on which a water com-

pany is entitled to base its compensation in determining the sufficiency of rates cannot include property not at present actually employed in collecting or distributing the water, however useful it may have been in the past or may yet be in the future. *Id.*

15. Water rates which will produce some reward to the owner of the water plant may nevertheless be so grossly and palpably insufficient to afford just compensation to the owner as to give the court power to relieve against an ordinance establishing such rates. *Id.*

16. Water rates which will produce but little more than 8½ per cent upon the actual cost of the waterworks after deducting current expenses do not constitute just compensation to the water company, where it is compelled to pay a much higher rate upon money which it appears to have fairly borrowed, when the rate paid does not appear to be above the lowest market rate, and the prudence and economy of the management are not successfully impeached. *Id.*

17. An ordinance fixing water rates so palpably unreasonable and unjust as to amount to a taking of the property of a water company without just compensation is not justified by Cal. Const. art. 14, § 1, providing for the establishment of such rates. *Id.*

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Waters; extent of riparian owner's right to divert. 182

Municipal regulation of nuisance affecting. 324

Unlawful diversion of. 355

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Right to alluvion, reliction, or accretion; land filled out for wharf. 609

Title to land under. 608, 851

Effect of sudden submergence upon title to land; change of boundary. 849

WHARVES. See WATERS, 5.

WILLS. See also CONTRACTS, 8; EVIDENCE, 22, 23.

1. A will jointly executed by husband and wife cannot be proved as the will of both during the lifetime of one of them. *Re Davis's Will* (N. C.) 289

2. An instrument executed by husband and wife as their joint will may be proved and take effect as the separate will of the husband after his death during the wife's lifetime, and, unless in some way revoked, may, upon her death, be again probated as to her property mentioned therein. *Id.*

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Wills probate of joint or mutual will:—(I.) Two wills in one instrument; (II.) right to revoke; (III.) joint wills to operate on survivor's death. 289

Lost or destroyed, evidence to establish. 433

WITNESSES.

A banker who, to show that deposits

were not received with his knowledge or consent, testifies that on the day they were received he went to another town, and telephoned those in charge of the bank not to receive any more deposits, may be asked on cross-examination how long he remained at that place, and whether or not on his return he found any deposits to have been made after his instructions not to receive them, for the purpose of fully disclosing his connection with the deposit. *State v. Eifert* (Iowa) 485

WOMEN. See also OFFICERS, NOTES AND BRIEFS.

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Negligence in attempting to get on or off moving street car. 788

WORKHOUSE.

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Right of woman to be director of. 211

WRIT AND PROCESS. See also CONSTITUTIONAL LAW, 5, 6, 12, 15.

1. An attorney at law is privileged from the service of process while attending upon the supreme court of Michigan and while going to and returning from the court to the county of his residence. *Hoffman v. Bay County Circuit Judge* (Mich.) 668

2. The privilege of exemption of attorneys from arrest in certain cases, given by How. Mich. Ann. Stat. § 7258, is not exclusive of the common-law privilege from service of process while attending court or returning therefrom. *Id.*

3. Jurisdiction of a foreign insurance company doing business in the state without complying with the statute which requires it before doing business to appoint the insurance

commissioner as attorney on whom process may be served cannot be acquired by service on such commissioner, where the fact appears from the plaintiff's own showing, and the defendant has not appeared to plead to the jurisdiction, and is not shown to have received notice, either actual or constructive. *Lubrano v. Imperial Council, O. of U. F. (R. I.)* 546

4. Service of an alternative writ of mandamus to compel a nonresident joint-stock association engaged in business in the state as a common carrier to print and keep for public inspection schedules showing the classification, rates, fares, and charges for transportation of property of all kinds and classes in the state, and to file a copy thereof with the state railroad and warehouse commission, made upon a specified person described by the court allowing the writ as the general agent of such association,—is sufficient to give jurisdiction to the court to proceed with the hearing, although the person served was only a local agent, where there is no general agent or any officer or agent superior to him in the state, and all the officers and shareholders are nonresidents. *State, Railroad & W. Com., v. Adams Exp. Co. (Minn.)* 225

5. Mandamus may be served on a joint-stock association by serving it on the head officer or the select body or person within the corporation whose province it is to put in motion the machinery necessary to secure performance of the duty. *Id.*

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Service on insurance commissioner for foreign company. 547

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L. R. A. CASES AS AUTHORITIES.

CASES IN 38 L.R. A.

38 L. R. A. 33, PENN MUT. L. INS. CO. v. MECHANICS' SAV. BANK & T. CO. 19 C. C. A. 286, 316, 37 U. S. App. 692, 43 U. S. App. 75, 72 Fed. 413, 73 Fed. 653.

Forfeiture of policy of insurance.

Cited in *Nederland L. Ins. Co. v. Meinert*, 62 C. C. A. 380, 127 Fed. 654, holding policy not forfeited for nonpayment of premium on day on which it falls due, where policy contains provision allowing thirty days' delay.

Cited in footnote to *Phenix Ins. Co. v. Fuller*, 40 L. R. A. 408, which holds policy not avoided by encumbrance in absence of inquiries or false representations.

— By misrepresentations.

Cited in *Guarantee Co. v. Mechanics' Sav. Bank & T. Co.* 26 C. C. A. 164, 47 U. S. App. 91, 80 Fed. 784, holding president's knowledge that cashier had engaged in speculative gambling, but had stopped, not breach of warranty avoiding policy insuring bank against loss through employees; *Fidelity Mut. Life Asso. v. Miller*, 34 C. C. A. 220, 63 U. S. App. 717, 92 Fed. 72, holding membership in secret beneficial order not within provision requiring applicant to state whether he had ever made application to any "company, association, or society;" *Fidelity Mut. Life Asso. v. McDaniel*, 25 Ind. App. 614, 57 N. E. 645, holding insured's reply alleging that diseases, undisclosed in application, left no bad effect on constitution insufficient to avoid answer alleging misrepresentation; *Continental Fire Ins. Co. v. Whitaker* (Tenn.) 64 L. R. A. 453, footnote p. 451, 79 S. W. 119, holding fire insurance policy not avoided by misrepresentation as to encumbrances, where applicant made no representations, but statement was inserted by company's agent without former's knowledge.

Cited in footnote to *Globe Mut. L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead.

Cited in note (55 L. R. A. 123, 129, 130, 138, 139) on forfeiture of life insurance by false representations as to previous application for insurance.

Distinguished in *Bruce v. Connecticut Mut. L. Ins. Co.* 74 Minn. 318, 77 N. W. 210, holding consultation with medical examiner of fraternal and benefit association, to determine whether life insurable, comprehended within question "Has any opinion ever been sought or consultation had with any person as to whether your life was insurable?"

What is "good health" or "bodily infirmity."

Cited in footnotes to *Barnes v. Fidelity Mut. Life Asso.* 45 L. R. A. 264, which holds person in bed with cold may be "in good health" within meaning of policy, though pneumonia, terminating fatally, sets in soon after; *Black v. Travelers' Ins. Co.* 61 L. R. A. 500, which holds injury not "bodily infirmity," as matter of law, unless physical health of insured affected.

Accident policy as within statute applying to other policies.

Cited in footnote to *Standard Life & Acci. Ins. Co. v. Carroll*, 41 L. R. A. 194, which holds accident insurance policy not within statute as to admissibility of application in life or fire insurance policy.

Admissibility of evidence of custom.

Cited in *Louis v. Connecticut Mut. L. Ins. Co.* 58 App. Div. 142, 68 N. Y. Supp. 683, holding evidence of life insurance company's custom in refusing to issue policies to persons previously attempting to commit suicide, when fact known, incompetent.

Sufficiency of pleadings.

Cited in *Brady v. Evans*, 24 C. C. A. 238, 47 U. S. App. 416, 78 Fed. 560, holding pleading alleging that petitioner was induced to remain depositor by directors' statement as to bank's solvency, demurrable.

License of insurance on assessment plan.

Cited in footnote to *State ex rel. National Life Asso. v. Matthews*, 40 L. R. A. 418, which authorizes licensing of insurance on the assessment plan for sole benefit of policy holders.

Forfeiture of insurance company's charter.

Cited in footnote to *International Fraternal Alliance v. State*, 40 L. R. A. 187, which holds charter of insurance company forfeited by attempting to issue policy for excessive amount.

Conflict of laws as to insurance.

Cited in note (63 L. R. A. 864) on conflict of laws as to contracts of insurance.

38 L. R. A. 71, *LEE v. SOUTHERN P. R. CO.* 116 Cal. 97, 58 Am. St. Rep. 147, 47 Pac. 932.

Lessor's liability to servant of lessee.

Cited in *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 875, 66 S. W. 1054, denying power of railroad corporation to relieve itself from liability for negligence of lessee of road, under provision giving former power to "contract for rebuilding or operation of railroad;" *Chicago & G. T. R. Co. v. Hart*, 209 Ill. 425, 66 L. R. A. 81, 70 N. E. 654 (dissenting opinion), majority holding lessor railroad company liable to employee of lessee for injury due to allowing switch engine to get out of repair.

Cited in footnote to *Harden v. North Carolina R. Co.* 55 L. R. A. 784, which denies power of lessor of railroad to exempt itself from liability to employees of lessee.

Cited in note (44 L. R. A. 750, 753, 754) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

Liability to servant of another.

Cited in *McCall v. Pacific Mail S. S. Co.* 123 Cal. 44, 55 Pac. 706, holding company not liable to servant of stevedore for latent defects in sling furnished.

Cited in note (46 L. R. A. 90, 91) on right of servant to recover damages from persons other than his master for injuries received in performance of duties.

Liability for damages from construction of railroad.

Distinguished in *Guinn v. Ohio River R. Co.* 46 W. Va. 153, 76 Am. St. Rep. 806, 33 S. E. 87, holding lessee not liable to abutter for damages arising from construction of railroad.

Corporate mortgage.

Cited in *Central Trust Co. v. Warren*, 58 C. C. A. 293, 121 Fed. 327, holding mortgage by street railway company while solvent, not in violation of Constitution forbidding alienation of franchise to escape liabilities.

38 L. R. A. 74, *COHN v. KINGSLEY*, 5 Idaho, 416, 49 Pac. 985.

Legislative journals.

Cited in footnotes to *Stanly County v. Snuggs*. 39 L. R. A. 439, which holds fatal, omission to enter yeas and nays in journal on second and third readings on bill authorizing tax; *State ex rel. Cheyenne v. Swan*, 40 L. R. A. 195, which sustains court's right to examine journals to determine whether alleged statutes passed.

Validity of statute.

Cited in *State v. Ridenbaugh*, 5 Idaho, 715, 51 Pac. 750, refusing to consider validity of faro-game law for lack of jurisdiction, as state had no right to appeal; *People ex rel. Atty. Gen. v. Alturas County*, 6 Idaho, 422, 44 L. R. A. 124, 55 Pac. 1067, refusing to determine validity of passage of act for annexation of county after long acquiescence in its validity.

Construction of Constitution as to residence for voting purposes.

Cited in *Powell v. Spackman*, 7 Idaho, 709, 54 L. R. A. 384, 65 Pac. 503, holding that inmates of soldiers' home cannot acquire right to vote where institution located, where Constitution provides that "absence while kept at public expense does not change voting residence."

38 L. R. A. 93, *LOUISVILLE, N. A. & C. R. CO. v. KEEFER*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796.

Validity of contracts against carrier's or employer's negligence.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 200, 40 L. R. A. 103, 62 Am. St. Rep. 503, 46 N. E. 917, and subsequent appeal in 29 Ind. 656, 63 N. E. 231, sustaining employee's release of express and railroad companies from liability for negligence; *Russell v. Pittsburgh, C. C. & St. L. R. Co.* 157 Ind. 313, 55 L. R. A. 256, footnote P. 253, 87 Am. St. Rep. 214, 61 N. E. 678, and *McDermon v. Southern P. Co.* 122 Fed. 672, sustaining sleeping car porter's waiver of right of action against railroad company for negligence; *Payne v. Terre Haute & I. R. Co.* 157 Ind. 617, 56 L. R. A. 473, 62 N. E. 472, sustaining stipulation in pass releasing carrier from liability for negligence; *Blank v. Illinois C. R. Co.* 182 Ill. 338, 55 N. E. 332, Affirming 80 Ill. App. 484, and *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 516, 44 L. ed. 569, 20 Sup.

Ct. Rep. 385, Reversing 79 Fed. 564, sustaining contract exempting railroad company from liability for injury to express messenger; Missouri, K. & T. R. Co. v. Carter, 95 Tex. 477, 68 S. W. 159, holding contract exempting carrier from liability for damage by fire to property in its hands, but not as carrier, not prohibited by statute forbidding limitation of carrier's liability by contract; Illinois C. R. Co. v. J. L. Fulton Co. 108 Ill. App. 238, sustaining contract between railroad company and contractor engaged in constructing walls on right of way, making latter responsible for injuries to his employees; Seaboard Air Line R. Co. v. Main, 132 N. C. 455, 43 S. E. 930, holding that circus company's contract to indemnify carrier for loss due to injuries to latter's employees does not relieve carrier from liability for negligent injury.

Cited in footnote to Tarbell v. Rutland R. Co. 56 L. R. A. 656, which holds void, contract by next of kin releasing employer from liability for future injuries to employee.

Distinguished in Richmond v. Southern P. Co. 41 Or. 56, 57 L. R. A. 617, 93 Am. St. Rep. 694, 67 Pac. 947, holding passenger's agreement, when procuring mileage at reduced rates, to release carrier from liability for negligence, unenforceable.

Carrier's right to give exclusive favors.

Cited in Donovan v. Pennsylvania Co. 61 L. R. A. 143, 57 C. C. A. 365, 120 Fed. 218, sustaining right of railroad company to give exclusive right to solicit patronage within its station to one hackman.

38 L. R. A. 97, BOSTON & A. R. CO. v. MERCANTILE TRUST & D. CO. 82 Md. 535, 34 Atl. 778.

Distribution of assets of insolvent corporation.

Cited in Ross v. American Employers' Liability Ins. Co. 56 N. J. Eq. 45, 38 Atl. 22, decreeing dividends to those making claims and recovering judgments against insured before insurer's insolvency and to those injured before insolvency and recovering judgment afterwards; Gilbert v. Washington Beneficial Endowment Asso. 21 App. D. C. 364, holding claim under benefit certificate maturing several years before insolvency of insurance company entitled to priority in distribution of assets.

Cited in footnotes to Lewis v. American Sav. & Loan Asso. 39 L. R. A. 559, which holds resident shareholders and creditors alone entitled to participate in securities deposited by foreign loan association as condition of doing business in state; *Re Wisconsin Odd Fellows' Mut. L. Ins. Co.* 42 L. R. A. 300, which holds claim for death loss arising after assignment for creditors by assessment company not enforceable as debt against assigned property.

Set-off in insolvency or bankruptcy cases.

Cited in note (55 L. R. A. 50) on set-off in bankruptcy cases.

Annotation in 38 L. R. A. 97, referred to particularly in Allen v. Thompson, 108 Ky. 480, 56 S. W. 823, holding borrowing member of mutual insurance association not entitled to set off value of life insurance policy against loan from association, when latter becomes insolvent and has no assets except mortuary fund.

Preferences to employees.

Cited in Roberts v. Edie, 85 Md. 186, 36 Atl. 820, holding claims for wages

earned three months prior to assignment not preferred when assignment afterwards annulled in proceedings adjudging assignor bankrupt; *Hess v. Jewell*, 85 Md. 238, 36 Atl. 758, holding employees entitled to preference in payment of wages over creditor obtaining judgment eight days before assignment; *Clark v. Renninger*, 89 Md. 71, 44 L. R. A. 414, footnote p. 413, 42 Atl. 928, holding one cutting timber by contract not employee within statute providing for receiver of estate of one refusing to pay employees; *Latta v. Lonsdale*, 52 L. R. A. 480, 47 C. C. A. 2, 107 Fed. 585, holding lawyer employed by railroad company on salary payable monthly, not employee within statute giving preference to payment of wages from assets of insolvent.

Priority and payment of tax.

Cited in *State v. Safe Deposit & T. Co.* 86 Md. 584, 39 Atl. 523, holding taxes not due cannot be charged against trust estate; *Monticello Distilling Co. v. Baltimore*, 90 Md. 427, 45 Atl. 210, and *Carstairs v. Cochran*, 95 Md. 503, 52 Atl. 601, sustaining act requiring custodian of distilled spirits to pay taxes for owner, giving former lien for payments.

Distinguished in *Parlett v. Dugan*, 85 Md. 412, 37 Atl. 36, holding taxes on assigned property which trustee for creditors refuses to take, not entitled to priority of payment from funds in his hands derived from other sources.

Contracts releasing or indemnifying carrier against loss.

Cited in *Trenton Pass. R. Co. v. Guarantors Liability Indemnity Co.* 60 N. J. L. 254, 44 L. R. A. 216, 37 Atl. 609, sustaining contract to indemnify common carrier against losses resulting from negligence; *Kansas City, M. & B. R. Co. v. Southern R. News Co.* 151 Mo. 386, 45 L. R. A. 385, 74 Am. St. Rep. 545, 52 S. W. 205, holding contract by which news company indemnifies railroad company against loss due to injury to traveling news agents, valid; *South Carolina & G. R. Co. v. Carolina, C. G. & C. R. Co.* 93 Fed. 560, upholding contract of connecting railroad company to operate receiver's road, and exempting from liability for negligence; *Illinois C. R. Co. v. J. L. Fulton Co.* 108 Ill. App. 239, sustaining contract between railroad company and contractor engaged in constructing walls on right of way, making latter responsible for injuries to his servants; *Seaboard Air Line R. Co. v. Main*, 132 N. C. 457, 43 S. E. 930, holding that circus company's contract to indemnify carrier for loss due to injuries to latter's employees does not relieve carrier from liability for negligent injury.

Fraudulent conveyances.

Cited in *Thorp v. Leibrecht*, 56 N. J. Eq. 505, 39 Atl. 361, holding conveyance to wife for nominal consideration, two months after judgment for personal injuries and before final judgment, fraudulent.

Construction of statute against usury.

Cited in *Commercial Bldg. & L. Asso. v. Mackenzie*, 85 Md. 138, 36 Atl. 754, holding statute against usury has no application to loan by foreign corporation on leasehold property so as to invalidate mortgage providing for higher rate.

38 L. R. A. 119, *KERR v. URIE*, 86 Md. 72, 63 Am. St. Rep. 493, 37 Atl. 789.

Right to compel transfer of stock on corporate books.

Cited in *Real Estate Trust Co. v. Bird*, 90 Md. 243, 44 Atl. 1048, holding

equity will compel corporation to transfer on books, shares of stock and issue certificate.

Effect of apparent ownership of stock.

Cited in *Sherwood v. Illinois Trust & Sav. Bank*, 195 Ill. 119, 88 Am. St. Rep. 183, 62 N. E. 835, holding party liable as stockholder when qualified ownership not stated on corporate books.

What law governs.

Cited in *Lowndes v. Cooch*, 87 Md. 487, 40 L. R. A. 382, 39 Atl. 1045, holding that law of testator's domicile governs lapsing of legacy of stock in bank of state where legatee resides; *Aultman & T. Mach. Co. v. Kennedy*, 114 Iowa, 446, 89 Am. St. Rep. 373, 87 N. W. 435, holding rights of mortgagee and attaching creditors determined by law of state where property located.

Cited in note (57 L. R. A. 523) on conflict of laws as to capacity of married women to contract.

38 L. R. A. 122, *WALLACE v. PIERCE-WALLACE PUB. CO.* 101 Iowa, 313, 63 Am. St. Rep. 389, 70 N. W. 216.

Power of court to dissolve corporation.

Cited in *Gibson v. Thornton*, 107 Ga. 562, 33 S. E. 895, holding power of court of equity to dissolve corporation and appoint receiver dependent upon statute.

Appointment of receiver.

Cited in *Vila v. Grand Island Electric Light, Ice, & Cold Storage Co.* (Neb.) 63 L. R. A. 797, 97 N. W. 613, holding that receiver cannot be appointed at instance of mere mortgagee for property not covered by his mortgage.

38 L. R. A. 128, *CARPENTER v. KNAPP*, 101 Iowa, 712, 70 N. W. 764.

Beneficiary's interest under insurance certificate.

Cited in *Brown v. Iowa L. of H.* 107 Iowa, 442, 78 N. W. 73, holding that illegitimate children, as legal heirs, acquire vested interest under insurance certificate upon insured's death; *Haerther v. Mohr*, 114 Iowa, 637, 87 N. W. 692, holding that provision in policy for payment to beneficiary, executors, or assigns, gives former vested interest; *Finnerty v. Supreme Council C. K. of A.* 115 Iowa, 401, 88 N. W. 834, holding that beneficiary who is not member has no interest allowing right of appeal to tribunal of association or civil courts until insured's death.

Change of beneficiary.

Cited in *Delaney v. Delaney*, 175 Ill. 195, 51 N. E. 961, holding that insured may change name of beneficiary in insurance certificate; *Waldum v. Homstad*, 119 Wis. 319, 96 N. W. 806, sustaining policy issued by benefit society, though change of beneficiary not formally completed before insured's death, but where insured had performed his part and only ministerial act remained to be done by officer.

Cited in note (49 L. R. A. 738, 750) on power of insured to destroy rights of beneficiary.

Assignment of benefit certificate.

Cited in *Belknap v. Johnston*, 114 Iowa, 274, 86 N. W. 267, holding surrender of policy to mutual benefit society for one in favor of creditor not mere assign-

ment; *Farmers & T. Bank v. Johnson*, 118 Iowa, 286, 91 N. W. 1074, sustaining beneficiary's right to assign her interest in policy on life of father.

Amendment of by-laws of benefit society restricting benefits.

Cited in *Pain v. Société St. Jean Baptiste*, 172 Mass. 323, 70 Am. St. Rep. 287, 52 N. E. 502, holding that amendment to by-laws of beneficiary association, restricting benefits, applies to member under disability at time of adoption.

38 L. R. A. 134, *NEW ORLEANS & N. E. R. CO. v. McEWEN*, 49 La. Ann. 1184, 22 So. 675.

Liability for unforeseen consequences.

Cited in footnotes to *Osborne v. Van Dyke*, 54 L. R. A. 367, which holds one unlawfully beating another liable for injury to bystander by unintentional blow; *Cleghorn v. Thompson*, 54 L. R. A. 402, which denies liability of both master and servant for accidental shooting of man by servant while lawfully shooting at troublesome dogs; *Texas & P. R. Co. v. Carlin*, 60 L. R. A. 462, which sustains liability for negligence likely to produce injury, though particular injury not anticipated.

Liability to riparian owner.

Cited in note (41 L. R. A. 496) on liability for injuries to riparian owner by running logs in stream.

38 L. R. A. 140, *LAKE SHORE & M. S. R. CO. v. ORNDORFF*, 55 Ohio St. 589, 60 Am. St. Rep. 716, 45 N. E. 447.

Ejection of custodian for nonpayment of child's fare.

Cited in *Braun v. Northern P. R. Co.* 79 Minn. 409, 49 L. R. A. 321, footnote p. 319, 79 Am. St. Rep. 497, 82 N. W. 675, requiring tender to custodian, of fare paid by him before ejecting young child from train, and referring particularly to annotation in 38 L. R. A. 140.

38 L. R. A. 143, *RANDALL v. TUELL*, 89 Me. 443, 36 Atl. 910.

Effect on contract or right of recovery of failure to procure license.

Cited in *Black v. Security Mut. Life Asso.* 95 Me. 37, 54 L. R. A. 940, footnote p. 939, 49 Atl. 51, denying right to commissions of one securing applications for insurance before license, but which was granted before policies issued.

Cited in footnotes to *Smith v. Robertson*, 45 L. R. A. 510, which denies right of recovery on contract for services of unlicensed stallion; *Denning v. Yount*, 50 L. R. A. 103, which denies right of unlicensed brokers to recover commissions; *Citizens' State Bank v. Nore*, 60 L. R. A. 737, which authorizes recovery by bona fide purchaser of note for medical services by unlicensed practitioner.

38 L. R. A. 145, *ROGERS v. BARNES*, 169 Mass. 179, 47 N. E. 602.

Validity of sale of encumbered property.

Cited in *Lord v. Hartford*, 175 Mass. 325, 56 N. E. 609, holding pledgee precluded from buying pledged property.

Cited in footnote to *Lundberg v. Davidson*, 42 L. R. A. 103, which denies insane mortgagor's right to set aside sale of land in good faith under power in mortgage, or to redeem from same after expiration of statutory period.

Damages for wrongful sale of trust property.

Cited in *Prondzinski v. Garbutt*, 10 N. D. 309, 86 N. W. 969, holding beneficiary not limited to proceeds only from wrongful sale of trust property by trustee, where property cannot be restored.

Suit connected with real property in another state.

Cited in footnote to *Schmaltz v. York Mfg. Co.* 59 L. R. A. 907, which sustains jurisdiction in equity in one state of suit by citizen to enjoin other citizen removing alleged fixtures from land on which former has mortgage.

38 L. R. A. 149, *CUMMINGS v. PERRY*, 169 Mass. 150, 47 N. E. 618.

Reaffirmed on second appeal in 177 Mass. 408, 58 N. E. 1083.

Implied easement.

Cited in footnote to *Irvine v. McCreary*, 49 L. R. A. 417, which holds sale of building creates easement in alley across rear of adjacent lot belonging to grantor.

38 L. R. A. 152, *LEAVITT v. CANADIAN P. R. CO.* 90 Me. 153, 37 Atl. 886.

Validity of statute relating to peddlers' license.

Cited in *State v. Montgomery*, 94 Me. 205, 80 Am. St. Rep. 386, 47 Atl. 165, declaring unconstitutional, statute prohibiting issue of peddler's license to alien: *State v. Mitchell*, 97 Me. 71, 94 Am. St. Rep. 481, 53 Atl. 887, holding statute exempting those who own and pay taxes on stock in trade to amount of \$25, from payment of hawkers' and peddlers' license tax, void.

Right of subrogation.

Cited in *Lyons v. Boston & L. R. Co.* 181 Mass. 556, 64 N. E. 404, holding statute giving railroad company benefit of insurance on property destroyed by company's negligence, valid.

Cited in footnote to *Mason v. Marine Ins. Co.* 54 L. R. A. 700, which holds insurer receiving abandonment of vessel injured by collision entitled to recover for loss of prospective earnings recovered.

38 L. R. A. 156, *HALLYBURTON v. BURKE COUNTY FAIR ASSO.* 119 N. C. 526, 26 S. E. 114.

Liability for injury to spectator at public exhibition.

Cited in footnotes to *Smith v. Benick*, 42 L. R. A. 277, which denies liability of proprietor of public resort for negligence of balloonist, who was an independent contractor; *Sebeck v. Plattdeutsche Volksfest Verein*, 50 L. R. A. 199, which denies proprietor's liability for injury to spectator at exhibition by explosion of bomb in hands of skilled person; *Mastad v. Swedish Brethren*, 53 L. R. A. 803, which holds proprietor of place of amusement required to use reasonable care to protect patrons from assaults by one rendered disorderly by liquor sold there.

38 L. R. A. 157, *MITCHELL v. NEGAUNEE*, 113 Mich. 359, 67 Am. St. Rep. 468, 71 N. W. 646.

Exercise of municipal powers.

Approved in *Pioneer Iron Co. v. Negaunee*, 116 Mich. 433, 74 N. W. 700,

sustaining city's power to assess for city purposes, unimproved lands recently annexed.

Cited in *Lewick v. Glazier*, 116 Mich. 499, 74 N. W. 717, sustaining contract by village officers for construction of water works with grant of rights in streets; *Mayo v. Washington*, 122 N. C. 25, 40 L. R. A. 169, 29 S. E. 343 (dissenting opinion), majority holding debt for purchase of electric light plant for municipal purposes not "necessary expense" which may be created without majority vote; *Wadsworth v. Concord*, 133 N. C. 598, 45 S. E. 948 (concurring opinion), raising, without deciding, question whether act relating to electric light plant authorizes establishment of municipal plant as present "necessary expense."

Cited in footnote to *Fawcett v. Mt. Airy*, 63 L. R. A. 870, which sustains municipality's power to incur expense of owning and operating water and electric light plants without submitting proposition to voters.

Interference with legislative discretion.

Followed in *Pioneer Iron Co. v. Negaunee*, 116 Mich. 438, 74 N. W. 700, which holds fixing city limits and taxing districts within legislative discretion which courts refuse to disturb.

38 L. R. A. 161, *EVANSVILLE v. MILLER*, 146 Ind. 613, 45 N. E. 1054.

Municipal power over, and removal of, nuisances.

Cited in *Walker v. Towle*, 156 Ind. 642, 53 L. R. A. 751, 59 N. E. 20, denying city's liability for killing dog when running about streets unmuzzled in violation of ordinance; *Richmond Safety Gate Co. v. Ashbridge*, 116 Fed. 222, enjoining enforcement of ordinance directing removal of entire class of elevator appliances, condemned without inspection; *Rushville Natural Gas Co. v. Morristown*, 30 Ind. App. 459, 66 N. E. 179, holding ordinance requiring gas company to fulfil its contract as to price of gas, and, in case of refusal, directing marshal to sever connections and exclude company from streets, not declaration within statute that pipes were nuisance; *State ex rel. Indianapolis v. Indianapolis Union R. Co.* 160 Ind. 59, 60 L. R. A. 837, footnote p. 831, 66 N. E. 163, which denies city's power to declare anything a nuisance *per se*, not recognized as such by common law.

Cited in footnotes to *Valparaiso v. Bozarth*, 47 L. R. A. 487, which holds notice or request to remove building encroaching on street, unnecessary before action to abate it; *Wygant v. McLauchlan*, 54 L. R. A. 637, which denies city's power unreasonably to prohibit all interments within city; *Mercer County v. Harrodsburg*, 56 L. R. A. 583, which authorizes city to enjoin replacing of hitching posts removed as nuisances; *Ainsworth v. Lakin*, 57 L. R. A. 132, which denies obligation of owner to remove or protect walls left standing after fire, until reasonable time to investigate; *Laugel v. Bushnell*, 58 L. R. A. 266, which sustains city's power to denounce conclusively as nuisances, those which are such *per se*, or as to which there may be honest differences of opinion; *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Cited in notes (36 L. R. A. 598, 605) on power of municipal corporation to define, prevent, and abate nuisances; (38 L. R. A. 305, 323) on municipal power over nuisances affecting safety, health, and personal comfort; (38 L. R. A. 640) on municipal power over nuisances relating to trade or business; (39 L. R. A.

520) on municipal power as to nuisances affecting public morals, decency, peace, and good order; (39 L. R. A. 551) on municipal control over smoke as public nuisance; (39 L. R. A. 649, 667) on municipal power over nuisances affecting highways and waters; (41 L. R. A. 330) on injunctions by municipalities against nuisances affecting public morals, peace and good order, and health and safety; (42 L. R. A. 814, 825) on injunction by municipalities against nuisances on highways and streets.

Annotation in 38 L. R. A. 161, referred to particularly in *Coverdale v. Edwards*, 155 Ind. 383, 58 N. E. 495, upholding city's right to remove electric light poles as nuisances, after termination of license and notice to remove.

38 L. R. A. 175, *LIVINGSTON v. SUPERIOR COURT*, 117 Cal. 633, 49 Pac. 836.

38 L. R. A. 176, *WASSERMANN v. SLOSS*, 117 Cal. 425, 59 Am. St. Rep. 209, 49 Pac. 566.

Illegality as affecting right to recover.

Cited in *De Leonis v. Walsh*, 140 Cal. 183, 73 Pac. 813, holding that execution of deed as mortgage to evade land laws and enable grantor to take up certain public lands by falsely stating that she did not own any land does not show such illegality as to defeat action to recover land so conveyed; *Munns v. Donovan Commission Co.* 117 Iowa, 520, 91 N. W. 789, sustaining right to recover money paid to one to make purchases on board of trade, with understanding that no produce was to be delivered on purchases actually made, but money to be used in paying differences between contract and market price; *Stover v. Flower*, 120 Iowa, 520, 94 N. W. 1100, denying right to recover from principal after rescission of lease, rent paid to agent who, without authority, leased premises for house of ill fame.

38 L. R. A. 181, *GOULD v. EATON*, 117 Cal. 539, 49 Pac. 577.

Use of water for nonriparian land.

Cited in *Jones v. Conn*, 39 Or. 45, 54 L. R. A. 636, footnote p. 630, 87 Am. St. Rep. 634, 64 Pac. 855, and *Meng v. Coffey* (Neb.) 60 L. R. A. 916, 93 N. W. 713, sustaining riparian proprietor's right to use water for irrigating nonriparian land; *Crawford Co. v. Hall* (Neb.) 60 L. R. A. 902, footnote p. 889, 93 N. W. 781, denying riparian owner's right to use water for irrigation of nonriparian lands.

Diversion of water.

Cited in *California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co.* 127 Fed. 742, authorizing injunction restraining diversion of water from stream by means of canal.

Cited in footnote to *Stock v. Jefferson*, 38 L. R. A. 355, which holds diversion of water from mill without compensation not justified by improvement of highways, drainage of land, or general improvement of country.

Rights of upper and lower riparian owners.

Cited in note (41 L. R. A. 740) on correlative rights of upper and lower proprietors as to use and flow of water in stream.

38 L. R. A. 183 RABBITT v. WILCOXEN, 103 Iowa, 35, 64 Am. St. Rep. 152, 72 N. W. 306.

Rights of member of insolvent loan association.

Cited in Wilcoxen v. Smith, 107 Iowa, 561, 70 Am. St. Rep. 220, 78 N. W. 217, holding borrowing members entitled to actual, not book, value of stock in distribution of assets of insolvent loan association; Cook v. Emmet Perpetual & Mut. Bldg. Asso. 90 Md. 288, 44 Atl. 1022, holding general creditors entitled to priority over members of loan association who gave notice of withdrawal before judgment of insolvency; Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 279, holding that service of notice of withdrawal entitles member to no preference when association insolvent.

Cited in footnote to Southern Bldg. & L. Asso. v. Price, 42 L. R. A. 206, which holds withdrawal immediately due when loan association goes into receiver's hands.

Withdrawals from loan association.

Cited in Hawley v. North Side Bldg. & L. Asso. 11 Colo. App. 99, 52 Pac. 408, holding that withdrawal value of stock of member of loan association dates as of time of acceptance of resignation.

Cited in footnote to Andrews v. Roanoke Bldg. Asso. & Invest. Co. 49 L. R. A. 659, which holds relation to loan association not severed by withdrawal, so as to preclude member suing for receiver.

38 L. R. A. 188, AUBURN v. UNION WATER-POWER CO. 90 Me. 576, 38 Atl. 561.

Diversion of water for public purposes.

Cited in Hamor v. Bar Harbor Water Co. 92 Me. 376, 42 Atl. 790, denying mill owner's right of recovery for water company's diversion of portion of water of great pond for city purposes, thereby diminishing volume at outlet; Union Water Power Co. v. Lewiston, 95 Me. 177, 49 Atl. 878, denying city's liability for taking water from great pond under legislative authority; Elgin v. Elgin Hydraulic Co. 85 Ill. App. 193, holding public's right to use waters of navigable river paramount to rights of owners of water power; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 372, 42 L. ed. 506, 18 Sup. Ct. Rep. 157, holding grants to maintain dams and sluices in Mississippi river subject to city's right to divert portion for public purposes.

Cited in note (50 L. R. A. 747) on state and Federal ownership of waters.

38 L. R. A. 190, TREFETHEN v. LYNAM, 90 Me. 376, 60 Am. St. Rep. 271, 38 Atl. 335.

Creditor's rights to husband's earnings.

Cited in footnote to Blackburn v. Thompson, 56 L. R. A. 938, which holds subject to husband's debts, property purchased in wife's name from profits of business conducted as her agent.

— To earnings of debtor's children.

Cited in footnote to Flynn v. Baisley, 45 L. R. A. 645, which denies creditor's rights in earnings of emancipated minor child.

Burden of proof of husband's debt.

Cited in note (56 L. R. A. 830) on burden of proof of husband's debt to wife on account of property received from her.

38 L. R. A. 194, *HARTNETT v. PLUMBER'S SUPPLY ASSO.* 169 Mass. 229, 47 N. E. 1002.

Blacklisting and combinations or acts to injure business.

Cited in *Weston v. Barnicoat*, 175 Mass. 455, 49 L. R. A. 615, 56 N. E. 619, holding member of voluntary association liable for causing another to be black-listed for nonpayment of debt; *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L. R. A. 697, 44 C. C. A. 433, 105 Fed. 171 (dissenting opinion), majority denying merchants' liability for offering goods owned by them at cut price to injure manufacture and depress market value of product.

Cited in footnotes to *Brewster v. C. Miller's Sons Co.* 38 L. R. A. 505, which sustains agreement between undertakers to refuse to render services to anyone failing to pay bill to any of them; *Doremus v. Hennessy*, 43 L. R. A. 797, which holds members of trade association combining to prevent other persons dealing with nonmember liable for resulting injury; *Bailey v. Master Plumbers' Asso.* 46 L. R. A. 561, which holds void, by-laws of plumbers' association compelling members to pay fixed sums for certain items, and restricting purchasers to dealers selling only to members; *Ertz v. Produce Exchange*, 48 L. R. A. 90, which holds malicious, conspiracy to injure dealer by inducing other people not to deal with him; *Gatzow v. Buening*, 49 L. R. A. 475, which holds by-law of liverymen's association prohibiting furnishing hearse or carriages to nonunion liverymen, illegal; *Dun v. Weintraub*, 50 L. R. A. 670, as to what constitutes libel of merchant; *Ertz v. Produce Exchange*, 51 L. R. A. 825, which holds produce exchange discriminating against nonmembers and controlling delivery of goods, an illegal combination; *West Virginia Transp. Co. v. Standard Oil Co.* 56 L. R. A. 804, which sustains malicious competition to get customers from rival and obtain business for one's self; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices.

Cited in note (49 L. R. A. 612) on blacklisting dealer as libel.

Distinguished in *Reynolds v. Plumbers' Material Protective Asso.* 30 Misc. 718, 63 N. Y. Supp. 303, holding communication to other members of protective association that one member refuses to pay bill, privileged.

Liability of member of association for dealing with nonmember.

Cited in footnotes to *Downs v. Bennett*, 55 L. R. A. 560, which denies right of one only remotely affected, to injunction fining or expelling member for violation of by-law prohibiting members from dealing with nonmembers or with others who deal with such nonmembers; *Martell v. White*, 64 L. R. A. 260, which holds action maintainable on behalf of quarry owner against members of association to which he does not belong, enforcing by-law imposing fine on members dealing with nonmembers.

Action for procuring discharge of servant.

Cited in *May v. Wood*, 172 Mass. 14, 51 N. E. 191 (dissenting opinion), majority holding declaration for inducing master to discharge servant must set out alleged false statements; *Moran v. Dunphy*, 177 Mass. 487, 52 L. R. A. 116, 83

Am. St. Rep. 289, 59 N. E. 125, holding maliciously procuring discharge of employee, actionable.

33 L. R. A. 198, *MURFIN v. DETROIT & E. PL. ROAD CO.* 113 Mich. 675, 67 Am. St. Rep. 489, 71 N. W. 1108.

Use of streets by bicyclists.

Cited in *Lee v. Port Huron*, 128 Mich. 535, 55 L. R. A. 309, 87 N. W. 637, holding bicyclist riding on sidewalk under municipal authority may recover for injuries resulting from defective walk; *Richardson v. Danvers*, 176 Mass. 414, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688, holding bicycle not within statute for keeping highways safe for carriages.

Cited in footnote to *Gloucester & S. Turnp. Co. v. Leppee*, 41 L. R. A. 457, which denies right to collect toll from bicycles on turnpike.

Bicycle law.

Cited in note (47 L. R. A. 304) on bicycle law.

38 L. R. A. 200, *O. & W. THUM CO. v. TLOCZYNSKI*, 114 Mich. 149, 68 Am. St. Rep. 469, 72 N. W. 140.

Violation of relation as former employee or agent.

Cited in *Cahill v. Madison*, 94 Ill. App. 222, holding merchant may enjoin former employee's violation of restrictive covenant in contract by attempting to take away customers with whom he became acquainted as such employee.

Cited in footnote to *Stein v. National Life Asso.* 46 L. R. A. 150, which sustains right of former insurance agent to influence policy holders to transfer insurance to other company, when by so doing he violates no business secret or trust.

Secrets; injunction to protect.

Cited in *Westervelt v. National Paper & Supply Co.* 154 Ind. 678, 57 N. E. 552, holding that company engaging employee to complete secret paper-bag machine may enjoin employee's manufacturing same machine for others; *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 921, 53 C. C. A. 491, 116 Fed. 311, holding that employee knowing secrets of employer's business will be enjoined from violating contract not to enter rival concern during certain period.

Cited in footnotes to *Stewart v. Hook*, 63 L. R. A. 255, which sustains injunction against divulging, to detriment of discoverer, secret as to medical preparation gained through confidential relations; *Stone v. Goss*, 63 L. R. A. 344, which upholds injunction against disclosure of trade secret by one under express contract or contract implied from confidential relation.

— Validity of contract as to.

Cited in footnote to *Thibodeau v. Hildreth*, 63 L. R. A. 480, which sustains contract by employee that employer shall have benefit of all inventions made by him, and that he will keep information secret in case patent shall not be applied for.

38 L. R. A. 205, *HALL v. ALFORD*, 114 Mich. 165, 72 N. W. 137.

Nuisance in navigable waters.

Cited in *Water Comrs. v. Detroit*, 117 Mich. 462, 76 N. W. 70, holding vessel

damaged by fire and negligently allowed to become water logged in navigable river, public nuisance.

What waters subject to private ownership.

Cited in *Baldwin v. Erie Shooting Club*, 127 Mich. 662, 87 N. W. 59, and *Toledo Liberal Shooting Co. v. Erie Shooting Club*, 33 C. C. A. 236, 62 U. S. App. 644, 90 Fed. 682, holding arm of lake about 2 feet deep, covered in summer with tall rushes, subject to private ownership.

38 L. R. A. 208, *STATE ex rel. CROW v. HOSTETTER*, 137 Mo. 636, 59 Am. St. Rep. 515, 39 S. W. 270.

Construction of statute.

Cited in *Scarritt v. County Court*, 89 Mo. App. 589, holding court authorized by statute to grant saloon license upon petition of majority of taxpaying citizens owning property, although not majority owning real property; *Keene v. Wyatt*, 160 Mo. 15, 63 S. W. 116 (dissenting opinion), majority holding that creditors of deceased homesteader may, under statute, sell homestead subject to rights of widow and children; *Horstman v. Adamson*, 101 Mo. App. 125, 74 S. W. 398, holding deputy appointed by county clerk to act as long as latter remains in office may be discharged without liability, where statute providing for appointment fails to state how long it shall continue.

Right of woman to hold office.

Distinguished in *Atty. Gen. v. Abbott*, 121 Mich. 549, 47 L. R. A. 96, footnote p. 92, 80 N. W. 372 (approved in dissenting opinion), holding woman not eligible for office of prosecuting attorney.

— To practise law.

Cited in footnote to *Re Maddox*, 55 L. R. A. 298, which denies right of woman to practise law.

— To act as principal of schools.

Cited in footnote to *Com. ex rel. Scott v. Board of Public Education*, 41 L. R. A. 498, which holds exclusion of women from principalship of certain schools within discretion of board of education.

38 L. R. A. 218, *STATE ex rel. KANSAS CITY v. EAST FIFTH STREET R. CO.* 140 Mo. 539, 62 Am. St. Rep. 742, 41 S. W. 955.

City's power to abrogate contract.

Cited in *State ex rel. National Subway Co. v. St. Louis*, 145 Mo. 574, 42 L. R. A. 122, 46 S. W. 981, holding city allotting subway spaces in streets for wires cannot repudiate contract by giving same space to another company.

38 L. R. A. 224, *STATE ex rel. NISBETT v. TOOLE*, 69 Minn. 104, 65 Am. St. Rep. 553, 72 N. W. 53.

38 L. R. A. 225, *STATE ex rel. RAILROAD & W. COMMISSION v. ADAMS EXP. CO.* 66 Minn. 271, 68 N. W. 1085.

Court's exercise of nonjudicial powers.

Cited in footnotes to *State ex rel. Godard v. Johnson*, 49 L. R. A. 662, which holds void, statute creating court of visitation empowered to regulate operation

of railroads; *Zanesville v. Zanesville Teleg. & Teleph. Co.* 52 L. R. A. 150, which sustains statute empowering probate court to divest mode of constructing telegraph or telephone line in street; *Re Davies*, 56 L. R. A. 855, which holds supreme court justice may be empowered to appoint referee to take testimony to aid in suppressing monopoly.

Power to require information as to business.

Cited in footnote to *State ex rel. Railroad & W. Commission v. United States Exp. Co.* 50 L. R. A. 667, which sustains state's right to require information as to business within state of unincorporated express company of other state.

Service of process.

Cited in *Adams Exp. Co. v. Schofield*, 111 Ky. 836, 64 S. W. 903, holding that association of three thousand members will be considered a quasi corporation for purpose of service of process.

Cited in note (50 L. R. A. 594) on what service of process is sufficient to constitute due process of law.

38 L. R. A. 228, *STATE v. GERRY*, 68 N. H. 495, 38 Atl. 272.

Jurisdiction of justice of the peace.

Cited in *State v. Jackson*, 69 N. H. 512, 43 Atl. 749, holding that justice of the peace has power to impose fine of \$1 and costs for violation of statute relating to fast driving.

38 L. R. A. 236, *MCCANN v. CONSOLIDATED TRACTION CO.* 59 N. J. L. 481, 36 Atl. 888.

Liability for servant's negligence.

Cited in *McCauley v. Hutkoff*, 20 Misc. 100, 45 N. Y. Supp. 85, holding plate-glass insurance company liable for servant's interference with gas fixtures when replacing window.

Liability for fright of horse.

Followed in *Ayars v. Camden & Suburban R. Co.* 63 N. J. L. 420, 43 Atl. 678, affirming recovery for injuries caused by fright of horse at trolley car running into pool, throwing water sidewise, and making unusual noise.

Cited in *Johnston v. New York & L. B. R. Co.* 65 N. J. L. 423, 47 Atl. 586, affirming recovery for damages caused by fright of horse at sudden raising of red flag by mechanical contrivance in highway.

Cited in footnote to *Oates v. Metropolitan Street R. Co.* 58 L. R. A. 447, which holds company liable for motorman's sounding gong or ringing bell after seeing horse is frightened.

38 L. R. A. 238, *ROBBINS v. RASCOE*, 120 N. C. 79, 58 Am. St. Rep. 774, 26 S. E. 807.

Delivery of deed.

Cited in *Bond v. Wilson*, 129 N. C. 330, 40 S. E. 179, holding delivery of deed to agent, sufficient; *Tarlton v. Griggs*, 131 N. C. 221, 42 S. E. 591, holding delivery of deed not presumed from acknowledgment of husband and acknowledgment and privy examination of wife; *Chapin v. Nott*, 203 Ill. 347, 67 N. E. 833, holding delivery of recorded deed to mother of infant grantee, without conditions, prima facie valid.

Cited in note (54 L. R. A. 872, 903) on delivery of deed to third person, or record, or delivery for record, by grantor.

38 L. R. A. 240, *WILSON v. LEARY*, 120 N. C. 90, 58 Am. St. Rep. 778, 26 S. E. 630.

38 L. R. A. 242, *BROWN v. BROWN*, 121 N. C. 8, 27 S. E. 998.

Right to file lien against married woman's property.

Cited in *Finger v. Hunter*, 130 N. C. 531, 41 S. E. 890, sustaining statute allowing laborer to file lien against married woman's property.

Wife's right of action for causing abandonment by husband or alienation of affections.

Cited in second appeal on merits in 124 N. C. 20, 70 Am. St. Rep. 574, 32 S. E. 320, holding instruction that wife entitled to recover for parent's wilfully causing husband to abandon her, error.

Cited in footnotes to *Gerner v. Gerner*, 40 L. R. A. 549, which sustains wife's right of action against one inducing her husband to leave her, though parent's right to give him advice in good faith is upheld; *Beach v. Brown*, 43 L. R. A. 114, which sustains divorced wife's right of action in own name for prior alienation of husband's affections; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections when unaccompanied by adultery; *Dietzman v. Mullin*, 50 L. R. A. 808, which sustains wife's right of action for alienating husband's affections; *Wolf v. Frank*, 52 L. R. A. 102, and *Betser v. Betser*, 52 L. R. A. 630, which sustains wife's right of action for alienating her husband's affection.

38 L. R. A. 243, *NORFOLK STATE BANK v. MURPHY*, 40 Neb. 735, 59 N. W. 706.

Priority of judgment lien.

Followed in *Ocobock v. Baker*, 52 Neb. 450, 66 Am. St. Rep. 519, 72 N. W. 582, holding lien of judgment superior to mortgage filed after opening of term and prior to rendition.

Cited in *Chadron Bldg. & L. Asso. v. Hamilton*, 45 Neb. 372, 63 N. W. 808, holding lien of judgment subject to mortgagee's equity as to land inadvertently omitted from mortgage; *Hoagland v. Green*, 54 Neb. 167, 74 N. W. 424, holding that rendition of deficiency judgment at term subsequent to commencement of foreclosure creates lien superior to conveyance executed after opening of term, but prior to actual rendition; *Doe v. Startzer*, 62 Neb. 720, 87 N. W. 535, and *Olander v. Tighe*, 43 Neb. 347, 61 N. W. 633, holding that recovery of judgment against vendor creates lien as to unpaid purchase money due from vendee; *Hayden v. Huff*, 60 Neb. 626, 83 N. W. 920, holding judgment lien superior to deed executed prior to rendition, but subsequent to first day of term.

Cited in footnote to *Goetzinger v. Rosenfeld*, 38 L. R. A. 257, which holds mortgage for antecedent consideration on equality with judgment subsequently entered on same day.

38 L. R. A. 257, *GOETZINGER v. ROSENFELD*, 16 Wash. 392, 47 Pac. 882.
Sufficiency of assignment of error.

Cited in *Rhode Island Mortg. & T. Co. v. Spokane*, 19 Wash. 620, 53 Pac.

1104, holding that statement that complaint does not state cause of action constitutes sufficient assignment of error.

Priority of liens.

Cited in note (38 L. R. A. 250) on priority of judgment over conveyance made after beginning of term.

Distinguished in *Dawson v. McCarty*, 21 Wash. 319, 75 Am. St. Rep. 841, 57 Pac. 816, holding unrecorded mortgage entitled to priority over subsequent judgment.

38 L. R. A. 259, *GERMAN-AMERICAN SAV. BANK v. SPOKANE*, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542.

Municipal liability for street improvement and condemnation awards.

Followed without discussion in *Doxey v. Port Townsend*, 21 Wash. 707, 57 Pac. 1103.

Cited in *Bowman v. Colfax*, 17 Wash. 346, 49 Pac. 551, holding that mere unreasonable delay in enforcing special assessment for street improvements does not render city liable; *Seattle v. deWolfe*, 17 Wash. 351, 49 Pac. 553, holding personal action not maintainable in name of city to enforce assessment for local improvement; *Seavey v. Seattle*, 17 Wash. 363, 49 Pac. 517, denying city's liability for condemnation awards before loss of right to prosecute collection by assessment; *Wilson v. Aberdeen*, 19 Wash. 90, 52 Pac. 524; *Rhode Island Mortg. & T. Co. v. Spokane*, 19 Wash. 620, 53 Pac. 1104; *Northwestern Lumber Co. v. Aberdeen*, 20 Wash. 102, 54 Pac. 935; *North Western Lumber Co. v. Aberdeen*, 22 Wash. 406, 60 Pac. 1115; *Potter v. Whatcom*, 25 Wash. 210, 65 Pac. 197,—holding city not liable out of general fund for cost of street improvement payable on warrants drawn on special fund.

Distinguished in *Philadelphia Mortg. & T. Co. v. New Whatcom*, 19 Wash. 232, 52 Pac. 1063, granting mandamus to compel city to include in new assessment, interest accruing on void warrant for street improvement.

— For failure to exact bond.

Distinguished in *Rounds v. Whatcom County*, 22 Wash. 109, 60 Pac. 139, holding county liable to material man for failure to exact bond of contractor on public works.

Change of remedy as impairment of obligation.

Cited in footnote to *Peninsular Lead & Color Works v. Union Oil & Paint Co.* 42 L. R. A. 331, which holds statute for dissolution of attachment by assignment for creditors within ten days, void as to contracts made when right of attachment absolute.

38 L. R. A. 267, *GERMAN SAV. & L. SOC. v. WEBER*, 16 Wash. 95, 47 Pac. 224.

Agreement as to fixtures.

Cited in *Woodland Co. v. Mendenhall*, 82 Minn. 490, 83 Am. St. Rep. 445, 85 N. W. 164, upholding lien for purchase price of trolley wire strung on poles under agreement that vendor should retain control until payment.

Cited in footnotes to *Thomson v. Smith*, 50 L. R. A. 780, which sustains right of purchaser at sheriff's sale to wagon scales constituting fixture bought on conditional sale; *Schellenberg v. Detroit Heating & Lighting Co.* 57 L. R. A. 632,

which holds heating apparatus bought under contract reserving title in seller not fixture, though permanently placed in building; *Peaks v. Hutchinson*, 33 L. R. A. 279, which holds building on stone posts, erected under parol agreement that it shall remain builder's, does not pass to bona fide purchaser of land; *Beeler v. C. C. Mercantile Co.* 60 L. R. A. 283, which holds hotel building as fixed to and conveyed with land cannot afterward become a chattel by mere agreement of parties.

Mortgagee's rights as to fixtures.

Cited in *Neufelder v. Third Street & Suburban R. Co.* 23 Wash. 475, 53 L. R. A. 603, footnote p. 601, 83 Am. St. Rep. 831, 63 Pac. 197, holding machinery secured by bolts and screws, fastening it to building, not fixture as to mortgagee; *Fuller-Warren Co. v. Harter*, 110 Wis. 87, 53 L. R. A. 607, footnote p. 601, 84 Am. St. Rep. 867, 85 N. W. 698, denying right of vendor and vendee of personalty permanently annexed to land, to retain property as personalty as against owner of existing mortgage; *Paine v. McDowell*, 71 Vt. 34, 41 Atl. 1042, holding mortgagee not entitled to sawmill and machinery erected by mortgagor's lessee.

Cited in footnotes to *Anderson v. Creamery Package Mfg. Co.* 56 L. R. A. 554, which holds mortgage to seller of machinery purchased for use in permanent building, superior to existing real-estate mortgage; *Schmaltz v. York Mfg. Co.* 59 L. R. A. 907, which sustains jurisdiction in equity in one state of suit by citizen to enjoin other citizen from removing alleged fixtures from land on which former has mortgage.

What are fixtures.

Cited in footnote to *Philadelphia Mortg. & T. Co. v. Miller*, 44 L. R. A. 559, which holds bath tub, water heaters, and stove mantles not fixtures *per se*.

38 L. R. A. 271, *N. K. FAIRBANK & CO. v. CINCINNATI, N. O. & T. P. R. CO.*
26 C. C. A. 402, 47 U. S. App. 744, 81 Fed. 289.

What is "machinery" within exemption contract.

Cited on second appeal in 33 C. C. A. 615, 62 U. S. App. 231, 90 Fed. 471, holding release of carrier's liability for damage caused by "accident to machinery" does not include breaking of axle.

38 L. R. A. 275, *Re MELON STREET*, 182 Pa. 397, 38 Atl. 482.

Appeal from final judgment making awards quashed in 192 Pa. 332, 44 W. N. C. 361, 43 Atl. 1013.

Damages for injury to abutter's easement.

Cited in *Re Chatham Street*, 191 Pa. 606, 43 Atl. 365, holding abutter entitled to damages for injury to drainage caused by change of street grade; *Lewis v. Homestead*, 194 Pa. 204, 45 Atl. 123, holding owner entitled to damages for injury to property, caused by change of street grade, although change not immediately in front of premises; *Cram v. Laconia*, 71 N. H. 49, 57 L. R. A. 286, footnote p. 282, 51 Atl. 635, denying recovery for injury by discontinuing part of street on which property abuts; *Sensenig v. Lancaster*, 20 Lanc. L. Rev. 131, holding in absence of statute, city not liable for vacation of street deeded to it by abutting owners; *Lafean v. York County*, 20 Pa. Super. Ct. 580, holding abutter entitled to damages for partial interference with light, air, and access to prop-

erty, due to elevation of approach to bridge; *Cooper v. Scranton City*, 21 Pa. Super. Ct. 21, holding city liable, but not in action for trespass, for damages to abutting property resulting from change of street grade causing water to accumulate; *Fyfe v. Turtle Creek*, 22 Pa. Super. Ct. 298, holding municipal corporation liable for damage to house directly resulting from removing lateral support by construction of sewers; *Walsh v. Scranton*, 23 Pa. Super. Ct. 278, holding that construction of retaining wall at intersection of two streets, resulting in *cui de sac*, entitled abutter to damages.

Distinguished in *Stork v. Philadelphia*, 195 Pa. 106, 49 L. R. A. 603, 45 Atl. 678, denying damages for settling of walls of house, caused by improper construction of subway in street.

Decree confirming vacation of street.

Cited in *Re William Street*, 7 Pa. Dist. R. 4, 43 W. N. C. 8, holding decree unnecessary to complete vacation of street, struck off by revision of city plan.

Appointment of jury to assess damages.

Cited in *Re Toronto Street*, 26 Pa. Co. Ct. 98, holding that proceedings for appointment of jury to assess damages, caused by vacation of street should be brought in court of quarter sessions.

Assessment of nonabutting property.

Cited in *Re Orkney Street*, 194 Pa. 425, 48 L. R. A. 274, 45 Atl. 314, Affirming 9 Pa. Super. Ct. 610, 44 W. N. C. 12, holding that no assessment for benefits from opening street can be imposed upon nonabutting property.

Power of council to vacate street.

Cited in *Wetherill v. Pennsylvania R. Co.* 195 Pa. 159, 45 Atl. 658, refusing to enjoin vacation of street under authority of council.

Service of notice as to laying out road.

Cited in *Re Derry Twp. Road*, 11 Pa. Super. Ct. 238, holding that viewers' report raises presumption of service of notice on land owners as to laying out new road.

Conclusiveness of judgment establishing boundary.

Cited in footnote to *Long v. Wilson*, 60 L. R. A. 720, which holds judgment establishing boundary of highway in suit against owner on one side not conclusive on opposite owner.

Terminus for public road.

Cited in *Re Schuylkill River Road*, 19 Pa. Super. Ct. 378, holding large manufacturing center sufficient terminus for public road as "place of public resort."

38 L. R. A. 289, *Re DAVIS*, 120 N. C. 9, 58 Am. St. Rep. 771, 26 S. E. 636.

38 L. R. A. 294, *CARR v. BROWN*, 20 R. I. 215, 78 Am. St. Rep. 855, 38 Atl. 9.

Validity of statutes under fourteenth amendment.

Cited in *State v. Dalton*, 22 R. I. 82, 48 L. R. A. 779, 84 Am. St. Rep. 818, 46 Atl. 234, holding statute prohibiting vendor from giving purchaser stamp or coupon which entitles him to receive article from third person, void; *State v. Foster*, 22 R. I. 173, 50 L. R. A. 343, 46 Atl. 833, sustaining statute requiring transient dealers to make deposit of \$1,000, and pay \$200 for state, and \$100

to \$350 for local, license; *Crafts v. Ray*, 22 R. I. 186, 49 L. R. A. 608, 46 Atl. 1043, sustaining exemption from taxation for ten years of private manufacturing corporation on condition it locate in town; *Church v. South Kensington*, 22 R. I. 385, 53 L. R. A. 741, 48 Atl. 3, declaring void, provision charging town with maintenance of pauper upon report of commissioners not required to take or administer oaths; *Cunnius v. Reading School Dist.* 25 Pa. Co. Ct. 18, holding act relating to administration on estates of persons presumed to be dead, void; *Gunn v. Union R. Co.* 23 R. I. 302, 49 Atl. 999, holding that statute empowering appellate court to grant new trial "for reasons for which it is granted at common law" does not deprive person of property without due process of law or interfere with right to jury trial; *Re Ten-Hour Law*, 24 R. I. 619, 61 L. R. A. 618, 54 Atl. 602, holding exemption of certain contracts from operation of statute limiting hours of labor of employees of street railway companies, not void as being oppressive.

38 L. R. A. 297, *SWEENEY v. METROPOLITAN L. INS. CO.* 19 R. I. 171, 61 Am. St. Rep. 751, 36 Atl. 9.

Warranty of answers in insurance application.

Cited in footnote to *Globe Mut. L. Ins. Asso. v. Wagner*, 52 L. R. A. 649, which holds policy not avoided by false statement that none of applicant's brothers dead.

38 L. R. A. 299, *IRELAND v. GLOBE MILL & REDUCTION CO.* 20 R. I. 190, 38 Atl. 116.

Right to enact by-laws.

Cited on third appeal in 21 R. I. 10, 79 Am. St. Rep. 769, 41 Atl. 258, denying right of corporation to enact by-law relating to sale of stock, before filing certificate of organization.

38 L. R. A. 302, *CZECH v. GREAT NORTHERN R. CO.* 68 Minn. 33, 64 Am. St. Rep. 452, 70 N. W. 791.

Duty of railroad company at crossings.

Cited in *Croft v. Chicago G. W. R. Co.* 72 Minn. 48, 74 N. W. 898, holding railroad company liable for negligently killing cow at crossing; *Mack v. South Bound R. Co.* 52 S. C. 340, 40 L. R. A. 686, 68 Am. St. Rep. 913, 29 S. E. 905, holding evidence of failure to give statutory signals at crossing near accident, competent on question of reckless negligence; *Louisville & N. R. Co. v. Bodine*. 109 Ky. 515, 56 L. R. A. 508, footnote p. 506, 59 S. W. 740, requiring signals at private crossing for special train running at high speed, when crossing particularly dangerous; *Kinyon v. Chicago & N. W. R. Co.* 118 Iowa, 359, 96 Am. St. Rep. 382, 92 N. W. 40, holding operation of train over crossing at high rate of speed not, of itself, negligence.

38 L. R. A. 305, *HARRINGTON v. PROVIDENCE*, 20 R. I. 233, 38 Atl. 1.

Exercise of municipal powers.

Cited in *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 98, 126 Fed. 36, sustaining power of municipality to contract for removal of garbage, and give exclusive privilege for fifty years, with requirement as to erection of crematory within certain time.

Cited in footnotes to *Helena v. Dwyer*, 39 L. R. A. 266, which holds void, ordinance against selling fresh pork or sausage between specified dates; *Iler v. Ross*, 57 L. R. A. 895, which denies city's right to grant monopoly by contract for removal of ashes, etc.

— Over nuisances.

Cited in footnotes to *State ex rel. Moriarity v. McMahon*, 38 L. R. A. 675, which holds business of scavenger within control of city having power to make ordinances for protection of health; *Knauer v. Louisville*, 41 L. R. A. 219, which holds void, as indirect confiscation, ordinance prohibiting owner's removal of carcass of dead animal; *Valparaiso v. Bozarth*, 47 L. R. A. 487, which holds notice or request to remove building encroaching on street unnecessary before action to abate it; *Western & A. R. Co. v. Atlanta*, 54 L. R. A. 294, which holds power to abate nuisance in city to be in police court only; *Northwood v. Barber Asphalt Paving Co.* 54 L. R. A. 454, which holds compliance with insufficient special directions for abatement of nuisance, not excuse disobedience of general clause of decree; *Wygant v. McLauchlan*, 54 L. R. A. 637, which denies city's power unreasonably to prohibit all interments within city; *Mercer County v. Harrodsburg*, 56 L. R. A. 583, which authorizes city to enjoin replacing of hitching posts removed as nuisances; *Philadelphia v. Bradender*, 58 L. R. A. 220, which sustains ordinance against casting advertisements, etc., into vestibules of dwellings; *St. Louis v. Galt*, 63 L. R. A. 778, which sustains ordinance requiring cutting of weeds on city lots.

Cited in notes (38 L. R. A. 161) on municipal power over buildings and other structures as nuisances; (38 L. R. A. 641) on municipal power over nuisances relating to trade or business; (39 L. R. A. 520) on municipal power as to nuisances affecting public morals, decency, peace, and good order; (39 L. R. A. 551) on municipal control over smoke as public nuisance; (39 L. R. A. 621) on municipal control over public nuisances on public streets and highways, created by street railroad and other electrical companies; (39 L. R. A. 649, 653, 677, 685) on municipal power over nuisances affecting highways and waters; (40 L. R. A. 465) on injunction by municipalities against nuisances in waters and water courses; (41 L. R. A. 321, 322, 324-326) on injunction by municipal corporation against nuisances affecting public morals, peace and good order, and health and safety.

Distinguished in *Brown v. Narragansett*, 21 R. I. 505, 44 Atl. 932, holding no appeal lies from order of district council of Narragansett as to abatement of nuisances.

Right to maintain nuisance.

Cited in note (53 L. R. A. 895, 897) on prescriptive right to maintain public nuisance.

What is a nuisance.

Cited in footnote to *Kleebauer v. Western Fuse & Explosives Co.* 60 L. R. A. 377, which holds storage of gunpowder necessary for business of making fuses, carefully conducted in proper location, not nuisance *per se*.

State's exercise of police powers.

Cited in *State v. Dalton*, 22 R. I. 80, 48 L. R. A. 778, 84 Am. St. Rep. 818, 46 Atl. 234, holding statute prohibiting vendor from giving purchaser stamp or coupon which entitled him to receive article from third person void; *State v.*

Foster, 22 R. I. 172, 50 L. R. A. 343, 46 Atl. 833, sustaining statute requiring transient merchants to deposit \$1,000 and pay \$200 for state, and \$100 to \$350 for local, license; Tenement House Department v. Moeschen, 89 App. Div. 532, 85 N. Y. Supp. 704, sustaining act requiring individual water closets, instead of school sinks, to be used in tenement houses.

Cited in footnote to State v. Hyman, 64 L. R. A. 637, which holds prohibition against use of room in tenement or dwelling house for manufacture of clothing, except by immediate member of family, within police power.

38 L. R. A. 326, DARLINGTON v. WARD, 48 S. C. 570, 26 S. E. 906.

Exercise of municipal powers.

Cited in State *ex rel.* Southern R. Co. v. Earle, 66 S. C. 198, 44 S. E. 781, sustaining ordinance requiring railroad companies whose tracks cross city streets, to station flagman both day and night, whose duty it shall be to wave red flag or light upon approach of trains.

Cited in footnote to State *ex rel.* Indianapolis v. Indianapolis Union R. Co. 60 L. R. A. 831, which denies city's power to declare anything a nuisance *per se*, not recognized as such by common law.

Cited in note (38 L. R. A. 332) on municipal power over nuisances affecting safety, health, and personal comfort.

38 L. R. A. 339, FARRINGTON v. PUTNAM, 90 Me. 405, 37 Atl. 652.

Ultra vires as defense to recovery of corporate property.

Cited in Manchester Street R. Co. v. Williams, 71 N. H. 321, 52 Atl. 461, holding that officer of corporation selling its property as his own gives vendee no rights as against corporation, although latter acquired property by *ultra vires* act.

Right to attack devise to corporation.

Cited in Brigham v. Peter Bent Brigham Hospital, 126 Fed. 801, denying right of heirs to object to devise to hospital corporation on ground that it will increase amount of property beyond limit fixed by charter.

38 L. R. A. 355, STOCK v. JEFFERSON TWP. 114 Mich. 357, 72 N. W. 132.

Injunction to protect or restore easement.

Cited in Hyatt v. Albro, 121 Mich. 640, 80 N. W. 641, enjoining riparian owners from deepening outlet, thereby depriving mill owner of sufficient power; Ives v. Edison, 124 Mich. 410, 50 L. R. A. 138, 83 Am. St. Rep. 329, 83 N. W. 120, holding that owner of easement may compel restoration of stairway, although cost of rebuilding greater than injury.

38 L. R. A. 358, NEBRASKA MEAL MILLS v. ST. LOUIS S. W. R. CO. 64 Ark. 169, 62 Am. St. Rep. 183, 41 S. W. 810.

To whom delivery may be made under bill of lading.

Cited in footnotes to Chicago Packing & Provision Co. v. Savannah, F. & W. R. Co. 40 L. R. A. 367, which sustains delivery of goods without surrender of bill of lading to consignee, or on his order or direction; Southern R. Co. v. Atlanta Nat. Bank, 56 L. R. A. 546, which holds carrier liable to holder of bill of lading for

loss of cotton by delivery from its compress to third person at consignor's direction.

38 L. R. A. 367, *MACNAUGHTAN CO. v. MCGIRL*, 20 Mont. 124, 63 Am. St. Rep. 610, 49 Pac. 651.

Actions by foreign corporations involving interstate commerce.

Cited in *Kent & S. Co. v. Tuttle*, 20 Mont. 207, 50 Pac. 559, holding that foreign corporation suing for value of goods sold in state must allege facts showing sale in nature of interstate commerce; *Zion Co-op. Mercantile Asso. v. Mayo*, 22 Mont. 102, 55 Pac. 915, holding that foreign corporation suing on domestic contract need not allege compliance with requirements, where petition shows transaction *prima facie* interstate commerce.

Who engaged in interstate commerce.

Cited in footnotes to *Smith v. Jackson*, 47 L. R. A. 416, which holds agent collecting garments and sending them to laundry outside of state and redelivering to owners, not engaged in commerce; *Racine Iron Co. v. McCommons*, 51 L. R. A. 134, which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; *Croy v. Epperson*, 51 L. R. A. 254, which holds one taking orders in own name for articles manufactured in other state and delivering separate articles to customers, not engaged in interstate commerce; *French v. State*, 52 L. R. A. 160, which holds agent of nonresident company selling organ taken with him, or taking orders for others to be delivered by him, engaged in interstate commerce; *State v. Willingham*, 52 L. R. A. 198, which holds interstate commerce, delivery of portraits and frames by agent previously taking order for nonresident manufacturer.

Taxation of corporate franchises.

Cited in note (57 L. R. A. 85) on taxation of corporate franchises in United States.

38 L. R. A. 373, *JOHNSON v. STATE*, 59 N. J. L. 535, 37 Atl. 949.

Effect of void portion of act upon remainder.

Cited in *Bernards Twp. v. Allen*, 61 N. J. L. 242, 39 Atl. 716, raising, without deciding, as to effect of void portions of act upon valid portions; *Grey v. Dover*, 62 N. J. L. 50, 40 Atl. 640, holding that constitutional portion of statute will be sustained when separable from void part; *Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co.* 64 N. J. L. 345, 45 Atl. 762, holding that interdependent portions of statute fall when one invalid; *Doran v. Camden*, 64 N. J. L. 668, 46 Atl. 724, holding that invalidity of provision for imprisonment will not avoid entire ordinance relating to fine and imprisonment; *McArdle v. Jersey City*, 66 N. J. L. 599, 88 Am. St. Rep. 496, 49 Atl. 1013, holding that invalidity of manner of establishing excise board defeats entire excise act; *Riccio v. Hoboken*, 69 N. J. L. 661, 63 L. R. A. 491, 55 Atl. 1109, holding school law classifying school districts without adhering to any method of classification germane to purpose of enactment, void, as being local and special law providing for management of public schools.

Repeal of statute by implication.

Cited in *Holle v. State*, 62 N. J. L. 535, 41 Atl. 832, holding that act re-

pealing statute which abolished certain courts has no effect upon act reducing number of judges of such courts.

Protection of courts against changes.

Cited in footnote to *Love v. Liddle*, 62 L. R. A. 482, which denies power to regulate jurisdiction of justices of the peace by classification of cities in which they reside.

Exclusion of negroes from jury duty.

Cited in *Bullock v. State*, 65 N. J. L. 564, 86 Am. St. Rep. 668, 47 Atl. 62, holding absence of colored man from panel of jurors returned to try colored man, no error.

38 L. R. A. 376, *McNULTY v. PENNSYLVANIA R. CO.* 182 Pa. 479, 61 Am. St. Rep. 721, 38 Atl. 524.

Employee as passenger or fellow servant.

Cited in *Louisville & N. R. Co. v. Stuber*, 54 L. R. A. 698, 48 C. C. A. 152, 103 Fed. 937, holding foreman of water supply department fellow servant of engineer while in engine, going from place to place to supervise tanks; *Dickinson v. West End Street R. Co.* 177 Mass. 368, 52 L. R. A. 328, footnote p. 326, 83 Am. St. Rep. 284, 59 N. E. 60, holding street railway employee riding free not fellow servant of motorman; *Chattanooga Rapid Transit Co. v. Venagle*, 105 Tenn. 469, 51 L. R. A. 889, footnote p. 886, 58 S. W. 861, holding night watchman at depot boarding train to report readiness to resume duty, passenger; *Dishon v. Cincinnati, N. O. & T. P. R. Co.* 126 Fed. 202, holding section hand who lived in section house near track, and who, while on way to depot for own purpose, was injured by closing together of cars which had been separated to give section men passageway, fellow servant of those operating cars; *Simmons v. Oregon R. Co.* 41 Or. 163, 69 Pac. 440, holding employee of railroad company a passenger while riding free on extra freight on return from consultation with company's physician, whose fees are paid by company retaining sum from employees' pay checks.

Cited in footnotes to *Iannone v. New York, N. H. & H. R. Co.* 46 L. R. A. 730, which holds railroad employee gratuitously carried home after work not a passenger; *Travelers' Ins. Co. v. Austin*, 59 L. R. A. 107, which holds railroad paymaster traveling on company's business from station to station not a passenger within meaning of accident policy; *Sanderson v. Panther Lumber Co.* 55 L. R. A. 908, which holds foreman of lumber camp riding on log train to and from camp, fellow servant of persons operating train; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended, passenger; *Peterson v. Seattle Traction Co.* 53 L. R. A. 586, which holds member of construction gang riding home on ticket after day's work not fellow servant of those operating car; *Whitney v. New York, N. H. & H. R. Co.* 50 L. R. A. 615, which holds employee of railroad company riding on pass while making trip for own convenience, and which was given him under stipulation in his contract of employment, a passenger.

38 L. R. A. 378, *Re LENNIG*, 182 Pa. 485, 61 Am. St. Rep. 725, 39 Atl. 466.

Transfer of expectancy.

Cited in *Bechtel v. Lauer Brewing Co.* 21 Pa. Co. Ct. 450, holding assignment

of verdict before judgment, though not of record, entitles assignee to fund as against subsequent attaching creditor of assignor.

Distinguished in *Simon's Estate*, 9 Pa. Dist. R. 59, holding deed of interests taking effect at termination of existing life estate, valid.

— **Contracts relating to.**

Cited in *De Boer v. Harmsen*, 131 Mich. 94, 90 N. W. 1036, holding agreement by prospective heir to induce ancestor not to change will, valid, if latter is informed of arrangement.

38 L. R. A. 382, *O'NEIL v. BEHANNA*, 182 Pa. 236, 61 Am. St. Rep. 702, 37 Atl. 843.

Enjoining strikers' interference with business.

Cited in *York Mfg. Co. v. Oberdick*, 25 Pa. Co. Ct. 334, enjoining strikers from interfering with manufacturer by intimidating employees; *Marietta Casting Co. v. Thuma*, 28 Pa. Co. Ct. 260, 20 Lanc. L. Rev. 192, authorizing injunction restraining strikers from interfering with workmen by calling them names and picketing factory; *Patterson v. Building Trades*, 11 Kulp, 25, authorizing injunction against strikers declaring boycott against manufacturer.

38 L. R. A. 387, *EVEY v. MEXICAN C. R. CO.* 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.

Right of action for injury caused in another state or country.

Followed in *Mexican C. R. Co. v. Marshall*, 34 C. C. A. 137, 91 Fed. 937; *Mexican C. R. Co. v. Murray*, 42 C. C. A. 344, 102 Fed. 273; *Mexican C. R. Co. v. Eckman*, 42 C. C. A. 347, 187 U. S. 433, 47 L. ed. 247, 23 Sup. Ct. Rep. 211, Affirming 102 Fed. 276; *Mexican C. R. Co. v. Jones*, 48 C. C. A. 231, 107 Fed. 69, — holding that railroad employee injured in Mexico may sue in Federal court having jurisdiction of parties and subject-matter, since Mexican law not too indefinite to be administered in state.

Cited in *Law v. Western R. Co.* 91 Fed. 819, sustaining recovery of damages against railroad company for death of employee, allowed by statute of state where injury occurred and which is enforceable in another state having jurisdiction of parties; *Slater v. Mexican National R. Co.* 194 U. S. 135, 48 L. ed. 906, 24 Sup. Ct. Rep. 586 (dissenting opinion), majority denying Federal court's jurisdiction of common-law action founded on liability for death by wrongful act, created by Mexican law, because of lack of power to make decree of kind required by such laws.

Cited in footnotes to *Chicago & E. I. R. Co. v. Rouse*, 44 L. R. A. 410, which holds master's liability for fellow servant's act governed by law of place where cause of action arises; *Jones v. Chicago, St. P. M. & O. R. Co.* 49 L. R. A. 640, which holds statute of state where railroad employee injured, as to presumptive evidence of employer's knowledge of defect in appliance, not govern in action in other state; *Baltimore & O. S. W. R. Co. v. Read*, 56 L. R. A. 468, which denies right to recover in other state for injury from fellow servant's negligence in state where no remedy given.

Cited in note (56 L. R. A. 196, 197, 205, 206, 208, 209, 222) on conflict of laws as to action for death or bodily injuries.

38 L. R. A. 397, *PIONEER SAV. & L. CO. v. PROVIDENCE-WASHINGTON INS. CO.* 17 Wash. 175, 49 Pac. 231.

Mortgagee's interest in proceeds of insurance.

Cited in *Burrows v. McCalley*, 17 Wash. 275, 49 Pac. 508, holding mortgagee entitled to recover under policy payable to "mortgagee, as interest may appear," procured by executor of deceased mortgagor; *Boyd v. Thuringia Ins. Co.* 25 Wash. 450, 55 L. R. A. 167, 65 Pac. 785, holding policy issued to mortgagee, payable as interest may appear, not forfeited by mortgagor's conveyance.

38 L. R. A. 402, *PALMER v. VAN SANTVOORD*, 153 N. Y. 612, 47 N. E. 915.

Who are entitled to preferences as employees.

Cited in *Re Fowler*, 29 Misc. 426, 60 N. Y. Supp. 545, holding salesman not entitled to preference as to commissions earned under independent agreement; *Cochran v. A. S. Baker Co.* 30 Misc. 50, 61 N. Y. Supp. 724, holding salary of bookkeeper not preferred claim on dissolution of corporation; *Re Ginsburg*, 27 Misc. 751, 59 N. Y. Supp. 656, and *Re Luxton & B. Co.* 35 App. Div. 245, 54 N. Y. Supp. 778, holding salesman, paid by commissions and salary, an employee entitled to preferential payment; *Re American Lace & Fancy Paper Works*, 30 App. Div. 323, 51 N. Y. Supp. 818, holding manager who has supervision over business not entitled to preferential payment as employee; *Re Kimberly*, 37 App. Div. 109, 55 N. Y. Supp. 1024, holding truckman not entitled to preference in payment by assignee for creditors; *Re Stryker*, 158 N. Y. 530, 70 Am. St. Rep. 489, 53 N. E. 525, holding employees earning salaries from \$100 to \$225 monthly not entitled to preference; *Heckman v. Tammen*, 184 Ill. 148, 56 N. E. 361, affirming 84 Ill. App. 544, holding compositors, pressmen, cylinder-feeders, and bookkeepers entitled to preferences for wages, from assets of assigned estate; *Hopkins v. Cromwell*, 89 App. Div. 483, 85 N. Y. Supp. 839, holding one engaged to call upon farmers and contract for pickles in name of corporation, and after delivery to salt and weigh them, prepare brine, and care for them generally, an employee entitled to preference.

Cited in footnote to *Clark v. Renninger*, 44 L. R. A. 413, which holds one cutting timber by contract not employee within statute as to receivership.

Distinguished in *Re Mayer*, 101 Fed. 228, holding salesman receiving commissions as compensation not entitled to preference.

38 L. R. A. 405, *UNDERHILL v. HERNANDEZ*, 13 C. C. A. 51, 26 U. S. App. 573, 65 Fed. 577.

38 L. R. A. 410, *CAMPBELL v. COON*, 149 N. Y. 556, 44 N. E. 300.

Right of nonresident to file mechanic's lien.

Cited in *Re Simonds Furnace Co.* 30 Misc. 211, 61 N. Y. Supp. 974, holding that foreign corporation, not authorized to transact business in state, may file mechanic's lien against owner.

Enforcement of mechanic's lien.

Cited in *Schmohl v. O'Brien*, 25 Misc. 699, 55 N. Y. 629, holding that subcontractor's lien attaches to balance in owner's hand over contract price, where contractor defaults and owner completes work; *McConologue v. Larkins*, 32 Misc. 169, 68 N. Y. Supp. 188, holding preference of subcontractor over contractor as

to proceeds under building contract not abrogated by lien law; *New Jersey Steel & I. Co. v. Robinson*, 74 App. Div. 489, 77 N. Y. Supp. 547, Affirming 33 Misc. 365, 68 N. Y. Supp. 577 (dissenting opinion), majority holding contractor's assignee entitled to money due on building contract where contractor has defaulted and owner completed work, in preference to holders of mechanics' liens subsequently filed.

Cited in footnote to *Kirchman v. Standard Coal Co.* 52 L. R. A. 318, which holds lienor not estopped to enforce lien by mistaken statement of its payment, without knowledge of other person's intention to buy property.

Waiver of architect's certificate.

Cited in *Ocorr & R. Co. v. Little Falls*, 77 App. Div. 611, 79 N. Y. Supp. 251, holding architect's certificate required by contract before payments were due, waived by owners declaring contract forfeited and taking possession of building for purpose of completing it.

38 L. R. A. 413, *BURNEY v. CHILDREN'S HOSPITAL*, 160 Mass. 57, 61 Am. St. Rep. 370, 47 N. E. 401.

Property in, and right to control disposition of, dead body.

Cited in *Keyes v. Konkell*, 119 Mich. 551, 44 L. R. A. 243, 75 Am. St. Rep. 423, 78 N. W. 649, holding action in replevin not maintainable for corpse under statute for taking chattels; *Doxtator v. Chicago & W. M. R. Co.* 120 Mich. 597, 45 L. R. A. 536, 79 N. W. 922, holding railroad company not liable for failure to deliver to widow parts of husband's limbs amputated by surgeons; *Re Richardson*, 29 Misc. 369, 60 N. Y. Supp. 539, upholding widow's right to choose husband's burial place.

Cited in footnote to *Thompson v. State*, 51 L. R. A. 883, which holds attempt to make unauthorized sale of dead body of human being, a misdemeanor.

38 L. R. A. 415, *MINNEAPOLIS BASEBALL CO. v. CITY BANK*, 66 Minn. 441, 69 N. W. 331.

Enforcement of stockholder's liability.

Cited in *Somers v. Dawson*, 86 Minn. 43, 90 N. W. 119, and *Ueland v. Haugan*, 70 Minn. 352, 73 N. W. 169, holding that receiver of insolvent banking corporation may enforce stockholder's individual liability; *Colton v. Mayer*, 90 Md. 717, 47 L. R. A. 621, footnote p. 617, 78 Am. St. Rep. 456, 45 Atl. 874, denying receiver's right to enforce stockholders' liability.

— Outside of jurisdiction.

Cited in *Hanson v. Davison*, 73 Minn. 465, 76 N. W. 254 (dissenting opinion), majority holding liability of nonresident stockholder may be enforced by receiver in original action when property found within jurisdiction; *Finney v. Guy*, 106 Wis. 275, 49 L. R. A. 494, 82 N. W. 595, and *Hale v. Allison*, 188 U. S. 61, 47 L. ed. 386, 23 Sup. Ct. Rep. 244, holding absent stockholders of insolvent corporation not bound by making corporation party to action to enforce stockholders' statutory liability; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 763, holding that receiver may maintain ancillary suits against nonresidents to enforce stockholders' liability for benefit of all creditors.

Cited in footnote to *Howarth v. Lombard*, 49 L. R. A. 301, which authorizes suit to enforce stockholders' liability in foreign jurisdiction.

38 L. R. A. 419, *CONROY v. CHICAGO, ST. P. M. & O. R. CO.* 96 Wis. 243, 70 N. W. 486.

Rights of one temporarily leaving car.

Cited in footnote to *Chicago, R. I. & P. R. Co. v. Sattler*, 57 L. R. A. 890, which holds one leaving for own purpose, car standing on side track, not a passenger.

Contributory negligence.

Cited in *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 276, 65 N. E. 918, holding it not contributory negligence for one riding for pleasure, to drive upon temporary bridge over wide ditch dug in park.

Modification of judgment to conform to facts.

Cited in *Innes v. Milwaukee*, 96 Wis. 174, 70 N. W. 1064, which holds finding that elbow in blow-off pipe was made of material ordinarily used, inconsistent with finding of negligence causing attendant's death by bursting of elbow; *Keller v. Schmidt*, 104 Wis. 602, 80 N. W. 935, and *Dummer v. Milwaukee Electric R. & Light Co.* 108 Wis. 593, 84 N. W. 853, holding that appellate court will refuse to direct judgment when defendant fails to move in trial court to make judgment conform to undisputed evidence; *Zahn v. Milwaukee & S. R. Co.* 114 Wis. 43, 89 N. W. 889; *Stafford v. Chippewa Valley Electric R. Co.* 110 Wis. 362, 85 N. W. 1036; *Wanzer v. Chippewa Valley Electric R. Co.* 108 Wis. 324, 84 N. W. 423, — holding that trial court should modify special findings of jury to conform to undisputed facts.

Entry of judgment by order of appellate court.

Cited in *Muench v. Heinemann*, 119 Wis. 448, 96 N. W. 800, holding that appellate court will direct entry of judgment instead of new trial, where defendant moved in trial court for judgment and it appears that motion should have been granted.

38 L. R. A. 424, *FARMERS' LOAN & T. CO. v. OREGON P. R. CO.* 31 Or. 237, 65 Am. St. Rep. 822, 48 Pac. 706.

Demand of payment on receiver.

Cited in *Jackson v. McInnis*, 33 Or. 531, 43 L. R. A. 129, 72 Am. St. Rep. 755, 54 Pac. 884, holding demand of payment on receiver *pendente lite* of insolvent bank insufficient to bind indorser on negotiable certificate of deposit.

Costs of receivership.

Cited in *Chapman v. Atlantic Trust Co.* 56 C. C. A. 69, 119 Fed. 265, holding that court may render judgment against mortgagee for difference between proceeds of sale of mortgaged property and expenses of receiver appointed to manage such property.

38 L. R. A. 427, *WEST MEMPHIS PACKET CO. v. WHITE*, 99 Tenn. 256, 41 S. W. 583.

Carrier's duty to protect passengers.

Cited in *Illinois C. R. Co. v. Kuhn*, 107 Tenn. 125, 64 S. W. 202, affirming passenger's recovery for injuries resulting from derailment of sleeping car.

— From assault.

Cited in *Louisville & N. R. Co. v. Ray*, 101 Tenn. 8, 46 S. W. 554, affirming

recovery for injuries inflicted by employee upon passenger attempting to board train at place where he alighted by mistake; *Savannah, F. & W. R. Co. v. Boyle*, 115 Ga. 839, 59 L. R. A. 105, footnote p. 104, 42 S. E. 242, denying carrier's liability to passenger shot by negro tramp attempting to escape from arrest for stealing ride; *Tall v. Baltimore Steam Packet Co.* 90 Md. 256, 47 L. R. A. 123, footnote p. 120, 44 Atl. 1007, denying carrier's liability to passenger shot during quarrel with other passengers over cards.

Cited in footnote to *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483, which holds carrier liable for baggage master's assault with intent to rape passenger; *United R. & Electric Co. v. State*, 54 L. R. A. 942, which holds carrier liable for injuries inflicted on passenger by drunken passenger permitted to return and remain after removal; *Spangler v. St. Joseph & G. I. R. Co.* 63 L. R. A. 634, which holds carrier liable for injury to passenger by missile thrown through window by fellow passengers known to be intoxicated and to have threatened revenge on those interfering with their disorderly conduct.

Cited in note (55 L. R. A. 719) on carrier's liability for assault on passenger by strikers, mob, or third persons.

Care as to car brakes as question for jury.

Cited in *Texas & P. R. Co. v. Storey*, 29 Tex. Civ. App. 485, 68 S. W. 534, holding it question for jury whether railroad company should have anticipated drunken passenger's act in uncoupling from train, car whose brakes were sufficient when coupled to train, but insufficient when detached to prevent collision.

38 L. R. A. 433, *CLARK v. TURNER*, 50 Neb. 290, 69 N. W. 843.

Admissibility of testatrix's declarations.

Annotation in 38 L. R. A. 433, referred to particularly in *Re Kennedy*, 53 App. Div. 116, 65 N. Y. Supp. 879 (dissenting opinion), affirming 30 Misc. 6, 62 N. Y. Supp. 1011, majority holding testatrix's declarations, made just before death, admissible as indicating continued existence of will.

Proof of lost will.

Cited in *McCarn v. Rundall*, 111 Iowa, 409, 82 N. W. 924, holding paper offered as copy of lost will not proved by witness saying "it is right, as near as I can recollect;" *Williams v. Miles* (Neb.) 62 L. R. A. 387, 94 N. W. 705, holding that last will cannot be proved solely by testator's declarations.

Presumption as to destruction of will.

Cited in *McIntosh v. Moore*, 22 Tex. Civ. App. 27, 53 S. W. 611, and *Williams v. Miles* (Neb.) 62 L. R. A. 385, 94 N. W. 705, upholding presumption that testator destroyed will, where evidence shows will last seen in his possession and not found after death.

Heirs as witnesses.

Cited in *McCoy v. Conrad*, 64 Neb. 156, 89 N. W. 665, holding heirs not disqualified as witnesses as to transactions with decedent in contest proceedings for probate of will.

38 L. R. A. 458, *JEFFERSON v. BIRMINGHAM R. & ELECTRIC CO.* 116 Ala. 294, 67 Am. St. Rep. 116, 22 So. 546.

Liability for injury to trespasser.

Cited in *Highland Ave. & Belt R. Co. v. Robbins*, 124 Ala. 118, 82 Am. St. Rep.

153, 27 So. 422, holding that failure to allege company's wanton negligence in killing child while trespassing on track bars recovery; *Alabama G. S. R. Co. v. Moorer*, 116 Ala. 645, 22 So. 900, holding that diligence in reversing engine bars recovery for death of child killed while running along tracks.

Cited in footnote to *Biggs v. Consolidated Barb-Wire Co.* 44 L. R. A. 655, which holds owner liable for maintaining dangerous machinery on private grounds unprotected from visits of trespassing children.

Child's capacity question for jury.

Cited in *Tutwiler Coal, Coke & I. Co. v. Enslin*, 129 Ala. 346, 30 So. 600, holding capacity of thirteen-year-old child to be guilty of contributory negligence for jury to determine.

Allegations of negligence.

Cited in note (59 L. R. A. 247) on sufficiency of general allegations of negligence.

38 L. R. A. 460, *SAN DIEGO WATER CO. v. SAN DIEGO*, 118 Cal. 556, 62 Am. St. Rep. 261, 50 Pac. 633.

Municipal power to regulate water supply and rates.

Cited in *Knoxville v. Knoxville Water Co.* 107 Tenn. 672, 61 L. R. A. 895, 64 S. W. 1075, sustaining city's power to reduce water rate; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 748, holding ordinance passed pursuant to constitutional requirement reducing water rate below amount fixed by contract, void; *San Diego Land & Town Co. v. National City*, 174 U. S. 751, 43 L. ed. 1159, 19 Sup. Ct. Rep. 804, sustaining ordinance regulating water rates.

Cited in footnotes to *Ladd v. Boston*, 40 L. R. A. 171, which upholds city's removal of water meter, though fixtures so arranged as to cost consumer, after removal, twenty times as much as others pay; *Re Janvrin*, 47 L. R. A. 319, which sustains action empowering court to affix maximum water rates on petition of party aggrieved.

Court's power over water rates.

Cited in *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 260, 91 N. W. 1081, holding that court will not interfere with water rates fixed by city, where at such rates, company will receive $4\frac{1}{2}$ to $5\frac{1}{2}$ per cent interest on value of its property; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 585, sustaining power of court to determine reasonableness of ordinance fixing water rates.

Condemnation of water plant.

Cited in *Kennebec Water Dist. v. Waterville*, 97 Me. 216, 60 L. R. A. 867, 54 Atl. 6, holding that cost of replacing water plant must be considered in determining value when appropriated by eminent domain.

Cited in notes (58 L. R. A. 247) on acquisition of water supply by right of eminent domain; (61 L. R. A. 100, 101, 104) on establishment and regulation of municipal water supply.

City's liability for water.

Cited in *Contra Costa Water Co. v. Breed*, 139 Cal. 446, 73 Pac. 189 (dissenting opinion), majority holding city estopped to deny validity of claim for water on ground of lack of ordinance, where it has received water in absence of contract as to price.

38 L. R. A. 471, *KELSEY v. GREEN*, 69 Conn. 291, 37 Atl. 679.

Right to custody of children.

Cited in *McKercher v. Green*, 13 Colo. App. 282, 58 Pac. 406, holding mother entitled to custody of six-year-old child, where infant in delicate health and has never known father.

Cited in footnotes to *Stringfellow v. Somerville*, 40 L. R. A. 623, which denies father's right to claim custody of child against its welfare, after permitting it to remain with his deceased wife's sisters for several years; *Anderson v. Young*, 44 L. R. A. 277, which sustains court's power to uphold, in interest of child, custody held under void agreement with parent; *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child, notwithstanding assent to wife's deathbed contract to give custody to her relatives; *State ex rel. Las-serre v. Michel*, 54 L. R. A. 927, which denies father's absolute right to custody of minor child; *Stapleton v. Poynter*, 53 L. R. A. 784, which upholds custody of child taken against its will from wealthy grandparent and given to parent of moral habits.

Minor child's domicile.

Cited in footnote to *Fox v. Hicks*, 50 L. R. A. 663, which holds domicile of minor awarded to divorced mother follows mother's.

38 L. R. A. 474, *FISK v. HARTFORD*, 69 Conn. 375, 37 Atl. 983.

Diversion of stream for city purposes.

Cited on second appeal in 70 Conn. 729, 66 Am. St. Rep. 147, 40 Atl. 906, holding that knowingly permitting city for many years to take water in increasing quantities from head of stream by means of expensive distributing mains bars riparian owners' right to injunction; *Re Barre Water Co.* 72 Vt. 416, 48 Atl. 653, holding city's return of water in form of sewage into stream above property of mill-owners not element of damages.

38 L. R. A. 480, *EAGLE MFG. CO. v. DAVENPORT*, 101 Iowa, 493, 70 N. W. 707.

Conveyances in fraud of street assessments.

Cited in *Smith v. Des Moines*, 106 Iowa, 592, 76 N. W. 836, holding that assessment for street improvement cannot be defeated by conveyance made with intent to evade tax; *Ransom v. Burlington*, 111 Iowa, 79, 82 N. W. 427, holding conveyance to relative, without consideration, of 15-foot strip to avoid street assessment, fraudulent.

Method of assessing abutting property.

Cited in *Allen v. Davenport*, 107 Iowa, 103, 77 N. W. 532, sustaining front-foot rule applied to paving assessment of land abutting street, although tax exceeds benefits.

Special assessment as lien on abutting property.

Cited in *Cemansky v. Fitch*, 121 Iowa, 188, 96 N. W. 754, holding that filing of record of city council containing order for new sidewalk makes special assessment for construction of walk a lien on abutting property.

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38 L. R. A. 485, *STATE v. EIFERT*, 102 Iowa, 188, 63 Am. St. Rep. 433, 65 N. W. 309, 71 N. W. 248.

Admissibility of evidence.

Cited in *Wallace v. State*, 41 Fla. 573, 26 So. 713, holding that cross-examination should be limited to matters covered by direct.

Distinguished in *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa, 694, 74 N. W. 26, holding defendant's offer of evidence in contradiction of incompetent matter, no waiver of right to object to plaintiff's rebuttal evidence.

Receiving deposit when bank insolvent.

Cited in footnote to *Richardson v. Olivier*, 53 L. R. A. 113, which sustains shareholder's right to recover back deposit fraudulently taken while bank insolvent.

Cited in note (31 L. R. A. 125) on criminal liability for receiving deposit in bank, knowing of its insolvency.

38 L. R. A. 490, *DUMMER v. SMEDLEY*, 110 Mich. 466, 68 N. W. 260.

Stock assessments.

Cited in note (45 L. R. A. 647, 653) on assessments on paid-up stock.

Bonus stock of corporations.

Cited in *Kraft v. Griffon Co.* 82 App. Div. 33, 81 N. Y. Supp. 438, denying right of corporation, under statute, to issue stock as bonus on sale of corporate bonds.

38 L. R. A. 503, *UNION NAT. BANK v. BROWN*, 72 Am. St. Rep. 420, 41 S. W. 273.

Validity of "peddler's note" statute.

Cited in *Rumley v. Hall*, 107 Ky. 351, 54 S. W. 4, and *Nunn v. Citizens Bank*, 107 Ky. 264, 53 S. W. 665, sustaining act providing that notes given for articles sold by peddler shall be invalid unless words "peddler's note" written across face.

Exercise of police power.

Cited in *Levy v. State*, 161 Ind. 261, 68 N. E. 172, sustaining statute exempting sheriffs, assignees, and receivers from operation of statute requiring license of transient merchants.

38 L. R. A. 505, *BREWSTER v. C. MILLER'S SONS CO.* 101 Ky. 368, 41 S. W. 301.

Legality of combinations affecting business or employment.

Cited in *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1175, 55 L. R. A. 272, 64 S. W. 913, denying recovery to one discharged by reason of agreement between employer and others not to engage one who had been employed by either party; *New York, C. & St. L. R. Co. v. Schaffer*, 65 Ohio St. 421, 62 L. R. A. 935, 87 Am. St. Rep. 628, 62 N. E. 1036, holding that railroad companies may lawfully agree not to engage servant who cannot furnish clearance record of service; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 519, 42 L. R. A. 416, 74 Am. St. Rep. 421, 77 N. W. 13, enjoining strikers from establishing pickets, distributing boycott circulars, and intimidating employees and cus-

tomers; *Etna Ins. Co. v. Com.* 106 Ky. 892, 45 L. R. A. 362, 51 S. W. 624, holding combinations for purpose of maintaining rates of insurance not illegal at common law.

Cited in footnotes to *Doremus v. Hennessy*, 43 L. R. A. 797, which holds members of trade association combining to prevent other persons dealing with non-member, liable for resulting injury; *Ertz v. Produce Exchange*, 48 L. R. A. 90, which holds malicious, conspiracy to injure dealer by inducing other people not to deal with him; *Gatzow v. Buening*, 49 L. R. A. 475, which holds by-law of liverymen's association prohibiting furnishing hearse or carriages to nonunion liverymen, illegal; *Ertz v. Produce Exchange*, 51 L. R. A. 825, which holds produce exchange discriminating against nonmembers and controlling delivery of goods, an illegal combination; *West Virginia Transp. Co. v. Standard Oil Co.* 56 L. R. A. 804, which sustains malicious competition to get customers from rival and obtain business for one's self; *Brown v. Jacobs Pharmacy Co.* 57 L. R. A. 548, which sustains right to injunction against combination of merchants to prevent sales to other dealer unless he sells at fixed prices.

Cited in note (64 L. R. A. 723, 728) on illegal trusts under modern anti-trust laws.

Distinguished in *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 77, 71 S. W. 691, holding agreement among brewers to refuse to sell to anyone indebted to parties to agreement, illegal; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 289, 71 S. W. 455, holding agreement between plumbers' association, and dealers and manufacturers, whereby latter promise not to sell supplies except to members of association, illegal; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 451, 57 L. R. A. 558, 90 Am. St. Rep. 126, 41 S. E. 553, holding combination of dealers to compel another to sell at fixed price, and, upon refusal, to prevent sales being made to him, illegal.

Liability of members of association for dealing with nonmembers.

Cited in footnotes to *Martell v. White*, 64 L. R. A. 260, which holds action maintainable on behalf of quarry owner against members of association to which he does not belong, enforcing by-law imposing fine on members dealing with nonmembers; *Downs v. Bennett*, 55 L. R. A. 560, which denies right of one only remotely affected, to injunction fining or expelling member for violation of by-law prohibiting members from dealing with nonmembers, or with others who deal with such nonmembers.

Damages for refusal to compete.

Cited in *Master Builders' Asso. v. Domascio*, 16 Colo. App. 32, 63 Pac. 782, holding action not maintainable against members of builders' association for their giving architect notice of refusal to bid if certain bid is received in competition, where proof shows that only one fourth of contractors of city are members of association.

Effect of bad motive.

Cited in note (62 L. R. A. 715, 725, 728) on effect of bad motive to make actionable what would otherwise not be.

38 L. R. A. 509, *HOOPER v. BALTIMORE CITY PASS. R. CO.* 85 Md. 509, 37 Atl. 359.

Motive power used for street railways.

Cited in footnote to *Chicago General R. Co. v. Chicago City R. Co.* 50 L. R.

A. 734, which denies liability for collision with cars of other company because of running cable cars under authority to use animal power only.

Enforcement of right to lay conduits.

- Cited in *Chesapeake & P. Teleph. Co. v. Baltimore City*, 89 Md. 717, 43 Atl. 784 (distinguished in dissenting opinion), holding that injunction will protect right of telephone company to construct conduits on street, granted by ordinance and ratified by legislature; *Baltimore v. Baltimore County Water & Electric Co.* 95 Md. 241, 52 Atl. 670, holding that injunction is remedy to enforce water company's statutory right to lay conduits within certain territory.

38 L. R. A. 512, *SPADE v. LYNN & B. R. CO.* 168 Mass. 285, 60 Am. St. Rep. 393, 47 N. E. 88.

Report of second appeal in 172 Mass. 488, 43 L. R. A. 832, 70 Am. St. Rep. 298, 52 N. E. 747.

Fright or mental suffering as basis of recovery.

Approved in *White v. Sander*, 168 Mass. 297, 47 N. E. 90, denying recovery for bodily injury resulting from mere fright.

Cited in *Silsbee v. Webber*, 171 Mass. 380, 50 N. E. 555, raising, without deciding, question as to liability for threats causing fright; *Smith v. Postal Teleg. Cable Co.* 174 Mass. 577, 47 L. R. A. 324, footnote p. 323, 75 Am. St. Rep. 274, 55 N. E. 380, denying recovery for sickness due to fright caused by grossly negligent act of one knowing result would follow; *Mahoney v. Dankwart*, 108 Iowa, 324, 79 N. W. 134, denying damages for loss of health indirectly due to fright caused by blasting; *Lee v. Burlington*, 113 Iowa, 357, 86 Am. St. Rep. 379, 85 N. W. 618, denying recovery for loss of horse killed by fright at negligent use of street roller; *Ford v. Schliessman*, 107 Wis. 483, 83 N. W. 761, holding trespass causing fright alone, not element of damages; *Nelson v. Crawford*, 122 Mich. 470, 80 Am. St. Rep. 577, 81 N. W. 335, denying liability for miscarriage caused by fright at man wearing woman's clothes; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 77, 54 L. R. A. 850, 60 N. E. 674, Affirming 26 Ind. App. 219, 59 N. E. 416, denying damages for mental suffering due to nondelivery of telegram; *Kline v. Kline*, 158 Ind. 607, 58 L. R. A. 399, footnote p. 397, 64 N. E. 9, sustaining right to damages for mental suffering for assault by pointing gun with threat to shoot unless house vacated; *Prince v. Ridge*, 32 Misc. 667, 66 N. Y. Supp. 454, denying recovery for shame and suffering due to improper proposal; *Preiser v. Wielandt*, 48 App. Div. 573, 62 N. Y. Supp. 890, sustaining liability for fright causing death, resulting from landlord's tearing down house after expiration of term; *Hickey v. Welch*, 91 Mo. App. 14, holding anguish due to trespasser's violent conduct, element of damages; *Haas v. Metz*, 78 Ill. App. 53, denying recovery for mental disturbance caused by harsh words; *Watson v. Dilts*, 116 Iowa, 251, 57 L. R. A. 560, footnote p. 557, 93 Am. St. Rep. 239, holding one liable for frightening woman, causing nervous prostration, by stealthily entering home at night; *Linn v. Duquesne*, 204 Pa. 554, 93 Am. St. Rep. 800, 54 Atl. 341, holding mental suffering not element of damages for permanent injury to married woman's hands; *Cameron v. New England Teleph. & Teleg. Co.* 182 Mass. 311, 65 N. E. 385, sustaining right to recover for miscarriage caused by fright due to negligent explosion of dynamite near house where woman was sitting.

Cited in footnotes to *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong; *Reed v. Maley*, 62 L. R. A. 900, which holds that merely soliciting woman to sexual intercourse gives her no right of action for damages for suffering due to such proposal.

Disapproved in effect in *Watkins v. Kaolin Mfg. Co.* 131 N. C. 543, 60 L. R. A. 620, footnote p. 617, 42 S. E. 983. sustaining right of action for disease resulting from nervous shock due to negligent acts.

— **Caused by carrier.**

Explained in *Gannon v. New York, N. H. & H. R. Co.* 173 Mass. 42, 43 L. R. A. 834, 52 N. E. 1075, holding carrier liable for injury to passenger while impulsively attempting to escape from car containing burning oil, because of reasonable fear of injury.

Cited in *Berard v. Boston & A. R. Co.* 177 Mass. 182, 58 N. E. 586, raising, without deciding, question as to liability for personal injuries caused by fright; *Homans v. Boston Elev. R. Co.* 180 Mass. 457, 57 L. R. A. 292, footnote p. 291, 91 Am. St. Rep. 324, 62 N. E. 737, holding carrier liable for nervous shock due to slight injury caused by being thrown from seat; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 211, 63 Am. St. Rep. 343, 47 N. E. 694, denying recovery for mental anguish resulting from fright of horse at negligent closing of railroad gate; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 388, 56 N. E. 917, denying liability for impairment to health due to fright at peril of another; *St. Louis, I. M. & S. R. Co. v. Bragg*, 69 Ark. 405, 86 Am. St. Rep. 206, 64 S. W. 226, holding nervous prostration not probable consequence of carrier's negligence in putting passenger off at wrong place; *Mack v. South Bound R. Co.* 52 S. C. 332, 40 L. R. A. 683, footnote p. 679, 68 Am. St. Rep. 913, 29 S. E. 905, sustaining liability for personal injuries from fright; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 242, 47 L. R. A. 326, 77 Am. St. Rep. 856, 54 S. W. 544, holding that physical injury resulting from mental emotion entitles one to recover; *Ward v. West Jersey & S. R. Co.* 65 N. J. L. 384, 47 Atl. 561, denying right of recovery for shock received from negligent operation of railroad gates.

Proximate cause.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 542, 41 L. R. A. 798, 51 N. E. 1, holding negligence in storing oil upon platform in violation of statute not proximate cause of damage by fire started by shipper carelessly dropping match.

38 L. R. A. 514, *HUNT v. NEW HAMPSHIRE FIRE UNDERWRITERS' ASSO.* 68 N. H. 305, 73 Am. St. Rep. 602, 38 Atl. 145.

Third person's right to sue on contract for his benefit.

Cited in *First Nat. Bank v. Hunton*, 70 N. H. 227, 46 Atl. 1049, holding that wife's repudiation of note given to discharge husband's debt entitles payee to be subrogated to her rights in proceeds of note given by husband to indemnify her; *Bank Comrs. v. Security Trust Co.* 70 N. H. 553, 49 Atl. 113, holding owner of note may prove claim in insolvency upon guaranty.

Indemnity insurance.

Cited in *Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co.* 72 N. H. 494, 101 Am. St. Rep. 688, 57 Atl. 655, holding that one taking out employer's lia-

bility policy may compel insurance company to pay him amount of employee's judgment for injuries, although insured is unable to pay such judgment by reason of insolvency; *Bain v. Atkins*, 181 Mass. 245, 57 L. R. A. 793, 92 Am. St. Rep. 411, 63 N. E. 414, holding money due under policy against liability to third persons not trust fund for benefit of person whose injury caused liability.

Distinguished in *Cushman v. Carbondale Fuel Co.* 122 Iowa, 658, 98 N. W. 509, holding employee's unpaid judgment for personal injuries against employer not enforceable by employee against company issuing employer's liability policy.

38 L. R. A. 516, *NEW YORK & G. L. R. CO. v. NEW JERSEY ELECTRIC R. CO.* 60 N. J. L. 52, 37 Atl. 627.

Bailor's recovery for negligence of bailee and third party.

Cited in *New Jersey Electric R. Co. v. New York, L. E. & W. R. Co.* 61 N. J. L. 287, 43 L. R. A. 849, 41 Atl. 1116, Affirming 60 N. J. L. 340, 38 Atl. 829, holding bailor entitled to recover for damage to locomotive resulting from collision with trolley car, due to negligence of bailee of locomotive and street car company.

Negligence a question for jury.

Cited in *Exton v. Central R. Co.* 63 N. J. L. 356, 56 L. R. A. 510, 46 Atl. 1099, Affirming 62 N. J. L. 12, 56 L. R. A. 510, 42 Atl. 486, holding question for jury whether company used proper care in keeping passage to baggage room free from defects; *Ruch v. Gas Electric Co.* 65 N. J. L. 401, 47 Atl. 504, holding it question for jury whether use of lighted match to locate gas leak constitutes negligence.

38 L. R. A. 519, *STATE ex rel. MONNET v. GUILBERT*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551.

Exercise of police power.

Cited in *France v. State*, 57 Ohio St. 18, 47 N. E. 1041, sustaining act requiring medical practitioner to obtain license from state board.

Statutes relating to constructive notice.

Cited in *State ex rel. Andreu v. Canfield*, 40 Fla. 65, 42 L. R. A. 82, 23 So. 591 (dissenting opinion), majority sustaining act relating to constructive service on defendants in error by recording writ of error:

Distinguished in *People ex rel. Deneen v. Simon*, 176 Ill. 179, 44 L. R. A. 809, footnote p. 801, 68 Am. St. Rep. 175, 52 N. E. 910, and *State ex rel. Douglas v. Westfall*, 85 Minn. 446, 57 L. R. A. 302, footnote p. 297, 89 Am. St. Rep. 571, 89 N. W. 175, sustaining act for Torrens system of registering land titles.

Disapproved in *Tyler v. Registration Ct. Judges*, 175 Mass. 73, 51 L. R. A. 434, footnote p. 433, 55 N. E. 812, holding land registration act not invalidated by failure to provide for notice of transfers.

38 L. R. A. 529, *TURNER v. FIDELITY & C. CO.* 112 Mich. 425, 67 Am. St. Rep. 428, 70 N. W. 898.

What constitutes "total disability."

Cited in *Hohn v. Inter-State Casualty Co.* 115 Mich. 85, 72 N. W. 1105, holding ability to go to place of business, without strength to work, no bar to recovery.

ery in policy insuring against total disablement; *Lobdill v. Laboring Men's Mut. Aid Asso.* 69 Minn. 16, 38 L. R. A. 539, 65 Am. St. Rep. 542, 71 N. W. 696, holding ability to perform occasionally some trivial act connected with occupation no bar to recovery on policy for total disability; *Coad v. Travelers' Ins. Co.* 61 Neb. 568, 85 N. W. 558, holding that injury causing partial disability does not entitle insured to recover on policy for total disability; *Commercial Travelers' Mut. Acci. Asso. v. Springsteen*, 23 Ind. App. 667, 55 N. E. 973, holding instruction that insured may recover if disabled to extent that he could not do all kinds of business relating to his occupation, not error.

Annotation in 38 L. R. A. 529 referred to particularly in *Fuller v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 122 Mich. 552, 48 L. R. A. 88, footnote p. 86, 80 Am. St. Rep. 598, 81 N. W. 326, denying right to whole amount of insurance for amputation of "limb (whole hand or foot)," on amputation of part of foot.

Liability on policy during "confinement to house."

Cited in *Hoffman v. Michigan Home & Hospital Asso.* 128 Mich. 328, 54 L. R. A. 748, 87 N. W. 265, holding recovery on policy limiting liability to period of insured's confinement to house not defeated by insured's occasionally taking airing by physician's direction.

Estoppel to claim forfeiture of benefit certificate.

Cited in *Lord v. National Protective Soc.* 129 Mich. 341, 88 N. W. 876, holding benefit society estopped to claim forfeiture of certificate for nonpayment of assessments, where it accepts past-due assessments and retains them till after suit commenced by beneficiary.

38 L. R. A. 537, *LOBDILL v. LABORING MEN'S MUT. AID ASSO.* 69 Minn. 14, 65 Am. St. Rep. 542, 71 N. W. 696.

What constitutes "total disability."

Cited in *Hohn v. Inter-State Casualty Co.* 115 Mich. 85, 72 N. W. 1105, holding ability to go to place of business, without strength to work, no bar to recovery under policy insuring against total disablement; *Coad v. Travelers' Ins. Co.* 61 Neb. 570, 85 N. W. 558, holding that injury causing partial disability will not entitle insured to recover on policy for total disablement; *Commercial Travelers' Mut. Acci. Asso. v. Springsteen*, 23 Ind. App. 667, 55 N. E. 973, holding instruction that insured may recover if disabled to extent that he could not do all kinds of business relating to his occupation, not error; *Fidelity & C. Co. v. Getzendanner*, 93 Tex. 490, 56 S. W. 326, Affirming 22 Tex. Civ. App. 78, 53 S. W. 838, holding charge authorizing recovery on policy of insured who was prevented from performing duties as effectively as before accident, erroneous; *Brendon v. Traders & Travelers' Acci. Co.* 84 App. Div. 533, 82 N. Y. Supp. 860, holding physician totally disabled to perform his duties within meaning of policy where, day following injury to knee, he was obliged to take to his bed, and call physician who put knee in splints; *Monahan v. Supreme Lodge, O. of C. K.* 88 Minn. 228, 92 N. W. 972, holding insured's acting as nominal manager of mine, assisted by son, not deprived of benefit of total disability clause in policy, where he was healthy and vigorous before injury.

Cited in note (38 L. R. A. 529) on what constitutes total disability of insured.

38 L. R. A. 541, TOWER v. TOWER & S. STREET R. CO. 68 Minn. 500, 64 Am. St. Rep. 493, 71 N. W. 691.

38 L. R. A. 545, GARRATT FORD CO. v. VERMONT MFG. CO. 20 R. I. 187, 78 Am. St. Rep. 852, 37 Atl. 948.

Validity of contracts of foreign corporations not authorized to do business.

Cited in Commonwealth Mut. F. Ins. Co. v. Place, 21 R. I. 249, 43 Atl. 68, sustaining policy issued by foreign insurance company before it was authorized to do business in state.

38 L. R. A. 546, LUBRANO v. IMPERIAL COUNCIL, O. OF U. F. 20 R. I. 27, 37 Atl. 345.

Service of process.

Cited in footnotes to National Bank v. Furtick, 44 L. R. A. 115, which requires service on foreign insurance company as garnishee to be made on president, treasurer, cashier, or paying clerk; Mutual Reserve Fund Life Asso. v. Boyer, 50 L. R. A. 538, which denies right to serve process on state officer designated by foreign insurance company which has ceased to do business in state.

38 L. R. A. 549, JONATHAN TURNER'S SONS v. LEE GIN & MACH. CO. 98 Tenn. 604, 41 S. W. 57.

Deposit in court as payment pro tanto.

Cited in Caesar v. Capell, 83 Fed. 430, holding that court may permit withdrawal of money paid into court in foreclosure suit as payment *pro tanto*.

38 L. R. A. 554, STATE, *ex rel.* ASHBAUGH v. CIRCUIT COURT, 97 Wis. 1, 65 Am. St. Rep. 90, 72 N. W. 193.

Contempt by newspaper publication during pending trial.

Cited in footnotes to State v. Tugwell, 43 L. R. A. 717, which holds publication of embarrassing articles within time allowed for modification of opinion, a contempt; State v. Bee Pub. Co. 50 L. R. A. 195, which sustains punishment for contempt of newspaper publishing articles threatening judges with public odium if they decide pending cause in certain way; *Ex parte* Foster, 60 L. R. A. 631, which denies court's power to adjudge, on own motion, publisher in contempt for disobeying oral order not to publish testimony in pending case.

Supervisory control by court.

Cited in State *ex rel.* Fourth Nat. Bank v. Johnson, 103 Wis. 617, 51 L. R. A. 59, 79 N. W. 1081, holding trial court without authority to deny creditors' right to examine assignee as to settlement of affairs of insolvent bank; State *ex rel.* Rose v. Superior Court, 105 Wis. 678, 48 L. R. A. 829, 81 N. W. 1046, denying court's jurisdiction over passage of ordinance within general power of municipality, creating contract between city and street railway company; State *ex rel.* Milwaukee v. Ludwig, 106 Wis. 231, 82 N. W. 158, denying mandamus to reverse decision of lower court and compel discontinuance of action to restrain performance of contract between city and street car company.

Cited in note (51 L. R. A. 73, 76, 109) on superintending control and supervisory jurisdiction of superior over inferior or subordinate tribunal.

Violation of injunction as contempt.

Cited in *McEvoy v. Gallagher*, 107 Wis. 335, 83 N. W. 633, which holds finding defendants guilty of technical violation of injunction without impairing plaintiff's rights not ground for contempt.

Insufficiency of court's finding.

Cited in *Re McCormick*, 108 Wis. 239, 81 Am. St. Rep. 890, 84 N. W. 148, holding that county court's failure to find as to parent's abandonment of child invalidates order of adoption by another.

38 L. R. A. 561, *STATE v. HIGGINS*, 51 S. C. 51, 28 S. E. 15.

Special legislation.

Cited in *State v. Tucker*, 54 S. C. 252, 32 S. E. 361, sustaining act requiring land owners in certain counties to remove trash from streams; *Carolina Grocery Co. v. Burnet*, 61 S. C. 211, 58 L. R. A. 689, 39 S. E. 381, holding county board of commissioners a legal body authorized to approve claim against county, although act conferring such authority was a special provision in a general law; *State v. Hammond*, 66 S. C. 223, 44 S. E. 797, holding statute making it a misdemeanor to neglect to remove dam from running stream in certain countries after notice, void; *DeHay v. Berkeley County*, 66 S. C. 241, 44 S. E. 790, holding that valid special act relating to schools cannot be legally amended by statute providing salary for school commissioner of one county.

Cited in footnote to *Gustafson v. State*, 43 L. R. A. 615, which holds void, act limiting to taxpayers, right to take oysters in public waters.

Right to fish.

Cited in footnote to *State v. Dow*, 53 L. R. A. 314, which sustains statute against fishing for trout with intent to sell or trade.

Cited in note (39 L. R. A. 591) on governmental control over right of fishery.

38 L. R. A. 562, *SUN FIRE OFFICE v. CLARK*, 53 Ohio St. 414, 42 N. E. 248.

Change in interest within policy.

Cited in *Wolf v. Theresa Village Mut. F. Ins. Co.* 115 Wis. 408, 91 N. W. 1014, holding mortgage in form of deed in fee does not operate as change "in interest, title, or possession" within meaning of policy.

Policy as affected by option to rebuild or other insurance.

Cited in *Milwaukee Mechanics' Ins. Co. v. Russell*, 65 Ohio St. 256, 56 L. R. A. 161, 62 N. E. 338, holding condition in policy purporting to give insurer right to rebuild, void; *Johnson v. North British & M. Ins. Co.* 66 Ohio St. 19, 63 N. E. 610, holding that election to treat policy as void when informed of other insurance relieves company from liability; *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 555, 54 N. E. 772, holding mortgagee bound by mortgagor's violation of policy in procuring other insurance.

Vacancy as additional hazard.

Cited in *Doten v. Aetna Ins. Co.* 77 Minn. 477, 80 N. W. 630, holding answer alleging that insured house became vacant prior to fire, sufficient allegation of additional hazard.

Sufficiency of ownership within statute against burning property.

Cited in *Jones v. State*, 70 Ohio St. 43, 70 N. E. 952, holding that insurer who

burns property worth \$50, and in which he has interest, comes within provision of statute making it crime for one to burn his own property.

38 L. R. A. 570, *KIMBALL v. CARTER*, 95 Va. 77, 27 S. E. 823.

Sufficiency of bill of exceptions.

Cited in *Hughes v. Kelly*, 2 Va. Dec. 593, 30 S. E. 387, holding bill of exceptions not setting out testimony insufficient; *Kay v. Glade Creek & R. R. Co.* 47 W. Va. 478, 35 S. E. 973, refusing to consider exception when answer not incorporated in bill of exceptions.

38 L. R. A. 573, *DOBBINS v. MISSOURI, K. & T. R. CO.* 91 Tex. 60, 66 Am. St. Rep. 856, 41 S. W. 62.

Duty to keep premises or street safe.

Cited in *Dawson v. St. Louis Expanded Metal Fireproofing Co.* 94 Tex. 427, 61 S. W. 118, denying liability of independent contractor for injury to servant of another contractor by falling through cement panel constructed by former; *Clapp v. LaGrill*, 103 Tenn. 175, 52 S. W. 134, holding that implied invitation to use alley determines liability for maintenance of defective grating; *Davis v. Houston E. & W. T. R. Co.* 29 Tex. Civ. App. 46, 68 S. W. 733, and *Houston E. & W. T. R. Co. v. Grubbs*, 28 Tex. Civ. App. 372, 67 S. W. 519, denying railroad company's duty to light unused portion of platform; *Grant v. Hass*, 31 Tex. Civ. App. 691, 75 S. W. 342, sustaining right to recover for injury to innocent trespasser, caused by setting off spring gun placed to guard melon patch; *Parsons v. Manser*, 119 Iowa, 93, 62 L. R. A. 135, 97 Am. St. Rep. 283, 93 N. W. 86, holding owner of bees liable for locating hives near hitching post which he has fixed for fastening horses to; *Grundel v. Union Iron Works*, 141 Cal. 567, 75 Pac. 184, denying liability for death of one who said he "had business to perform on vessel" and who was killed by slipping of insecure gangplank.

Cited in footnotes to *Lorenzo v. Wirth*, 40 L. R. A. 347, which denies liability of occupant of house for injury to pedestrian stepping in dark into coal hole 2 feet from street line; *Rachmel v. Clark*, 62 L. R. A. 959, which holds manufacturer storing stone slabs on sidewalk in front of building liable for injuries to person lawfully using the sidewalk.

— For protection of children.

Cited in *Dublin Cotton Oil Co. v. Jarrard*, 91 Tex. 294, 42 S. W. 959, raising, without deciding, question as to implied invitation to child to enter premises; *San Antonio & A. P. R. Co. v. Morgan*, 92 Tex. 103, 42 S. W. 28, holding implied invitation basis of recovery for injury to child upon unlocked turntable; *Ryan v. Towar*, 128 Mich. 476, 55 L. R. A. 315, 92 Am. St. Rep. 481, 87 N. W. 644, denying liability to child who broke through wall of unused building and suffered injury on water wheel while rescuing playmate; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 402, 54 L. R. A. 316, footnote p. 314, 39 S. E. 82, denying duty of one making excavation on own land to guard trespassing children from injury; *Price v. Atchison Water Co.* 58 Kan. 554, 62 Am. St. Rep. 625, 50 Pac. 450, holding water works company liable for failure to guard against accidents to small boys permitted to resort to deep reservoir to fish; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 222, 44 L. R. A. 658, footnote p. 655, 56 Pac. 4, holding owner liable for maintaining dangerous machinery on private grounds unpro-

tected from visits of trespassing children; *Ritz v. Wheeling*, 45 W. Va. 267, 43 L. R. A. 151, 31 S. E. 993, denying city's liability for death of five-year-old child, drowned while trespassing about reservoir; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 462, 55 L. R. A. 913, 88 Am. St. Rep. 884, 40 S. E. 410, denying liability to child injured, when trespassing by cable hauling coal cars; *Paolino v. McKendall*, 24 R. I. 438, 60 L. R. A. 136, 96 Am. St. Rep. 736, 53 Atl. 268, holding that occupier of land who undertakes to burn rubbish is under no obligation to guard children of tender years who are in habit of resorting there to play.

Cited in footnotes to *Omaha v. Bowman*, 40 L. R. A. 531, which denies city's liability for drowning of child on private premises in pond caused by city's obstruction of water; *Stendal v. Boyd*, 42 L. R. A. 288, which holds that attractiveness of pond on one's own premises not render him liable for failure to fence premises *Cooper v. Overton*, 45 L. R. A. 591, which denies owner's liability for drowning of trespassing child in unfenced city lot in pond formed by damming surface water; *Arnold v. St. Louis*, 48 L. R. A. 291, which denies liability of city or private owner for drowning of children while skating on pond without invitation; *Kramer v. Southern R. Co.* 52 L. R. A. 359, which denies railroad company's liability for death of child by fall of pile of cross-ties piled in unused portion of street, unless company knew that children were in habit of playing there; *Heimann v. Kinnare*, 52 L. R. A. 652, which holds thirteen-year-old boy negligent *per se* in jumping over strip of water onto rotten ice on pond and sliding to point where water was over his head; *Kopplekom v. Colorado Cement Pipe Co.* 54 L. R. A. 284, which holds owner of uninclosed city lot liable for injury to young child by toppling over of large cement pipe used by children as plaything.

Railroad company's duty to trespasser on train.

Cited in *Crawleigh v. Galveston, H. & S. A. R. Co.* 28 Tex. Civ. App. 263, 67 S. W. 140, denying railroad company's liability for death of one who boarded freight car without invitation, and was killed in collision.

38 L. R. A. 577, *BAUGHN v. STATE*, 100 Ga. 554, 28 S. E. 68.

Affirmed in 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

Inquisition after sentence.

Cited in footnote to *State v. Nordstrom*, 53 L. R. A. 584, which holds trial of alleged insanity after sentence to death discretionary with court.

Discretion as to trial of insane person.

Annotation in 38 L. R. A. 577, referred to particularly in *State v. Kelley*, 74 Vt. 283, 52 Atl. 434, holding it within discretion of court to proceed with trial of one indicted for assault with intent to kill, after indications of his insanity appear.

Conclusiveness of finding as to insanity.

Annotation in 38 L. R. A. 577, referred to particularly in *Chase v. State*, 41 Tex. Crim. Rep. 562, 55 S. W. 833, holding special jury's determination that accused was of unsound mind not conclusive of insanity so that issue could not be raised again.

Review of motion denying inquisition.

Distinguished in *Sears v. Candler*, 112 Ga. 381, 37 S. E. 442, holding superior court judge's refusal to grant application for inquisition reviewable on appeal.

38 L. R. A. 591, *PEOPLE ex rel. NEW YORK INST. FOR BLIND v. FITCH*, 154 N. Y. 14, 47 N. E. 983.

Charitable institutions.

Followed in *Re New York Juvenile Asylum*, 172 N. Y. 59, 64 N. E. 764, Affirming 36 Misc. 635, 74 N. Y. Supp. 364, denying city's liability to asylum for care of child voluntarily surrendered by mother.

Cited in *Sargent v. Board of Education*, 76 App. Div. 590, 79 N. Y. Supp. 127, Affirming 35 Misc. 325, 71 N. Y. Supp. 954, sustaining right of board of education to pay salaries to teachers in local orphan asylum; *Collins v. New York Post Graduate Medical School*, 59 App. Div. 70, 69 N. Y. Supp. 106, denying liability of post-graduate school and hospital, supported chiefly by charity, for negligence in operating on patient who pays for board and room only; *People ex rel. State Charities v. New York Soc. for Prevention of Cruelty to Children*, 161 N. Y. 247, 55 N. E. 1063, Reversing 42 App. Div. 86, 58 N. Y. Supp. 953, Which Reversed 25 Misc. 55, 53 N. Y. Supp. 1017, holding New York society for prevention of cruelty to children not subject to visitation by state board of charities; *State ex rel. Olsen v. Board of Control*, 85 Minn. 204, 88 N. W. 533 (dissenting opinion) majority holding state normal schools within provisions of act relating to charitable institutions.

Distinguished in *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 22, 68 N. E. 997, Affirming 79 App. Div. 343, 79 N. Y. Supp. 369, holding industrial school, supported largely by charity, not liable to boy committed by magistrate, for injuries sustained in consequence of foreman's failure to instruct him concerning operation of machine.

38 L. R. A. 606, *SAGE v. NEW YORK*, 154 N. Y. 61, 61 Am. St. Rep. 592, 47 N. E. 1096.

Rights as to lands under water.

Cited in *DeLancey v. Hawkins*, 23 App. Div. 12, 49 N. Y. Supp. 469, holding state's grant to riparian owner of right to build marine railroad, no defense to action in ejectment under deed subject to state's claims, when road used for private purpose; *Consolidated Ice Co. v. New York*, 53 App. Div. 261, 65 N. Y. Supp. 912, holding city entitled to strip of land formerly under water, acquired under Dongan charter, and reserved in deed by city; *Jarvis v. Lynch*, 157 N. Y. 447, 52 N. E. 657, holding title to lands between high and low water marks on west side of Harlem river not derivable from Nicoll's grant; *Knickerbocker Ice Co. v. Forty-second Street & G. Street Ferry R. Co.* 176 N. Y. 417, 68 N. E. 864, holding New York city's title in tideway and submerged lands of Hudson river, acquired under Dongan and Montgomerie charters, subject to rights of public.

Cited in note (42 L. R. A. 164) on title to land under water.

Distinguished in *Bent v. Emery*, 173 Mass. 497, 53 N. E. 910, holding that dredging of flats, resulting in removal of large quantities of earth and sinking of surface, entitles owner to compensation; *Baird v. Campbell*, 67 App. Div. 112, 73 N. Y. Supp. 617, sustaining title of freeholders of Harlem to marshes which passed under Harlem patent.

Riparian owner's right of access to water front.

Cited in *People ex rel. Cornwall v. Woodruff*, 30 App. Div. 47, 51 N. Y. Supp. 515, sustaining grant to adjoining riparian proprietors, impairing access to dock of first patentee; *People v. Mould*, 37 App. Div. 37, 55 N. F. Supp. 453,

Reversing 24 Misc. 291, 52 N. Y. Supp. 1032, denying state's right to compel removal of wharf by riparian owner, when not shown to obstruct navigation; *Re* New York, 168 N. Y. 139, 56 L. R. A. 502, 61 N. E. 158, Reversing 60 App. Div. 124, 69 N. Y. Supp. 994, holding construction of speedway on tideway of river for pleasure uses only, not exercise of reserved right to improve navigation; *Slingerland v. International Contracting Co.* 169 N. Y. 69, 56 L. R. A. 499, footnote p. 494, 61 N. E. 995, affirming 43 App. Div. 223, 60 N. Y. Supp. 12, denying riparian owner's right to damages for injuries to right of access by one dredging under government authority; *New Whatcom v. Fairhaven Land Co.* 24 Wash. 499, 54 L. R. A. 194, 64 Pac. 735, holding that municipal corporation owning land on navigable lake cannot appropriate waters of lake for city purposes to injury of riparian owner whose rights vested before adoption of state Constitution; *Scranton v. Wheeler*, 179 U. S. 161, 45 L. ed. 136, 21 Sup. Ct. Rep. 48, holding owner of land facing navigable river not entitled to compensation for obstruction to access from shore by erection of pier under authority of Congress.

Cited in note (40 L. R. A. 600) on right of owner of upland to access to navigable water.

Construction of bridge over navigable waters.

Cited in *People ex rel. Howell v. Jessup*, 160 N. Y. 267, 54 N. E. 682, sustaining constitutional power of certain town to authorize riparian proprietor to construct bridge over waters not navigable when power granted town.

Obstruction of flow of freshet waters.

Cited in *Jones v. Seaboard Air Line R. Co.* 67 S. C. 194, 45 S. E. 188, holding riparian owner entitled to damages resulting from railroad company's obstruction of flow of freshet waters by faulty construction of piers.

Corporeal appurtenances.

Cited in footnote to *Forrest v. Vanderbilt*, 52 L. R. A. 473, which holds naphtha launch not appurtenance of yacht with which it is used as tender.

38 L. R. A. 615, *HARROUN v. BRUSH ELECTRIC LIGHT CO.* 152 N. Y. 212, 46 N. E. 291.

Court's unanimous decision and its review.

Followed without discussion in *Fowler v. Buffalo Furnace Co.* 160 N. Y. 666, 55 N. E. 1095.

Cited in *Whittleder v. Citizens' Electric Illuminating Co.* 47 App. Div. 544, 62 N. Y. Supp. 488, holding decision unanimous when justice of appellate division, who did not hear oral argument, participates in decision to which no one dissents; *People v. Helmer*, 154 N. Y. 509, 49 N. E. 249, holding that court of appeals cannot review questions of fact on appeal from conviction for exhibiting false books to bank examiner, when affirmance of appellate division unanimous; *Warn v. New York C. & H. R. R. Co.* 163 N. Y. 526, 57 N. E. 742, holding judgment of appellate division reciting that one justice sat, but did not vote, and rest concurred, nonunanimous.

38 L. R. A. 616, *PECK v. ELLIOTT*, 24 C. C. A. 425, 47 U. S. App. 605, 79 Fed. 10.

Ancillary proceeding by receiver of insolvent corporation.

Cited in *Cunningham v. Cleveland*, 39 C. C. A. 215, 98 Fed. 660, holding an-

cillary action to enforce payment of debt of insolvent corporation not affected by legal nature of proceedings when equity has jurisdiction of original action.

Power to compel assessment.

Cited in *Johnson Electric-Service Co. v. Detroit Chamber of Commerce*, 124 Mich. 118, 82 N. W. 795, holding that by-law authorizing assessment of dues affords creditor no ground to compel assessment, when paid.

Issue of stock as bonus.

Cited in *Kraft v. Griffon Co.* 82 App. Div. 33, 81 N. Y. Supp. 438, denying right of corporation, under statute, to issue stock as bonus on sale of corporate bonds.

Enactment of by-laws.

Cited in footnote to *North Milwaukee Town-Site Co. v. Bishop*, 45 L. R. A. 174, which holds stockholders, not directors, empowered to enact by-laws.

38 L. R. A. 624, *CONSOLIDATED COAL CO. v. PEERS*, 166 Ill. 361, 46 N. E. 1105,

Sufficiency of pleading.

Cited in *Stover Mfg. Co. v. Millane*, 89 Ill. App. 537, holding demurrer proper remedy to question sufficiency of pleading.

Rights and liabilities of assignees and grantees.

Second appeal in 97 Ill. App. 188, holding assignee of lease bound to perform all express covenants of lease running with the land.

Cited in *Peck v. Christman*, 94 Ill. App. 436, holding assignee liable on covenants running with the land; *Springer v. Chicago Real Estate Loan & T. Co.* 102 Ill. App. 302, holding that assignee of lease may reassign and relieve himself of liability for rent; *Crawford v. Nimmons*, 180 Ill. 145, 54 N. E. 209, holding that deed made subject to usurious mortgage does not estop grantee from raising defense of usury on foreclosure; *Siegel v. Borland*, 191 Ill. 111, 60 N. E. 863, holding purchaser of mortgaged premises not personally liable for debt, when not assumed; *Springer v. DeWolf*, 194 Ill. 221, 56 L. R. A. 467, footnote p. 465, 88 Am. St. Rep. 155, 62 N. E. 542, Affirming 93 Ill. App. 263, denying assignee's power to absolve himself from liability to lessor for rent by assigning lease to third person; *B. Roth Tool Co. v. Champ Spring Co.* 93 Mo. App. 540, 67 S. W. 967, holding assignee of lease bound by covenant to furnish steam power.

Liability for royalty under coal lease.

Cited in *Berwind-White Coal Min. Co. v. Martin*, 60 C. C. A. 31, 124 Fed. 317, holding that abandonment of leased coal mine entitles lessor to recover royalty which lessee covenanted to pay on specified amount of coal to be mined.

38 L. R. A. 629, *TEELE v. BISHOP OF DERRY*, 168 Mass. 341, 60 Am. St. Rep. 401, 47 N. E. 422.

Validity of gift manifesting charitable intent.

Cited in *Dexter v. Harvard College*, 176 Mass. 196, 57 N. E. 371, sustaining gift for college purposes, unless it be all expended for scholarship to which testator's kin have preference; *Sherman v. Congregational Home Missionary Soc.* 176 Mass. 351, 57 N. E. 702, holding court will carry out gift manifesting charitable intent, although particular manner undetermined; *Lackland v. Walker*, 151

Mo. 258, 52 S. W. 414, holding that equity will carry out charitable devise when particular mode fails; Eliot's Appeal, 74 Conn. 604, 51 Atl. 558, holding bequest for purpose of erecting chapel and supporting mission not void because place selected not favorable.

Declaration of trust.

Cited in Loring v. Hildreth, 170 Mass. 331, 40 L. R. A. 130, 64 Am. St. Rep. 301, 49 N. E. 652, holding grantor's record of undelivered deed of trust insufficient to create declaration of trust.

Construction of bequest.

Cited in Old Ladies Home v. Hoffman, 117 Iowa, 720, 89 N. W. 1066, holding that bequest to orphan asylum "in" certain city, and if none exists to old ladies' home "in" such city, should be construed as going to orphan asylum located within mile of city but outside corporate limits, instead of to home within city.

38 L. R. A. 631, KELLEY v. NEW YORK, N. H. & H. R. CO. 168 Mass. 308, 60 Am. St. Rep. 397, 46 N. E. 1063.

Husband's recovery for injury to wife.

Cited in Selleck v. Janesville, 104 Wis. 577, 47 L. R. A. 694, 76 Am. St. Rep. 892, 80 N. W. 944, holding that husband may recover value of wife's services to him, in action for her injury on defective walk.

38 L. R. A. 633, GRANEY v. ST. LOUIS, I. M. & S. R. CO. 140 Mo. 89, 41 S. W. 246.

Liability for negligence.

Cited in Nixon v. Hannibal & St. J. R. Co. 141 Mo. 436, 42 S. W. 942, holding company liable for injury resulting from failure to repair crossing; Hoepfer v. Southern Hotel Co. 142 Mo. 389, 44 S. W. 257, holding erroneous, instruction that defendant not chargeable unless injury was of such character as might reasonably have been foreseen as result of machinery running roughly.

Distinguished in Chicago & A. R. Co. v. Kansas City Suburban Belt R. Co. 78 Mo. App. 257, holding collision when train running at rate allowed by ordinance not prima facie case for damages.

Contributory negligence.

Second appeal in 157 Mo. 671, 50 L. R. A. 155, 57 S. W. 276, denying company's liability to one standing at crossing and drawn under train by suction, when result not reasonably anticipated.

Cited in Kreis v. Missouri P. R. Co. 148 Mo. 334, 49 S. W. 877, denying company's liability for death of woman walking along track and killed by venturing too near passing train.

38 L. R. A. 637, TRENTON PASS. R. CO. v. COOPER, 60 N. J. L. 219, 64 Am. St. Rep. 502, 37 Atl. 730.

Presumption of negligence.

Cited in Newark Electric Light & P. Co. v. Ruddy, 62 N. J. L. 508, 57 L. R. A. 626, 41 Atl. 712, holding that injury from broken electric light wire trailing on sidewalk creates presumption of negligence; Boyd v. Portland General Electric Co. 40 Or. 131, 57 L. R. A. 622, 66 Pac. 576, and Boyd v. Portland Electric

Co. 41 Or. 344, 68 Pac. 810, holding that presumption of negligence arises from injury to traveler in highway, caused by contact with broken electric wire; Gulf, C. & S. F. R. Co. v. Hayden, 29 Tex. Civ. App. 283, 68 S. W. 530, holding presumption of negligence created by injury to operator by starting of lathe machine which would not start except by act of some person, or defect in machine; Dallas Consol. Electric Street R. Co. v. Broadhurst, 28 Tex. Civ. App. 634, 68 S. W. 315, holding that severe electric shock received by one taking hold of hand bar of electric car to get on, raises presumption of negligence; Walters v. Denver Consol. Electric Light Co. 17 Colo. App. 195, 68 Pac. 117, holding that injury from contact with uninsulated electric wire placed 14 inches below window creates presumption of negligence.

Cited in footnote to Snyder v. Wheeling Electric Co. 39 L. R. A. 499, which holds death of person by stepping on live electric wire fallen to ground raises presumption of negligence.

Liability for injuries from electric wires.

Cited in New York & N. J. Teleph. Co. v. Bennett, 62 N. J. L. 743, 42 Atl. 759, affirming recovery for injuries from charged electric wire lying in street.

Cited in footnotes to Brush Electric Light & Power Co. v. Lefevre, 49 L. R. A. 771, which denies liability for death by uninsulated electric light wire running above awning 16 feet above street; Boyd v. Portland General Electric Co. 52 L. R. A. 509, which holds want of sufficient assistance promptly to replace wires broken by severe storm not excuse, as matter of law, for delay.

Declarations as part of res gestæ.

Cited in footnote to Sample v. Consolidated Light & R. Co. 57 L. R. A. 186, which holds admissible, declaration of motorman as to cause of accident while car still on body of injured child.

38 L. R. A. 638, *MADDEN v. PENN ELECTRIC LIGHT CO.* 181 Pa. 617, 37 Atl. 817.

Interference with internal affairs of foreign corporation.

Followed in American Grease Co. v. Vogellus, 23 Pa. Co. Ct. 665, 9 Pa. Dist. R. 217, denying bill in equity to prevent cancelation of certain shares of stock of foreign company.

Cited in Madden v. Penn Electric Light Co. 21 Pa. Co. Ct. 83, 7 Pa. Dist. R. 305, refusing to inquire into improvident contract made by foreign corporation operating in state under license; Hartley v. Welsh, 8 Pa. Dist. R. 548, 16 Montg. Co. L. Rep. 16, denying court's jurisdiction over election affairs of foreign corporation; Healy v. Eastern Bldg. & L. Asso. 17 Pa. Super. Ct. 395, refusing to construe contract as to rights of withdrawing member of loan association to be performed in another state; Lewisohn Bros. v. Anaconda Copper Min. Co. 26 Misc. 622, 56 N. Y. Supp. 807, denying injunction to minority stockholders to restrain proposed sale by foreign corporation of mining claims outside of jurisdiction; *Re Rappleye*, 43 App. Div. 87, 59 N. Y. Supp. 338, denying mandamus to compel inspection by stockholder of books of foreign corporation; Hallenborg v. Greene, 66 App. Div. 597, 73 N. Y. Supp. 403, denying injunction to resident stockholder to prevent officers of foreign corporation from transferring property to rival corporation without consideration; Condon v. Mutual Reserve Fund Life Asso. 89 Md. 120, 44 L. R. A. 154, 73 Am. St. Rep. 169, 42 Atl. 944, and Taylor v. Mutual Reserve Fund

Life Asso. 97 Va. 73, 45 L. R. A. 627, 33 S. E. 375, denying injunction to prevent foreign assessment insurance company from taking steps to cancel policy; *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 181, 43 L. R. A. 398, footnote p. 390, denying power to enjoin illegal assessment on resident members of foreign insurance company; *Schmit v. Metallic Condense Co.* 27 Pa. Co. Ct. 615, sustaining power of state court to appoint receiver to preserve assets of foreign corporation where all stockholders, officers, and promoters, except one director, are citizens of such state.

Trespass for detention of property.

Cited in *Sellers v. Shue*, 20 Lanc. L. Rev. 104, sustaining right to maintain action in trespass for detention of personal property.

38 L. R. A. 640, *Ex parte LACEY*, 108 Cal. 326, 49 Am. St. Rep. 93, 41 Pac. 411.

Municipal power over nuisances.

Cited in *California Reduction Co. v. Sanitary Reduction Works*, 61 C. C. A. 98, 126 Fed. 36, Affirming 94 Fed. 699, and holding ordinance authorizing contract for removal and cremation of garbage, within municipal power to abate nuisances; *Dobbins v. Los Angeles*, 139 Cal. 184, 96 Am. St. Rep. 95, 72 Pac. 970, sustaining ordinance prohibiting erection of gas works or storage of gas within certain limits; *Odd Fellows' Cemetery Asso. v. San Francisco*, 140 Cal. 231, 73 Pac. 987, holding ordinance prohibiting burials within city limits within municipal power to abate nuisances.

Cited in footnotes to *Crowley v. West*, 47 L. R. A. 652, which holds void, ordinance prohibiting livery stables in business part of city, except those already in operation; *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 399, which authorizes injunction against blowing of factory whistle at unreasonable hours in populous community.

Cited in notes (36 L. R. A. 606) on power of municipal corporation to define, prevent, and abate nuisances; (38 L. R. A. 161) on municipal power over buildings and other structures as nuisances; (38 L. R. A. 305) on municipal power over nuisances affecting safety, health, and personal comfort; (39 L. R. A. 520) on municipal power as to nuisances affecting public morals, decency, peace, and good order; (39 L. R. A. 551) on municipal control over smoke as public nuisance; (39 L. R. A. 640) on municipal power over nuisances affecting highways and waters; (41 L. R. A. 326) on injunction by municipalities against nuisance affecting public morals, peace, and good order, and health and safety.

Right to maintain nuisance.

Cited in note (53 L. R. A. 894) on prescriptive right to maintain public nuisances.

38 L. R. A. 658, *SUPREME LODGE, K. OF P. v. IMPROVED ORDER, K. OF P.* 113 Mich. 133, 71 N. W. 470.

Use of similar name.

Cited in *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 120 Mich. 164, 44 L. R. A. 844, 78 N. W. 1072, holding that Lamb Knit Goods Company may enjoin use of word "Lamb" in connection with business in which "Lamb stitch" used.

Cited in footnotes to *Armington v. Palmer*, 43 L. R. A. 95, which sustains private suit in equity to prevent wrongful assumption by corporation of name belonging to plaintiff; *International Committee, Y. W. C. A. v. Young Women's Christian Asso.* 56 L. R. A. 868, which sustains right of local Y. W. C. A. to enjoin deceptive use of similar name by organization subsequently incorporated; *Peck Bros. & Co. v. Peck Bros. Co.* 62 L. R. A. 81, which sustains injunction in favor of purchaser of name and good will of corporation against use of similar name by persons connected with branch of old corporation.

38 L. R. A. 663, *HOFFMAN v. CIRCUIT CT. JUDGE*, 113 Mich. 109, 67 Am. St. Rep. 458, 71 N. W. 480.

Privilege from arrest or service of process.

Cited in *Monroe v. St. Clair Circuit Judge*, 125 Mich. 285, 52 L. R. A. 190, footnote p. 189, 84 N. W. 305, denying privilege from arrest to owner of libeled vessel going to court at request of purchaser under contract for sale free from liens; *Greenleaf v. People's Bank*, 133 N. C. 297, 63 L. R. A. 502, footnote p. 500. 98 Am. St. Rep. 709, 45 S. E. 638, which holds nonresident attorney not exempt from service of process when coming into state to transact business before courts in client's interest.

38 L. R. A. 665, *KINNEY v. ONSTED*, 113 Mich. 96, 67 Am. St. Rep. 455, 71 N. W. 482.

Injury to licensee.

Cited in *Clark v. Michigan C. R. Co.* 113 Mich. 27, 67 Am. St. Rep. 442, 71 N. W. 327, denying company's liability to licensee for injuries resulting from falling over semaphore wire.

Proof of contributory negligence.

Cited in *Pittsburgh & C. Dock Co. v. Detroit Transp. Co.* 122 Mich. 449, 81 N. W. 269, holding displacement of timber by mooring line of defendant's boats, causing machine to fall, not proof of machine owner's contributory negligence.

38 L. R. A. 666, *RANDALL v. CHICAGO & G. T. R. CO.* 113 Mich. 115, 71 N. W. 450.

Servant's implied power to bind master.

Followed in *Hartigan v. Michigan C. R. Co.* 113 Mich. 123, 71 N. W. 452, denying carrier's liability to trespasser ejected from train by brakeman without authority.

Cited in *Maxson v. Michigan C. R. Co.* 117 Mich. 224, 75 N. W. 459, denying implied authority of division superintendent of railroad to bind company by agreement to give life employment to servant in settlement of claim; *Chicago, R. I. & P. R. Co. v. Brackman*, 78 Ill. App. 150, denying company's liability for act of brakeman in ejecting boy stealing ride in freight car.

38 L. R. A. 669, *LANE v. EATON*, 69 Minn. 141, 65 Am. St. Rep. 559, 71 N. W. 1031.

Uncertainty or lack of incorporation as affecting gift.

Cited in *Kahle v. Evangelical Lutheran Joint Synod*, 81 Minn. 10, 83 N. W. 460, sustaining gift contemplating incorporation of voluntary society, and direct-

ing trustees to convey when incorporation effected; *Haynes v. Carr*, 70 N. H. 482, 49 Atl. 638, sustaining devise to trustees to expend in their discretion for benefit of poor of state; *Shanahan v. Kelly*, 88 Minn. 209, 92 N. W. 948, holding bequest for Masses, void; *Owatonna v. Rosebrock*, 88 Minn. 323, 92 N. W. 1122, upholding bequest of sum to certain persons to use income in aiding and maintaining Kindergarten in certain city.

Cited in footnote to *Re Winchester*, 54 L. R. A. 281, which holds valid bequest possible to unincorporated educational society with existing organization.

38 L. R. A. 672, *STATE v. CHICAGO, M. & ST. P. R. CO.* 68 Minn. 381, 64 Am. St. Rep. 482, 71 N. W. 400.

Validity of statute regulating business of commission merchants.

Cited in *State ex rel. Beek v. Wagener*, 77 Minn. 494, 46 L. R. A. 445, 77 Am. St. Rep. 681, 80 N. W. 633, sustaining statute regulating business of commission merchants handling agricultural products.

38 L. R. A. 675, *STATE ex rel. MORIARITY v. McMAHON*, 69 Minn. 265, 72 N. W. 79.

Habeas corpus.

Cited in *State ex rel. Zaske v. Matter*, 78 Minn. 379, 81 N. W. 9, holding habeas corpus not proper remedy to obtain discharge of one committed for non-support.

Statutes requiring licenses.

Cited in footnotes to *State ex rel. Beek v. Wagener*, 46 L. R. A. 422, which sustains statute regulating business of commission merchants handling agricultural products; *State v. Zeno*, 48 L. R. A. 88, which sustains requirement of license for barber.

38 L. R. A. 677, *STATE ex rel. LURIA v. WAGENER*, 69 Minn. 206, 65 Am. St. Rep. 565, 72 N. W. 67.

Police power over business.

Cited in *Rosenbloom v. State*, 64 Neb. 350, 57 L. R. A. 926, footnote p. 922, 89 N. W. 1053, sustaining license tax on peddlers, although venders of own products exempt.

Cited in footnote to *State ex rel. Beek v. Wagener*, 46 L. R. A. 442, which sustains statute regulating business of commission merchants handling agricultural products.

Distinguished in *State v. Johnson*, 86 Minn. 124, 90 N. W. 1133, sustaining statute prohibiting issue of liquor license after vote of no license.

38 L. R. A. 679, *BIGLEY v. WATSON*, 98 Tenn. 353, 39 S. W. 525.

Decree limited to matters presented in pleadings.

Cited in *Griffith v. Security Home Bldg. & L. Asso.* 100 Tenn. 411, 45 S. W. 670, holding decree of sale unauthorized under mortgagor's bill seeking ascertainment of balance due.

Validity of consent decree.

Cited in *Wilson v. Schaefer*, 107 Tenn. 334, 64 S. W. 208, holding that consent

decree for exchange of lands binds infant, when made by compromise with next friend under approval of court; *Johnston v. Osment*, 108 Tenn. 36, 65 S. W. 23, sustaining consent decree between owner of life estate and remainderman when court has jurisdiction of all parties, although beyond scope of pleadings.

Interest by curtesy in life estate.

Cited in *Waller v. Martin*, 106 Tenn. 343, 82 Am. St. Rep. 882, 61 S. W. 73, holding that surviving husband has no interest by curtesy in life estate of wife.

Rights of contingent remainderman.

Cited in *Ryan v. Monaghan*, 99 Tenn. 341, 42 S. W. 144, holding that devise to wife for life, then to heirs of son, and in default of heirs to testator's brothers', gives latter no interest till death of son without issue; *Forrest v. Porch*, 100 Tenn. 393, 45 S. W. 676, holding that devise to widow for life, then to testator's heirs at law, creates contingent remainder; *Herrick v. Fowler*, 108 Tenn. 418, 67 S. W. 861, holding that devise to husband with power to dispose of property between children, as he thinks best, gives children no beneficial interests until husband's death; *Harrison v. Weatherby*, 180 Ill. 446, 54 N. E. 237, holding that devise to daughter and remainder to unborn children vests fee in testator's heirs, subject to birth of remaindermen.

38 L. R. A. 684, *McCORNICK v. WESTERN U. TELEG. CO.* 25 C. C. A. 35, 49 U. S. App. 116, 79 Fed. 449.

Transfer of cases from territorial to state courts.

Cited in *Hecht v. Metzler*, 82 Fed. 342, holding that Utah enabling act authorized constitutional convention to provide for transfer of pending cases to state and Federal courts.

State and Federal ownership of waters.

Cited in *Farm Invest. Co. v. Carpenter*, 9 Wyo. 136, 50 L. R. A. 756, 87 Am. St. Rep. 918, 161 Pac. 258, sustaining declaration of state Constitution, ratified by Congress, that waters of natural streams are property of state.

Telegraph company's liability for fraudulent telegram.

Cited in *Western U. Teleg. Co. v. Schriver*, 129 Fed. 345, holding telegraph company not liable for fraudulent telegram sent to plaintiff's bank, stating that defendant's check would be honored.

38 L. R. A. 687, *FIRST PRESBY. CHURCH v. MYERS*, 5 Okla. 809, 50 Pac. 70.

Liability for pastor's salary.

Cited in footnote to *Baxter v. McDonnell*, 40 L. R. A. 670, which denies obligation of Roman Catholic bishop to pay salary of priest assigned by himself or his predecessor.

38 L. R. A. 694, *WILLIAMSON v. JONES*, 43 W. Va. 562, 64 Am. St. Rep. 891, 27 S. E. 410.

Nature of property in minerals.

Cited in *Wagner v. Mallory*, 41 App. Div. 129, 58 N. Y. Supp. 526, holding oil in ground is component part of real estate.

Cited in footnotes to *Kelley v. Ohio Oil Co.* 39 L. R. A. 765, which sustains right to drill oil well on own land near line of other person whose oil drawn

out; *Carter v. County Court*, 43 L. R. A. 725, which denies right to tax, as personalty, lessee's interest in oil wells while oil remains in place of earth; *Murray v. Allard*, 39 L. R. A. 249, which holds oil and natural gas minerals within reservation in deed; *Wilson v. Hughes*, 39 L. R. A. 292, which holds oil lease of infant's land, a sale; *Manufacturer's Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 50 L. R. A. 768, which holds unlawful, pumping of natural gas to injury of other persons having wells supplied from same reservoir.

— **Interest of lessee, tenant, or remainderman.**

Cited in *Steelsmith v. Gartlan*, 45 W. Va. 36, 44 L. R. A. 113, 29 S. E. 978, holding that completion of unproductive oil or gas well vests no title in lessee under lease to operate wells for prospective rentals; *Hall v. Vernon*, 47 W. Va. 301, 49 L. R. A. 467, 81 Am. St. Rep. 791, 34 S. E. 764, holding that partition of oil and gas owned by co-owners separate from surface cannot be decreed; *Cecil v. Clark*, 49 W. Va. 470, 39 S. E. 202; *Cecil v. Clark*, 47 W. Va. 407, 81 Am. St. Rep. 802, 35 S. E. 11; *Stewart v. Tennant*, 52 W. Va. 574, 44 S. E. 223.—holding unauthorized extraction of coal by tenant in common is waste; *Bond v. Godsey*, 99 Va. 566, 39 S. E. 216, holding that tenant by curtesy has no right to work unopened mines; *Barnsdall v. Boley*, 119 Fed. 196, holding void, oil lease executed by tenant by curtesy; *Eakin v. Hawkins*, 52 W. Va. 128, 43 S. E. 211, holding that interest on fund during natural life is interest of life tenant in proceeds of royalty for oil; *Haskell v. Sutton*, 53 W. Va. 214, 44 S. E. 533, holding that lease of land for oil and gas purposes is grant of part of corpus of land.

Cited in footnotes to *St. Paul v. Cragnas*, 47 L. R. A. 540, which sustains right of lessee of undivided interest in mine to recover from other owners for exclusion from mine; *Gannon v. Peterson*, 55 L. R. A. 701, which denies right of owners of expectancy to injunction against owner of determinable fee mining coal.

Estoppel.

Cited in *Ralston v. Weston*, 46 W. Va. 555, 76 Am. St. Rep. 834, 33 S. E. 326, holding that lot owner cannot destroy public's easement in street by setting up equitable estoppel; *Smith v. Gott*, 51 W. Va. 146, 41 S. E. 175, holding wife having equitable title to property to which husband has legal title, not estopped from setting up her title against husband's creditors; *Hunt v. Reilly*, 24 R. I. 71, 59 L. R. A. 208, footnote p. 206, 96 Am. St. Rep. 707, 52 Atl. 681, holding wife's failure to notify purchaser of rights after learning of forgery of her name to husband's deed does not estop her to claim dower; *McNeeley v. South Penn Oil Co.* 52 W. Va. 644, 62 L. R. A. 577, 44 S. E. 508, holding that married woman will not, by estoppel, lose her right to land owned jointly by herself and husband, simply by knowledge that he has exchanged it in own name; *Pocohontas Light & Water Co. v. Browning*, 53 W. Va. 439, 44 S. E. 267, holding that owner's neglect to cause removal of water-pipe line placed by mistake partly on such owner's land will not operate as estoppel; *Hunt v. Reilly*, 23 R. I. 474, 50 Atl. 833, holding married woman not estopped by laches to claim her dower in land which husband had conveyed, and in deed of which she did not join.

Infant's liability for torts.

Cited in note (57 L. R. A. 686) on liability of infant for torts.

Constructive notice of lien or defect in title.

Cited in *Hoback v. Miller*, 44 W. Va. 640, 29 S. E. 1014, holding grantee of

purchaser under decree void for want of jurisdiction, bound to know defect; *First Nat. Bank v. Hyer*, 46 W. Va. 17, 32 S. E. 1000, holding purchaser at judicial sale bound to know what property will be acquired; *Southern Bldg. & L. Asso. v. Page*, 46 W. Va. 305, 33 S. E. 336, holding record of title bond sufficient notice of lien; *Calvert v. Ash*, 47 W. Va. 486, 35 S. E. 887, holding that *caveat emptor* applies to purchase at judicial sale; *Lindt v. Uihlein*, 116 Iowa, 54, 89 N. W. 214, holding grantee presumed to have constructive notice of defect in title so as to bar his recovery for improvements and payment of taxes; *Johnson v. Mutual L. Ins. Co.* 113 Ky. 887, 69 S. W. 751, holding bona fide purchaser from husband not chargeable with notice of defect in deed to him of wife's separate estate, which had previously been conveyed by husband and wife to third party without consideration, who at once reconveyed to husband.

Cited in footnote to *Johnson v. Equitable Securities Co.* 56 L. R. A. 933, which holds bona fide purchaser paying purchase money protected from unknown equities.

Allowance for permanent improvements.

Cited in *Haymond v. Camden*, 48 W. Va. 467, 37 S. E. 642, denying allowance for permanent improvements when claimant has notice of defective title.

Measure of damages for mesne profits.

Cited in *Bodkin v. Arnold*, 48 W. Va. 109, 35 S. E. 980, holding rental value and damages for waste, measure of damages in action for mesne profits.

38 L. R. A. 708, *HOELZEL v. CRESCENT CITY R. CO.* 49 La. Ann. 1302, 22 So. 330.

Negligence in crossing street car tracks.

Cited in *Knoker v. Canal & C. R. Co.* 52 La. Ann. 813, 27 So. 279, denying recovery for death of one killed while attempting to cross street car tracks at night in front of rapidly moving car; *Cowden v. Shreveport Belt R. Co.* 106 La. 237, 30 So. 747, holding that failure to stop, look, and listen before attempting to cross electric car line bars recovery.

Cited in footnotes to *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671, which holds passenger starting to cross intervening tracks after alighting not required to look and listen for trains; *Tesch v. Milwaukee Electric R. & Light Co.* 53 L. R. A. 618, which requires traveler to look and listen before crossing street car track at place reasonably certain to effect purpose; *Kansas City-Leavenworth R. Co. v. Gallagher*, 64 L. R. A. 344, which sustains right of one about to cross street car tracks to believe that car is running at lawful speed and is under control.

38 L. R. A. 716, *HENSON v. BECKWITH*, 20 R. I. 165, 78 Am. St. Rep. 847, 37 Atl. 702.

Landlord's liability for defects.

Cited in *Railton v. Taylor*, 20 R. I. 234, 39 L. R. A. 248, 38 Atl. 980, holding landlord not exempt from liability for damage resulting from negligence in use of heating apparatus under his control; *McKee v. McCardell*, 21 R. I. 364, 43 Atl. 847, holding declaration, in action against landlord for injuries received by falling into unguarded elevator well, alleging invitation, sufficient; *McKee v. McCardell*, 22 R. I. 73, 46 Atl. 181, holding landlord may show an-

other's ownership in action for injuries sustained by falling into unguarded elevator well.

Cited in footnotes to *Gardner v. Rhodes*, 57 L. R. A. 749, which denies landlord's liability for injury from fall on ice permitted by tenant to accumulate on sidewalk; *Barrett v. Lake Ontario Beach Improv. Co.* 61 L. R. A. 829, which sustains owner's liability for insufficiency of railing of leased toboggan slide; *Langenbaugh v. Anderson*, 62 L. R. A. 948, which denies liability of lessor of lot for production of oil or gas therefrom, for injury to adjoining owner's property through escape of oil by lessee's negligence.

38 L. R. A. 719, *RICH v. STATE*, 38 Tex. Crim. Rep. 199, 42 S. W. 291.

38 L. R. A. 721, *RYDER v. STATE*, 100 Ga. 528, 62 Am. St. Rep. 334, 28 S. E. 246.

Proof as to sanity.

Cited in footnote to *Maas v. Oklahoma*, 53 L. R. A. 814, which requires proof of accused's sanity beyond reasonable doubt, after evidence by him raising reasonable doubt as to sanity.

Cited in notes (39 L. R. A. 333) on expert opinions as to sanity or insanity; (39 L. R. A. 717) on opinions of subscribing witnesses as to sanity or insanity; (42 L. R. A. 766) on conclusiveness of testimony of experts.

Annotation in 38 L. R. A. 721, referred to particularly in *Re Welch*, 108 Wis. 394, 84 N. W. 550, holding admissibility of impressions of nonexpert witness as to mental competency within discretion of trial court.

Instruction as to weight of testimony.

Cited in *Merritt v. State*, 107 Ga. 681, 34 S. E. 361, holding it error to instruct jury as to expert testimony "that where elements are undoubted, their testimony is entitled to great weight;" *Bourquin v. Bourquin*, 110 Ga. 444. 35 S. E. 710, holding charge that certain evidence is entitled to great consideration, error; *Re Blake*, 136 Cal. 311, 89 Am. St. Rep. 135, 68 Pac. 827, holding charge discrediting testimony of medical experts as to testator's sanity, error.

Estoppel to complain of erroneous instruction.

Cited in *Howard v. State*, 115 Ga. 253, 41 S. E. 654, denying right of accused subsequently to complain of erroneous instruction which he has requested court to give, relating to circumstances under which one may kill another.

Qualification of jurors.

Cited in *Jackson v. State*, 103 Ga. 420, 30 So. 251, holding right to object to juror for cause not waived by consenting that *voir dire* be propounded to panel.

38 L. R. A. 749, *MERRITT v. GATE CITY NAT. BANK*, 100 Ga. 147, 27 S. E. 979.

Computation of time.

Cited in *Heard v. Phillips*, 101 Ga. 692, 44 L. R. A. 370, 31 S. E. 216, holding Sundays included in computing time preceding term of court in which petitions must be filed to be returnable to that term.

Cited in note (49 L. R. A. 204, 230) on rule as to first and last days in computation of time.

Delay in protesting note or presenting check.

Cited in footnote to *Morris v. Union Nat. Bank*, 50 L. R. A. 182, which denies

bank's liability for failure to protest in due season, note falling due on holiday under honest mistake as to proper time.

Cited in note (53 L. R. A. 432) on effect on drawer's liability, of delay in presenting check where drawee remains solvent.

38 L. R. A. 750, *ECKMAN v. CHICAGO*, B. & Q. R. CO. 169 Ill. 312, 48 N. E. 496.
Validity of railroad relief association contracts.

Cited in *Beck v. Pennsylvania R. Co.* 63 N. J. L. 240, 76 Am. St. Rep. 211, 43 Atl. 908; *Petty v. Brunswick & W. R. Co.* 109 Ga. 672, 35 S. E. 82; *Johnson v. Charleston & S. R. Co.* 55 S. C. 160, 44 L. R. A. 649, 32 S. E. 2,—sustaining contract by which acceptance of benefits from relief organization by injured employee releases company from liability.

Cited in footnote to *Pittsburg, C. C. & St. L. R. Co. v. Moore*, 44 L. R. A. 633, which sustains contract allowing railroad employee option between action for damages or claim on relief fund.

Recovery on railroad benefit certificate.

Cited in footnote to *Oyster v. Burlington Relief Department*, 59 L. R. A. 292, which denies right to recover on certificate of railroad relief department, after recovering full statutory penalty for employee's death.

Ultra vires as defense or as affecting deed.

Cited in *Hartford Deposit Co. v. Rector*, 92 Ill. App. 180, holding *ultra vires* in execution of lease no defense to action for rent; *Juergens v. Cobe*, 99 Ill. App. 160, holding trust deed taken by loan association on encumbered property not void because association unauthorized to loan money upon encumbered property; *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 49, 64 L. R. A. 405, 72 Am. St. Rep. 245, 54 N. E. 619 (dissenting opinion), majority holding corporation not estopped to raise defense of *ultra vires* to enforcement of contract against public policy.

Estoppel by acceptance of benefits.

Cited in *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 608, 49 L. R. A. 656, 53 N. E. 349, holding street railway company accepting benefits of ordinance permitting it to use streets estopped from action to prevent unjust discrimination in fares in violation of obligations under ordinance.

38 L. R. A. 756, *STATE v. McNASPY*, 58 Kan. 691, 50 Pac. 895.

Surrender of prisoner brought from another state.

Cited in footnote to *Re Little*, 57 L. R. A. 295, which holds that prisoner transferred to other state for trial in Federal court may be turned over to state authorities.

38 L. R. A. 758, *CLEVELAND NAT. BANK v. MORROW*, 99 Tenn. 527, 63 Am. St. Rep. 853, 42 S. W. 200.

38 L. R. A. 760, *STANFORD v. MAGILL*, 6 N. D. 536, 72 N. W. 938.

Continuance of contractual relations.

Cited in *Roehm v. Horst*, 178 U. S. 17, 44 L. ed. 960, 20 Sup. Ct. Rep. 780, holding that parties to executory contract have right to maintain contractual relations till time of performance.

Measure of damages for breach of contract.

Cited in Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 413, 87 N. W. 993, holding difference between contract price and market value is measure of damages for refusal to accept.

Cited in note (52 L. R. A. 248, 251) on loss of profits of sale or purchase as damages.

Motion for direction of verdict.

Cited in First M. E. Church v. Fadden, 8 N. D. 166, 77 N. W. 615, and United States v. Bishop, 60 C. C. A. 125, 125 Fed. 183, holding failure of party moving for direction of verdict to ask that questions of fact be submitted to jury when motion overruled, regarded as submitting disputed question to court.

38 L. R. A. 773, RASMUSSEN v. BAKER, 7 Wyo. 117, 50 Pac. 819.

Followed without discussion in Irons v. Clark, 7 Wyo. 161, 50 Pac. 1103.

Language of official publications.

Cited in footnote to State *ex rel.* Goebel v. Chamberlain, 40 L. R. A. 843, which denies validity of publication of delinquent tax list in English in newspaper otherwise printed in German.

Reserved questions of law.

Cited in Foote v. Smith, 8 Wyo. 512, 58 Pac. 898, holding that lawful dismissal of action by plaintiff in lower court prevents consideration on appeal of questions reserved for decision of supreme court; State *ex rel.* Perkins v. Sheridan County, 7 Wyo. 164, 51 Pac. 204, holding it not duty of court to determine cause upon reserved questions of law.

Right of de jure officer to salary paid de facto officer.

Cited in Rasmussen v. Carbon County, 8 Wyo. 283, 45 L. R. A. 298, 56 Pac. 1098, holding *de jure* officer not entitled to salary paid to *de facto* officer because of former's failure to qualify.

38 L. R. A. 786, JAGGER v. PEOPLE'S STREET R. CO. 180 Pa. 436, 36 Atl. 867.

Negligence in getting off or on moving car.

Cited in Shade v. Union Traction Co. 20 Pa. Co. Ct. 294, 7 Pa. Dist. R. 36, denying liability to passenger injured by falling from lower step of platform while waiting for street car to stop; Hunterson v. Union Traction Co. 205 Pa. 571, 55 Atl. 543, holding it negligence *per se* to step off or on moving car; Jones v. Canal & C. R. Co. 109 La. 215, 33 So. 200, holding it not negligence, as matter of law, to alight from slowly moving street car, and referring particularly to annotation in 38 L. R. A. 786.

— In riding on running board.

Cited in footnote to Third Ave. R. Co. v. Barton, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track, while passing around conductor, also on running board.

— In crossing car tracks.

Cited in footnote to Walker v. St. Paul City R. Co. 51 L. R. A. 632, which holds person attempting to cross street car track in dark, after signals for stopping car given, not negligence *per se*.

Newsboy as passenger.

Cited in footnote to *Padgitt v. Moll*, 52 L. R. A. 854, which holds newsboy jumping on and off moving car to sell papers, not a passenger.

Evidence as to custom.

Cited in *Anderson v. Union Traction Co.* 4 Lack. Legal News, 16, 7 Pa. Dist. R. 47, holding evidence that other conductors accepted similar tickets, inadmissible in action for damages for ejection of passenger.

38 L. R. A. 791, *EDWARDS v. WARREN LINOLINE & GASOLINE WORKS*, 168 Mass. 564, 47 N. E. 502.

Nature of limited partnerships.

Cited in *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 303, 58 U. S. App. 444, 86 Fed. 595, holding "partnership association, limited," a corporation.

— Payment of subscriptions to.

Cited in footnote to *Rouse, H. & Co. v. Detroit Cycle Co.* 38 L. R. A. 794, which sustains right to pay subscriptions to capital stock of partnership association by giving note which is immediately converted into money.

— Liability of members.

Cited in footnote to *Staver & A. Mfg. Co. v. Blake*, 38 L. R. A. 798, which holds members of limited partnership not liable as general partners for technical irregularities in formation.

38 L. R. A. 794, *ROUSE, H. & CO. v. DETROIT CYCLE CO.* 111 Mich. 251, 69 N. W. 511.

Liability of members of limited partnership.

Cited in *Hogan v. Hadzsits*, 113 Mich. 574, 71 N. W. 1092, holding that statement in renewal articles of partnership that special partner contributed certain sum, consisting of interest in old firm, does not render him liable generally.

Cited in footnote to *Staver & A. Mfg. Co. v. Blake*, 38 L. R. A. 798, which holds members of limited partnership not liable as general partners for technical irregularities in formation.

Rights and nature of partnership association.

Cited in *Sanitas Nut Food Co. v. Force Food Co.* 124 Fed. 302, sustaining right of limited partnership association to sue in Federal court for infringement of patent.

Cited in footnote to *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded in Massachusetts as partnership, instead of corporation.

38 L. R. A. 798, *STAVES & A. MFG. CO. v. BLAKE*, 111 Mich. 282, 69 N. W. 508.

Liability of members of limited partnership.

Cited in *Rouse, H. & Co. v. Detroit Cycle Co.* 111 Mich. 257, 38 L. R. A. 797, 69 N. W. 511, holding that payment by notes renders subscribers' stock in limited partnership association paid up as against creditors, when notes converted into money; *Hogan v. Hadzsits*, 113 Mich. 574, 71 N. W. 1092, holding that statement in renewal articles of limited partnership that special partner contributed certain sum, consisting of interest in old partnership, does not render him liable generally.

Rights and nature of partnership association.

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38 L. R. A. 804, *GARANTEE TRUST & S. D. CO. v. PHILADELPHIA, R. & N. E. R. CO.* 69 Conn. 709, 38 Atl. 792.

Appeal from final judgment.

Cited in *Standley v. Hendrie & B. Mfg. Co.* 25 Colo. 380, 55 Pac. 723, holding that appeal lies from judgment authorizing receiver to issue certificates as prior liens.

38 L. R. A. 808, *DALE v. COM.* 101 Ky. 612, 42 S. W. 93.

38 L. R. A. 809, *SCHMIDT v. LOUISVILLE & N. R. CO.* 101 Ky. 441, 41 S. W. 1015.

Compelling operation of railroad.

Cited in *Southern R. Co. v. Franklin & P. R. Co.* 96 Va. 707, 44 L. R. A. 303, footnote p. 297, 32 S. E. 485, authorizing mandatory injunction to compel continued operation of leased railroad.

Construing instruments together.

Cited in *Phillips v. Southern Division C. & O. R. Co.* 110 Ky. 45, 60 S. W. 941, construing as one instrument, lease of unfinished railroad and mortgage on road to lessee to secure payment of bonds issued to lessee; *Louisville & N. R. Co. v. Schmidt*, 112 Ky. 721, 66 S. W. 629, construing as one instrument, lease of unfinished railroad, mortgage to lessee to secure payment of bonds, and mortgage by lessee on earnings to trustee for bondholders.

Third person's right of action on contract.

Cited in footnotes to *Ferris v. American Brewing Co.* 52 L. R. A. 305, which sustains right of action of one for whose benefit stipulation in lease against sale on premises of other person's beer was made; *Electric Appliance Co. v. United States Fidelity & G. Co.* 53 L. R. A. 609, which denies right of one furnishing materials to contractor, to sue on bond by latter to city, conditioned on turning over building free of claims for materials; *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* 59 L. R. A. 796, which denies right of action against railroad company carrying mail under contract with government, by sender of registered mail destroyed through negligence of its employees; *Tweeddale v. Tweeddale*, 61 L. R. A. 509, which sustains right of third person to enforce contract made for his benefit.

38 L. R. A. 823, *FARMERS' BANK v. SHIPPEY*, 182 Pa. 24, 37 Atl. 844.

Negotiability of note.

Cited in footnote to *Commercial Bank v. Cheshire Provident Inst.* 41 L. R. A. 175, which holds negotiable, unrestricted guaranty of payment indorsed on note.

38 L. R. A. 826, *DELAWARE & H. CANAL CO. v. HUGHES*, 183 Pa. 66, 63 Am. St. Rep. 743, 38 Atl. 568.

Conveyance or partition of surface or coal beneath.

Cited in *Hosack v. Crill*, 18 Pa. Super. Ct. 98, holding that conveyance of underlying coal, grantor retaining surface, works severance of title; *Byers v. Byers*, 183 Pa. 517, 39 L. R. A. 538, footnote p. 537, 41 N. W. 361, 63 Am. St. Rep. 765, 38 Atl. 1027, holding that parol partition of surface does not extend *per se* to coal beneath; *Robbins v. Penn Gas Coal Co.* 28 Pa. Co. Ct. 59, holding conveyance of land, except stratum of coal, no bar to subsequent partition of stratum.

38 L. R. A. 829, *WAMPLER v. STATE*, 148 Ind. 557, 47 N. E. 1068.

Mandamus to enforce public duty.

Cited in *Manor v. State*, 149 Ind. 313, 49 N. E. 160, holding that town trustee may compel auditor to issue warrant for town funds; *State ex rel. Cutter v. Kamman*, 151 Ind. 410, 51 N. E. 483, holding that any person interested may maintain action in mandamus to compel road supervisor to repair highway; *State ex rel. Morgan v. Real Estate Bldg. & L. Asso.* 151 Ind. 505, 51 N. E. 1061, holding mandamus proper remedy to compel loan association to exhibit books to assessors; *State ex rel. Colscott v. King*, 154 Ind. 629, 57 N. E. 535, holding that mandamus will lie to enforce taxpayer's right to examine records of county auditor; *State ex rel. Horne v. Beil*, 157 Ind. 27, 60 N. E. 672, holding that mandamus will lie to compel school trustees to enforce order requiring vaccination of school children.

— Sufficiency of petition and writ.

Cited in *Applegate v. State*, 158 Ind. 123, 63 N. E. 16, holding that petition for mandamus to compel bank to exhibit books to assessor must show that taxpayer failed to make return for taxation of his money on deposit; *Hart v. State*, 161 Ind. 192, 67 N. E. 996, holding that writ of mandamus to show cause why state treasurer should not be compelled to pay certificate must show facts sufficient in law to entitle one to writ.

Allowance of illegal claim as crime.

Cited in *State v. Robertson*, 23 Ind. App. 427, 55 N. E. 491, holding allowance of illegal claim not crime under statute imposing penalty for failure to perform duty prescribed by law.

Casting deciding vote.

Cited in *State ex rel. Morris v. McFarland*, 149 Ind. 274, 39 L. R. A. 284, 49 N. E. 5, holding auditor's right to give casting vote on tie by township trustees not limited to vote by ballot.

Directory provisions of statute.

Cited in *Landes v. State*, 160 Ind. 486, 67 N. E. 189, holding requirement of act as to enrolment, attestation, and approval by mayor of ordinance, directory only; *Gallup v. Schmidt*, 154 Ind. 204, 56 N. E. 443, holding statute requiring treasurer to report delinquency of executors in payment of taxes, directory as to time.

38 L. R. A. 834, *TERRY v. RICHMOND*, 94 Va. 537, 27 S. E. 429.

Public corporation's liability for negligence or damages.

Cited in *Powell v. Wytheville*, 95 Va. 75, 27 S. E. 805, holding city liable for filling depression without providing outlet for drainage; *Maia v. Eastern State Hospital*, 97 Va. 511, 47 L. R. A. 578, 34 S. E. 617, denying liability of hospital corporation for negligently causing death of patient by caving-in of excavation; *Jones v. Williamsburg*, 97 Va. 724, 47 L. R. A. 299, 34 S. E. 883, denying city's liability for injury to person struck by bicycle rider by reason of failure to enforce ordinance prohibiting riding on walks.

Cited in footnote to *Duncan v. Lynchburg*, 48 L. R. A. 331, which denies city's liability for nuisance by pollution of water in unauthorized operation of rock quarry outside city limits.

38 L. R. A. 837, *TRADEMEN'S NAT. BANK v. LOONEY*, 99 Tenn. 278, 63 Am. St. Rep. 830, 42 S. W. 149.

Equities in note indorsed by trustee.

Cited in footnote to *Grafton Nat. Bank v. Wing*, 43 L. R. A. 831, which denies personal liability of executor indorsing paper in name of estate, describing himself as executor.

Who are bona fide purchasers.

Cited in footnote to *Lamson v. Beard*, 45 L. R. A. 822, which holds broker taking from bank president drafts signed by him for individual debt not bona fide purchaser.

38 L. R. A. 843, *BANK OF GILBY v. FARNSWORTH*, 7 N. D. 6, 72 N. W. 901.

38 L. R. A. 847, *NEASHAM v. McNAIR*, 103 Iowa, 695, 64 Am. St. Rep. 202, 72 N. W. 773.

What are family expenses.

Cited in *Houghteling v. Walker*, 100 Fed. 254, holding rent of house leased by husband and occupied by himself and wife, family expense.

38 L. R. A. 849, *CHICAGO v. WARD*, 169 Ill. 392, 61 Am. St. Rep. 185, 48 N. E. 927.

Restrictions as applicable to submerged lands.

Cited in *Bliss v. Ward*, 198 Ill. 109, 64 N. E. 705, holding that extension of park over submerged lands subjects them to park restrictions as to buildings.

Right to follow accretions.

Cited in note (51 L. R. A. 425) on right to follow accretions across division line previously submerged by action of water.

Title to islands.

Cited in note (58 L. R. A. 677) on title to islands.

Restrictions relating to dedicated land.

Cited in *Chicago City R. Co. v. Montgomery, Ward & Co.* 76 Ill. App. 541, dissolving injunction against erection of trolley road on street alleged to be part of park trust property; *Manson v. South Bound R. Co.* 64 S. C. 121, 41

S. E. 832, denying injunction to nonabutting owners against condemnation of park for railroad purposes.

Cited in footnotes to *Summers v. Beeler*, 48 L. R. A. 54, which holds restriction in deed as to building line not available to prior grantee of other lot; *Ewertsen v. Gerstenberg*, 51 L. R. A. 310, which denies injunction against encroachment by building on space reserved for courtyard by common plat of lots.

Distinguished in *Chicago Yacht Club v. Marks*, 97 Ill. App. 409, denying injunction against erection of club house on lake front, which is no part of trust property subject to restrictions against erection of buildings.

38 L. R. A. 860, *Re BEARD*, 7 Wyo. 104, 75 Am. St. Rep. 882, 50 Pac. 226.

Assessment after insolvency.

Cited in *Hill v. Graham*, 11 Colo. App. 542, 53 Pac. 1060, holding assessment on stockholder in insolvent bank after his assignment for benefit of creditors, provable as claim against assigned estate.

38 L. R. A. 863, *McLENNAN v. McLENNAN*, 31 Or. 480, 65 Am. St. Rep. 835, 50 Pac. 802.

Remarriage before expiration of statutory period.

Cited in *Re Wood*, 137 Cal. 141, 69 Pac. 900 (dissenting opinion), majority holding marriage of divorced person, valid where contracted, valid in state before expiration of year to appeal; *Eaton v. Eaton*, 66 Neb. 682, 60 L. R. A. 608, footnote p. 605, 92 N. W. 995, which holds absolutely void, marriage by divorced person during time given to commence proceedings for reversal.

Cited in footnote to *Durland v. Durland*, 63 L. R. A. 959, which sustains power of legislature to forbid divorced persons remarrying within six months after date of decree.

Conflict of laws as to marriage.

Cited in note (57 L. R. A. 170) on conflict of laws as to validity of marriage.



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